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CJEU – Recent Developments in Value Added Tax 2020

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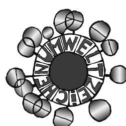

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Preface

The Court of Justice of the European Union (CJEU) is a driving force in the field of European Union indirect taxation. As the significance of VAT as a revenue source continues to grow, it is increasingly valuable and important for business practitioners, government and judiciary representatives, and academics alike to have a forum for the thorough analysis and exchange of opinions on indirect taxation cases pending at the CJEU.

On 25 and 26 March 2021, the WU Vienna University of Economics and Business, Institute for Austrian and International Tax Law hosted the conference: **Court of Justice of the European Union: Recent VAT Case Law**. This conference project began upon the initiative of the Taxation and Customs Union Directorate of the European Commission. This year, the eighth conference in this series was held at the Institute. It was a resounding success and brought together leading academics, judges, government and business representatives from all over the world. The cases presented and the issues raised at the conference are published in this book.

We are very grateful to the authors who not only delivered impressive presentations and articles but also committed themselves to an extremely ambitious schedule, which allowed for vivid exchanges during the conference. This further enabled us to address an extensive number of areas as well as to publish this book. It goes without saying that all opinions expressed in this book can only be attributed to the respective authors themselves and not necessarily to their employers or employees, to the editors involved, or to any other organization or committee.

This publication is supported by funds of the Oesterreichische Nationalbank (Austrian Central Bank, Anniversary Fund, project number: 18053). We would like to express our sincere gratitude for Linde's cooperation and swift realization of this publication project.

Above all, we would like to thank the members of the Institute for Austrian and International Tax Law, in particular Renée Pestuka, Hedwig Pfanner and Layomi Gunatilleke-Jester, who were responsible for the organization and preparation of the conference and getting the book published. Likewise, Jo Hamilton-Bilijam contributed greatly to the completion of the book by editing and polishing texts for the authors, many of whom were writing in English as a foreign language. Furthermore, we are also grateful to Christian Knotzer and Andreas Ullmann who also helped in organizing the conference and editing this book.

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Mariken van Hilten studied tax law at Leiden University (1983–1987) and obtained her PhD on Financial Transactions in European VAT at the same university in 1992. From 1987 until 1998, Ms van Hilten was a VAT and customs consultant, first with PwC and afterwards at KPMG. In 1998, she exchanged tax consultancy for the judiciary and became an appellate tax judge, first in the 's-Hertogenbosch Court of Appeal and, from 2002 onwards, in the Amsterdam Court of Appeal. In 2007, Ms van Hilten joined the Hoge Raad der Nederlanden (the Supreme Court of the Netherlands). From 2007–2015, she was Advocate-General, and since September 2015 has been a judge in its tax section. Since October 2020, Ms van Hilten is Vice-President of the Hoge Raad der Nederlanden. Additionally, from 1997–2002, Ms van Hilten was Professor of Indirect Taxes at Leiden University, and from 2009–2012 held the temporary chair on VAT law at the Vrije Universiteit Amsterdam. Since 2016, she is Professor of Indirect Taxes at the University of Amsterdam. Ms van Hilten has published extensively on VAT and customs law, and is a regular speaker at seminars and conferences.

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She set up and lead from 2014 to 30 June 2019 at PwC Legal the tax litigation, dispute resolution and tax policy services practice.

Before joining PwC Legal, she worked at PwC Tax Advisors since 1984 and was appointed Partner in 1996. She lead PwC's European VAT Network from 1998 to 2002. She was PwC's Global Indirect Taxes Leader from 2002 to 2012 and the Global Indirect Taxes Policy Leader (from 2002 to 2014). From 2013 to 2014 she was the partner in charge of services to the EU Institutions (2013 to 2014). She led more than 40 studies, most of them on taxation and a few on customs, delivered to the EU Commission and the EU Parliament. She advised the UAE (Dubai) on the introduction of VAT, the GCC (drafting of VAT Framework Agreement) and was appointed as an international expert for the VAT/GST reform in China. Ms Lejeune was a member of the European Commission's VAT Expert Group from 2012 to 2019 and is a member of the OECD's Consumption Tax Technical Advisory Group. From 2010 to 2020, she lectured on the LLM International Tax Law program at WU Vienna University of Economics and Business, Institute for Austrian and International Tax Law and, from 2017 to 2021, at the VUB's Diplomatic Academy ("Vrije Universiteit Brussel"). She has lectured as a guest professor at other Belgian and foreign universities and for conference organizers. She has authored over 30 books and more than 100 articles on global/EU VAT policy and the case law of the European Court of Justice. She is a member of the editorial board of the International VAT Monitor published by IBFD. Ms Lejeune was Belgian Taxman 2009 and was elected 5th Global Most Influential Tax Expert by Tax Business and 1st Indirect Tax Expert in 2006.

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Melchior Wathelet, born in 1949 in Petit-Rechain (Belgium) where he is still living, holds the qualifications "*licencié en droit*" (1972), "*licencié en Science économique*" (1974) (Liège University) and Master of Laws (1976) (Harvard University). After three years as Research Fellow at Liège University (European Law and Economics), he was elected as a Member of the Belgian House of Representatives in 1977, and was appointed as a Member of the Belgian Federal Government between 1980–1981. Between 1981 and 1988, he served both as a Member and as President of the Walloon Government, and thereafter again as a Member of the Belgian Federal Government (namely as Deputy Prime Minister, Minister of Justice, and Minister of Defence). His career as a university professor began in 1985 at the University of Louvain-la-Neuve.

In 1995, he left political life to become a judge at the European Court of Justice where he served until 2003. Between 2003 and 2012, he was member of the French Bar (in a tax law firm, dealing with the European law aspects) and came back to the European Court as Advocate General (2012) and First Advocate General (2014–2018). He was Professor of European Law at Liège and Louvain-la-Neuve universities until September 2020, and has been a Visiting or Invited Professor at several other universities (Paris-Dauphine, Dijon, Paris II, Lyon III universities, France; Bâton Rouge University, the US; University of Hamburg, Germany; University of Szeged, Hungary; University of Luxemburg, Luxemburg; and now KU Leuven, Belgium.

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Joint and Several Liability Rules in EU VAT Law

Karoline Spies

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6. Conclusion and outlook

1. The hot topic of joint and several liability (JSL) rules

Based on the optional rule in Art. 205 of the VAT Directive, Member States have, already for many years, implemented joint and several liability rules – often also labelled as "third-party liability"[1] – for diverse scenarios in their national VAT law. About twenty Member States have made use of the option (in particular for cross-border supplies).[2] These rules – although being practically challenging – have not led to many infringement proceedings or preliminary rulings before the CJEU (see, on the CJEU judgments, section 3.).

Recently, in the light of the digital revolution and the emergence of the "platform economy", the relevance of JSL rules has gained momentum; how to apply VAT to the platform economy and the role of platforms in the VAT compliance and collection process are currently on the agenda of the OECD, the EU, and individual jurisdictions worldwide. In 2019, the OECD published a report (hereinafter "the OECD Report") on the role of digital platforms in the collection of VAT/GST on online sales.[3] This Report discusses different levels of integration of online platforms in the compliance and collection process in VAT/GST: a full VAT/GST liability regime, JSL regimes, information sharing obligations, and the education of suppliers selling on the platform. Furthermore, as a follow-up, in 2020 the OECD published Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy.[4]

On the EU level, these different integration levels of online platforms in the VAT compliance and collection process have been implemented in parallel (each for different supplies). A deemed reseller rule (full liability regime) has been effective for certain supplies of goods facilitated by an online platform as of 1 July 2021 (new Art. 14a of the VAT Directive). Similarly, as of 1 July 2021, online platforms will have to record certain data on all facilitated supplies of goods and services not falling within the deemed reseller rule (new Art. 242(a) of the VAT Directive). Moreover, DAC 7 – adopted by the Council in March 2021 – will lead to addi-

1 See, inter alia, S. Pfeiffer, *Austria – Value Added Tax – Country Tax Guide*, IBFD online, last reviewed: 23 February 2021, heading of section 10.4. (similar in other Country Tax Guides on VAT); and F. Annacondia, *VAT Options Exercised by the Member States – Global Topics* (last reviewed: 1 January 2020), IBFD online, section 10.4.

2 A comprehensive overview can be found in F. Annacondia, *VAT Options Exercised by the Member States – Global Topics* (last reviewed: 1 January 2020), IBFD online, section 10.4. A key area where many Member States have implemented JSL are intra-Community supplies and missing trader fraud scenarios (see also I. Lejeune, S. Kotanidis & E. Cortvriend, *European Union – Joint and several liability relating to intra-Community acquisitions*, IVM 2009, p. 365).

3 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20 June 2019, https://www.oecd.org/tax/the-role-of-digital-platforms-in-the-collection-of-vat-gst-on-online-sales-e0e2dd2d-en.htm (accessed on 27 April 2021).

4 OECD, *Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy*, 3 July 2020, available at https://www.oecd.org/tax/exchange-of-tax-information/model-rules-for-reporting-by-platform-operators-with-respect-to-sellers-in-the-sharing-and-gig-economy.htm (accessed on 27 April 2021).

tional data reporting obligations for all facilitated supplies combined with an automatic exchange of this information between Member States as of 2023.[5] Finally, some Member States, including Austria and Germany, have unilaterally implemented JSL rules based on the option in Art. 205 of the VAT Directive, according to which economic operators of online platforms (also labelled as "electronic interfaces") become liable for VAT on the supplies they facilitate if they do not carry out certain due diligence obligations regarding the VAT compliance of the underlying suppliers selling goods or services via their platform. The scope and effect of the JSL rules in the Member States differ to a rather great extent. Stakeholders criticize aspects of these JSL rules for online platforms as being burdensome and disproportionate.[6] In 2019, the European Commission initiated an infringement proceeding against Germany arguing that the German JSL rules for online platforms hinder the free access of EU businesses to the German market and thus violate EU law.[7]

In the light of these developments, it is the right time to take a closer, critical look at the legal basis for these JSL rules and their potential interaction with the higher-ranking general principles of EU law and the internal market.

2. Different models of JSL rules based on the OECD Report

With respect to the platform economy, the OECD distinguishes between two variations of a JSL rule. A similar systematic distinction could also be made for JSL rules applied to other areas in the traditional economy. For both models, the OECD Report highlights the need for proportionality and legal certainty.[8] These two variations of a JSL are described as follows:

Model I: Forward looking

The digital platform is held jointly and severally liable for the future undeclared VAT/GST of the underlying suppliers once the tax authority has spotted cases of

5 Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (known as "DAC 7").

6 See, inter alia, R. Ismer, *Rechtswissenschaftliches Gutachten – Die geplanten Neuregelungen zu Aufzeichnungspflichten und zur Haftung von Marktplatzbetreibern in § 22f und § 25e UStG-E aus rechtstechnischer und europarechtlicher Sicht*, September 2018, available at https://www.bitkom.org/sites/default/files/file/import/20180924-Reform-Umsatzsteuer-Ismer-Studie.pdf (accessed on 19 April 2021); S. Härtwig, *Gesetzliche Neuregelung zur Haftung von Plattformen*, UR 2018, p. 777 (780); O. Zugmaier & M. Oldiges, *Elektronische Marktplätze haften für Umsatzsteuerausfälle*, DStR 2019, p. 15 (pp. 19–20); W. Hidien, *Ist das deutsche Haftungsmodell für Online-Marktplatzbetreiber unionsrechtswidrig?*, DStR 2020, p. 257 (p. 263 et seq.).

7 INFR(2019)4080, 10 October 2019.

8 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20 June 2019, p. 65.

non-compliance, notified the platform of these non-compliant suppliers, and the latter did not take appropriate action within a specified number of days. The result of such a forward-looking JSL rule is securing compliance from the underlying supplier or removing the supplier from the platform. This model typically does not require the digital platform's (presumed) "knowledge" of fraudulent behavior of the underlying supplier, but links to the notification by the tax authority.[9]

From the perspective of the person covered by the JSL rule, this approach seems preferable, as it avoids the uncertainty connected to a good faith/knowledge test. The administrative burden for tax authorities, however, is higher than under the second model.

Model II: Focus on past liability

The platform is held jointly and severally liable for the past undeclared VAT/GST of underlying suppliers when the platform should have had a reasonable expectation that the supplier should be registered for VAT/GST but was not. Under this concept, therefore, platforms are forced to carry out know-your-customer checks, for example by requesting and verifying VAT/GST registration numbers from underlying suppliers.[10]

From the tax authorities' perspective, the second model seems preferable, as it shifts more responsibilities to the platform, thereby – presumably – acting more as a deterrent and, therefore, potentially being more effective in ensuring tax collection. On the negative side, this approach will lead to a higher administrative burden for the persons covered by the JSL rule and greater legal uncertainty in practice.

The OECD highlights that both models "*can be designed to work in tandem*".[11] This distinction of different types of JSL rules in the OECD Report does not therefore prevent jurisdictions from implementing a variation or combination of both concepts. The Austrian JSL rules for online platforms follow model II with some adaptions (see section 5.2.). The German JSL rules for online marketplaces also seem to be closer to model II, while the UK JSL rules for online marketplaces show features of both models.[12]

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9 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20 June 2019, p. 63.

10 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20 June 2019, pp. 63–64.

11 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20 June 2019, p. 63.

12 On the UK and German JSL regime, see, inter alia, M. Lamensch & R. Millar, *The Role of Marketplaces in Taxing B2C Supplies*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Value Added Tax 2018* (Vienna: Linde 2019), pp. 51 et seq.

3. The legal basis in Art. 205 of the VAT Directive

3.1. Wording and history

The implementation of JSL rules for EU VAT can be based on the option in Art. 205 of the VAT Directive that reads:

> In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.

A similar optional JSL rule has already been included in the original version of the Sixth VAT Directive.[13]

Interestingly, in contrast to the adopted version of the Sixth VAT Directive, the Commission proposal to the Sixth VAT Directive of 1973[14] did not include an optional rule comparable to Art. 205 of the VAT Directive. Instead, Art. 21(2) of the Commission proposal provided a mandatory JSL rule for import VAT covering the consignee, the declarant, and his agent. This proposed rule did not include any escape clause for good faith/proportionality reasons, but followed a strict liability concept.[15]

Since 2004, the introduction of an additional JSL rule to the VAT Directive with the aim of combatting missing trader fraud has been discussed at EU level.[16] These discussions led to a Commission proposal in 2008, according to which a new second paragraph would have been added to Art. 205 of the VAT Directive. According to this new rule, the supplier of an intra-Community supply should have been held jointly and severally liable for the VAT on the intra-Community acquisition in the destination state, if he did not correctly submit a recapitulative statement for the intra-Community supply and was not able to duly justify his

13 Art. 21(1)(a) last sentence in the original version of the Sixth VAT Directive: "*The Member States may also provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax*".

14 Proposal for a Sixth Council Directive on the harmonization of legislation of Member States concerning turnover taxes – Common system of value added tax: uniform basis of assessment, OJ C 80, 5 October 1973, pp. 1–34.

15 Art. 21(2) proposal to the Sixth VAT Directive provides that the following person(s) shall be liable to pay import VAT: "*the person specified as consignee in the import documents or, in the absence of such documents or specification, the importer. The consignee, the declarant and his agent shall be jointly liable for tax*".

16 Report from the Commission to the Council and the European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud, COM(2004) 260, p. 15; Communication from the Commission to the Council concerning some key elements contributing to the establishment of the VAT anti-fraud strategy within the EU, COM(2007) 758 final, p. 11: "*In the context of missing trader fraud, whereby a number of actors intervene with the sole objective of hiding the fraudulent character of the transaction chain and thereby making the detection more complicated, the Commission sees the benefits of invoking this provision [option for JSL]*".

shortcoming to the satisfaction of the competent authorities.[17] In contrast to the optional rule in Art. 205(1) of the VAT Directive, this would have been a compulsory provision (obligation to implement by Member States). The Council never reached an agreement on this provision.[18]

3.2. Context, objective, and concept

To get a better understanding of the importance and objective of the optional rule in Art. 205 of the VAT Directive, it is worth looking at the context in which this rule is embedded. Art. 205 of the VAT Directive is part of the section "*Persons liable for payment of VAT to the tax authorities*" which – besides Art. 205 of the VAT Directive – includes a number of other optional rules.

The most important rules regulating the person liable to VAT are Arts. 193 and 196 of the VAT Directive (the "basic rule"[19]). According to the general rule in Art. 193 of the VAT Directive, VAT shall be payable by the taxable person carrying out the supply of goods or services (i.e. the supplier), except for cases specifically regulated otherwise in the subsequent articles.

Art. 196 in conjunction with Art. 192a of the VAT Directive provides the most prominent exception to the general rule in Art. 193 of the VAT Directive, known as the mandatory "reverse charge". According to this article, VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Art. 44 of the VAT Directive are supplied, if the services are supplied by a taxable person not established within the territory of the Member State in which the VAT is due. This rule leads to the result that the customer (rather than the supplier) is liable to pay VAT for most cross-border B2B supplies of services.[20]

Next to the mandatory reverse charge in Art. 196, the VAT Directive also permits (but does not obligate) Member States to apply the reverse charge mechanism to other supplies, in particular to all other *cross-border* supplies of services or goods where the supplier is not established in the Member State in which the VAT is due

17 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards tax evasion linked to import and other cross-border transactions, COM (2008) 805; critical on this proposal I. Lejeune, S. Kotanidis & E. Cortvriend, *European Union – Joint and several liability relating to intra-Community acquisitions*, IVM 2009, pp. 362 et seq.

18 Interestingly, this proposed rule showed some similarities to the quick fix added to Art. 138 of the VAT Directive, according to which the receipt of the customer's VAT ID and the correct submission of the recapitulative statement are material conditions for the exemption of the intra-Community supply (as of 1 January 2020). Even though this quick fix is not designed as a JSL rule, it implements similar strict (formal) requirements for the supplier and follows a similar objective (prevention of fraud in cross-border trade).

19 CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 27.

20 Mandatory reverse charge also exists for a couple of other special transactions: e.g. in triangulation cases (Art. 197 of the VAT Directive), specific transactions relating to investment gold (Art. 198 of the VAT Directive).

(Art. 194 of the VAT Directive). This includes, for example, services linked to immovable property, supplies with installation, or supplies of goods without transportation in a chain transaction. The Directive also permits Member States, subject to certain conditions, to apply the reverse charge mechanism to certain *domestic* supplies that are presumed to be more vulnerable to fraud (Arts. 199, 199a to 199c of the VAT Directive).

Arts. 200–203 of the VAT Directive include special rules for the person liable for VAT with respect to specific transactions (for example, intra-Community acquisitions, importation). Finally, Art. 204 of the VAT Directive (another optional rule) permits Member States, under certain conditions, to allow the taxable person to appoint a tax representative as the person liable for the payment of the VAT, if he/she is not established in the Member State in which the VAT is due.

Art. 205 of the VAT Directive does not alter all these liability rules (in particular Art. 193 and Art. 196) and their implementation in domestic law. It provides the Member States with the possibility to assign a "second" person who is responsible for the correct collection of VAT on a certain supply and could be held liable, if the primary tax debtor (supplier or customer) does not remit the VAT. AG Kokott also refers to this concept as "secondary liability".[21] Sometimes, the term "third-party liability" is also used.[22] Art. 205 of the VAT Directive, thus, strengthens the enforcement possibilities of tax authorities.[23] In the light of this context, Member States might particularly make use of the option in Art. 205 of the VAT Directive for areas in which they fear and presume an increased risk of non-collection and/or tax evasion and avoidance.

The concept of the JSL rule is not further defined in the VAT Directive. Therefore, it is unclear, and has also not been addressed by the CJEU so far, whether this concept is to be understood as a default liability, i.e. whether the tax authorities need to endeavour to collect VAT from the primary person liable to pay VAT first, or whether they could directly approach the person subject to the JSL rule (for example, the online marketplace), if the conditions for JSL are met.[24]

21 Opinion of AG Kokott, 14 January 2021, C-4/20, *ALTI*, EU:C:2021:12, para. 28.

22 See, inter alia, S. Pfeiffer, *Austria – Value Added Tax – Country Tax Guide*, IBFD online, last reviewed: 23 February 2021, heading of section 10.4. (similar in other Country Tax Guides on VAT); F. Annacondia, *VAT Options Exercised by the Member States – Global Topics* (last reviewed: 1 January 2020), IBFD online, section 10.4.

23 See also CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 29: "*for the efficient collection of VAT*".

24 See on this aspect, inter alia, the discussions in Austrian literature, by C. Kindl, *Gesamtschuld und Haftung im nationalen und europäischen Umsatzsteuerrecht* (Vienna: LexisNexis-Verl. ARD Orac, 2010) p. 79; and D. Auer, *Mehrwertsteuerbetrugsbekämpfung in der EU* (Vienna: Linde 2020) p. 137. The first reading would limit the effectiveness of the JSL rule. The German language version ("Haftung") could speak in favour of the first reading, whereas the English language version ("jointly and severally liable") could also support a broader understanding (see C. Kindl, *Gesamtschuld und Haftung im nationalen und europäischen Umsatzsteuerrecht* (Vienna: LexisNexis-Verl. ARD Orac, 2010) p. 79).

According to AG Kokott, it "*follows from the very nature of joint and several liability that each debtor is liable for the full amount of the debt and the creditor is, in principle, free to claim payment of that debt from one or more of the debtors as he chooses*".[25] The AG derives this conclusion from CJEU judgments in the field of customs law, where a similar term ("jointly and severally liable") is used within EU legislation.[26]

3.3. Scope

The substantive scope of Art. 205 of the VAT Directive is very broad. Art. 205 of the VAT Directive specifies neither the persons that Member States may designate as joint and several debtors nor the situations in which such designation may be made. Thus, according to the CJEU, it is for the Member States to determine the conditions and arrangements under which the JSL provided for in that article will be incurred.[27] As Art. 205 of the VAT Directive refers to "persons", it could potentially also be applied to non-taxable persons.[28] Moreover, the scope is not restricted to cross-border cases; hence, the option may also be used for purely domestic scenarios.[29]

Art. 205 of the VAT Directive refers to almost all articles in the section "Persons liable for payment of VAT to the tax authorities". Remarkably, only one article is explicitly excluded: Art. 201 of the VAT Directive on import VAT. According to Art. 201 of the VAT Directive, import VAT shall be payable "*by any person or persons designated or recognised as liable by the Member State of importation*". Art. 201 of the VAT Directive itself hence grants broad discretion to Member States when defining the person liable for import VAT, which should also include the right for Member States to implement JSL rules for import VAT.[30] Therefore, the exclusion of Art. 201 from the scope of Art. 205 of the VAT Directive should not have any material consequence.

Art. 205 of the VAT Directive, as it stands nowadays, does not set any substantive conditions under which circumstances (for example, a violation of due diligence

25 Cf Opinion of AG Kokott, 14 January 2021, C-4/20, *ALTI*, EU:C:2021:12, para. 32.

26 CJEU, 18 May 2017, C-154/16, *Latvijas Dzelzceļš*, EU:C:2017:392, para. 85; CJEU, 22 November 2017, C-224/16, *Aebtri*, EU:C:2017:880, paras. 19–80.

27 CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 31.

28 F. Annacondia, *VAT Options Exercised by the Member States – Global Topics* (last reviewed: 1 January 2020), IBFD online, section 10.4.

29 F. Annacondia, *VAT Options Exercised by the Member States – Global Topics* (last reviewed: 1 January 2020), IBFD online, section 10.4.2.; Opinion of AG Kokott, 14 January 2021, C-4/20, *ALTI*, EU:C:2021:12, para. 29.

30 Compare also European Commission, Explanatory Notes on the VAT e-commerce rules, December 2020, p. 53 (available at https://ec.europa.eu/taxation_customs/commission-guidelines_en, accessed on 19 January 2022) : "*If the VAT is not collected by the IOSS registered supplier or electronic interface and VAT becomes due upon importation into the EU in the Member State of final destination, that Member State can decide freely on the person liable to pay the import VAT (either the customer or the supplier or the electronic interface – Article 201 of the VAT Directive)*".

obligations, "bad" faith, etc.) a person can be made subject to JSL. However, this does not mean that there are no legal limits (see, on the legal limits, section 4.).

4. CJEU case law on JSL rules

4.1. Overview

The CJEU has had to address questions related to Art. 205 of the VAT Directive (or its predecessor in Art. 21 of the Sixth VAT Directive) in four cases.[31] The *Federation of Technological Industries* case of 2006 concerned UK JSL rules applicable to suppliers of goods who were made jointly liable for VAT on any previous or subsequent supply, in case they knew or should have known that the supply was involved in a fraudulent transaction.[32] The *Vlaamse Oliemaatschappij NV* case of 2011 involved a Belgian JSL rule applicable to warehouse keepers who were jointly liable for the VAT owing on a supply of goods, released from the warehouse, by the owner of the goods.[33] Finally, in the *Macikowski* case of 2015, the CJEU had to address special Polish rules for court enforcement officers who were made subject to obligations to calculate, collect, and pay the VAT on the sale of immovable property effected through enforcement.[34]

Finally, in May 2021, the CJEU issued another ruling to Art. 205 of the VAT Directive in the *ALTI* case. A Bulgarian court asked the CJEU whether Art. 205 of the VAT Directive permits Member States to provide that, in addition to the supplier, the recipient of a purely domestic supply is a further "*person liable for payment of VAT*" and to hold him liable not only for a third-party VAT liability but also for third-party default interest. Contrary to AG Kokott,[35] the CJEU concluded that Art. 205 of the VAT Directive does not preclude legislation pursuant to which the person held jointly and several liable must pay, in addition to the VAT, the default interest on that amount.[36] Due to its specific background, this case will not be addressed in detail in the following sections.

The CJEU has developed the following general rules in its judgments on Art. 205 of the VAT Directive (and its predecessor in Art. 21 of the Sixth VAT Directive): as a starting point, the Court emphasized that this option "*permits, as a rule, Member States to enact measures under which a person is to be jointly and severally liable to pay a sum in respect of VAT payable by another person*".[37] However, the

31 See also Opinion of AG Kokott, 14 January 2021, C-4/20, *ALTI*, EU:C:2021:12, para. 27. In the *FIRIN* case, the referring Bulgarian court also addressed Art. 205 in its preliminary questions. However, the CJEU declared the preliminary question relating to Art. 205 as inadmissible (CJEU, 13 March 2014, C-107/13, *FIRIN*, EU:C:2014:151, paras. 28–32).

32 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309.

33 CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871.

34 CJEU, 26 March 2015, C-499/13, *Macikowski*, EU:C:2015:201.

35 Opinion of AG Kokott, 14 January 2021, C-4/20, *ALTI*, EU:C:2021:12.

36 CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 45.

37 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 28; CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 19.

CJEU also highlighted that Member States are not fully free in their discretion: when Member States make use of the option in Art. 205 of the VAT Directive, they "*must comply with the general principles of law which form part of the Community legal order, which include, in particular, the* ***principles of legal certainty and proportionality***" [emphasis added].[38] In a similar vein, the OECD highlights in its Report on the platform economy that it is "*important for a tax authority when applying JSL to avoid disproportionate requirements on platforms and include clear criteria to ensure legal certainty*".[39]

When carrying out this proportionality test, the CJEU strikes a balance of interests: the interest of Member States (the need to preserve tax revenues) has to be balanced against the interest of the natural or legal persons acting on the market and covered by the JSL rules (fundamental rights of the persons affected[40]).[41] In particular, the Court emphasized that Member States are free "*to preserve the rights of the public exchequer as effectively as possible*". However, "*such measures must not go further than is necessary for that purpose*".[42] Hence, it also needs to be tested whether there are other "*appropriate means less detrimental*" available for Member States in order to combat tax evasion and avoidance.[43] More recently in the *ALTI* case, the CJEU specified that the application of a JSL rule to a person other than the person liable for payment of VAT "*must be justified by the factual and/or legal relationship between the two persons concerned*".[44]

When applying these general principles to the specific domestic JSL rules at hand, the Court concluded that it is for the referring court to make the final decision on whether the specific rules are in violation of EU law.[45] The CJEU, however, gave the national courts some more detailed criteria on the way to determine this (see, in more detail, section 4.2.).

38 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 29; similar CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 20; CJEU, 26 March 2015, C-499/13, *Macikowski*, EU:C:2015:201, para. 47; CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 32.

39 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20 June 2019, p. 65.

40 In its judgments, the CJEU did not explicitly rely on the fundamental rights, but uses the vague concept of proportionality as a separate general principle and legal basis. In the author's opinion, the Court would be better off in relying on the fundamental rights (e.g. right to conduct a business).

41 See Opinion of AG Poiares Maduro, 7 December 2005, C-384/04, *Federation of Technological Industries*, EU:C:2005:745, para. 25: "*the national court will have to strike a balance between the need to ensure the collection of VAT and the interest in ensuring that regular trade is not rendered unreasonably difficult by the threat of liability for the non-payment of VAT owed by another*." Opinion of AG Kokott, 14 January 2021, C-4/20, *ALTI*, EU:C:2021:12, para. 1.

42 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 30; CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 33.

43 CJEU, 19 Sept 2000, C-177/99, *Ampafrance SA*, EU:C:2000:470, para. 61; similar CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 33.

44 CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 34.

45 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 34; CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 27; CJEU, 26 March 2015, C-499/13, *Macikowski*, EU:C:2015:201, para. 52.

Moreover, the CJEU had to decide on the admissibility of comparable JSL rules in other fields of law, namely the field of excise duties within the scope of Directive 92/12/EEC (*Kapnoviomichania*[46]), customs law (amongst others "*Latvijas Dzelzceļš" VAS*[47]), and when dealing with fundamental freedoms.[48] In addition, these judgments give insights on the application of the general EU law principles to JSL rules.

4.2. VAT cases

4.2.1. *Federation of Technological Industries*

The landmark case regarding JSL rules in VAT is *Federation of Technological Industries* of 2006. According to UK VAT law, traders were held jointly and severally liable on unpaid VAT on previous and subsequent supplies in a chain, if the traders knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid. The law included several presumptions under which circumstances a person was presumed to have reasonable grounds for suspecting that VAT would go unpaid (e.g. a comparably low price). The JSL rules were limited to the supply of specific goods (e.g. telephones, computers, etc.)[49] and aimed at combating missing trader fraud.[50]

When being asked to rule on the admissibility of these rules, the CJEU concluded that "*a system of* ***strict liability [goes] beyond what is necessary*** *to preserve the public exchequer's rights*".[51] Therefore, "*any* ***presumptions*** *may not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person* ***to rebut*** *them with evidence to the contrary*".[52] In particular, traders who "***take every precaution which could reasonably be required of them***" to ensure that their transactions do not form part of a fraudulent transaction should not be covered by the JSL rules [emphasis added].[53]

To sum up: based on the *Federation of Technological Industries* case, a strict liability does not seem to be in line with the EU VAT Directive. Moreover, it seems that national tax authorities may rely on presumptions of knowledge of involvement in a fraudulent transaction for applying JSL rules; such presumptions, however, must be rebuttable.

46 CJEU, 2 June 2016, C-81/15, *Kapnoviomichania Karelia AE*, EU:C:2016:398.
47 CJEU, 18 May 2017, C-154/16, *Latvijas Dzelzceļš*, EU:C:2017:392.
48 CJEU, 3 October 2006, C-290/04, *Scorpio*, EU:C:2006:630; CJEU, 18 October 2012, C-498/10, *X*, EU:C:2012:635.
49 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 6.
50 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 7.
51 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 32.
52 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 32.
53 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 33.

In the light of more recent CJEU judgments on missing trader fraud scenarios in VAT law as well as on abusive transactions in direct tax law, it is questionable whether this reasoning on rebuttable presumptions in the *Federation of Technological Industries* case can still be uphold. In the *Mahagében and Dávid* case of 2012, the CJEU emphasized that it is, "*in principle, for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud*".[54] Against this background, the tax authority cannot ask the taxable person to carry out checks which go beyond the ordinary course of their business (for example, require the taxable person wishing to exercise the right to deduct VAT to ensure that the issuer of the invoice was in possession of the goods at issue and was in a position to supply them, and that he has satisfied his obligations as regards declaration and payment of VAT).[55] The burden of proof on the existence of fraud and the involvement in fraud, hence, rests, as a general rule, with the competent authority in the first place.

This is also confirmed – and even more emphasized – by direct tax law jurisprudence in which the CJEU is very critical about rebuttable presumptions for fraud and abuse set up by domestic legislatures. In particular, in *Eqiom* of 2017, the Court held in very general terms that:

> [i]n order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities *may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole operation at issue.* The imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even prima facie evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse.[56] [Emphasis added.]

The CJEU used a similar reasoning in the *Euro Park Service* and *N Luxembourg* cases (both direct tax cases).[57]

In the author's opinion, it is unclear how the reasoning in the *Federation of Technological Industries* case of 2006 can be reconciled with the (recent) *Eqiom* line of case law. In the light of the latter jurisprudence, the reasoning in *Federation of Technological Industries* relating to the permissibility of rebuttable presumptions may need some refinement. In particular, one may argue that EU law could force Member States to implement JSL rules based on model I (see section 2.) only. According to model I, a forward-looking JSL would apply once the tax authorities

54 CJEU, 21 June 2012, Joined Cases C-80/11 and C-142/11, *Mahagében and Dávid*, EU:C:2012:373, para. 62.

55 CJEU, 21 June 2012, Joined Cases C-80/11 and C-142/11, *Mahagében and Dávid*, EU:C:2012:373, paras. 61 et seq.

56 CJEU, 7 September 2017, C-6/16, *Eqiom*, EU:C:2017:641, para. 32.

57 CJEU, 8 March 2017, C-14/16, *Euro Park Service*, EU:C:2017:177, paras. 55–56; CJEU 26 February 2019, C-115/16 and others, *N Luxembourg 1 and others*, EU:C:2019:134, para. 142; in a similar vein CJEU, 5 July 2012, C-318/10, *SIAT*, EU:C:2012:415, paras. 55 and 56.

have issued an alert that certain suppliers are non-compliant/fraudulent and the operator of the platform does not block these suppliers from using the platform in due time. Following this JSL model, the burden of proof on the existence of fraud and the involvement in fraud would, hence, rest with the tax authority in the first place. Model I (forward looking) would therefore clearly be in line with the *Eqiom* line of case law.

Despite this potential conflict with other case law, the CJEU recently confirmed its reasoning on the permissibility of rebuttable presumptions (developed in the *Federation of Technological Industries* case in the year 2006) in the *ALTI* case in May 2021.[58]

4.2.2. *Vlaamse Oliemaatschappij NV*

According to Belgian VAT law, warehouse keepers, of warehousing arrangements other than customs warehousing, were jointly and severally liable for the payment of VAT, together with the persons who are primarily liable for the tax.[59] Different to the *Federation of Technological Industries* case, the *Vlaamse Oliemaatschappij NV* case did not concern fraudulent or presumably fraudulent transactions, but a scenario where VAT went unpaid due to insolvency of the primary person liable for tax. The company, Ghebra, was a fuel wholesaler and stored its petroleum products in a warehouse belonging to Vlaamse Oliemaatschappij (VOM). During March and April 2003, Ghebra supplied fuel for valuable consideration, and released it from VOM's warehouse. These supplies triggered VAT. However, since Gehbra was declared insolvent in June 2003, the VAT was not paid. The Belgian tax authorities issued an order for recovery against VOM based on the JSL rules. VOM argued that as a warehouse keeper, he merely makes his warehouse available to his customers to allow goods to be stored and has no legal or fiscal means at his disposal to monitor or enforce the effective payment of VAT by his customers.[60] Against this background, the Belgian court asked the CJEU whether Member States may provide that a warehouse keeper is jointly and severally liable for the VAT owing on a supply of goods made for valuable consideration, and released from the warehouse, by the owner of the goods, even where the warehouse keeper acts in good faith or where no fault or negligence can be imputed to the warehouse keeper.

The CJEU held, in a rather clear wording, that this JSL rule seems to be in conflict with EU law, since:

- it does not allow warehouse keepers "*to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay*";[61]

58 CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, paras. 36–39.
59 CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 23.
60 CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 15.
61 CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 24.

- it is "*clearly […] disproportionate to hold that person* ***unconditionally liable*** *for the shortfall in tax caused by acts of a third party* ***over which he has no influence whatsoever***" [emphasis added];[62] and
- it should be taken into account whether the person who should be obliged to pay VAT "*acted in good faith, exhibiting all the* ***due diligence of a circumspect trader****, that he took every reasonable measure in his power and that his participation in fraud is excluded*" [emphasis added].[63]

As the *Vlaamse Oliemaatschappij NV* case – based on the facts described in the CJEU judgment – was not linked to any fraud, this reasoning leads to open questions. The phrase "*over which he has no influence whatsoever*" seems to refer to the fact that the warehouse keeper cannot monitor or enforce the effective payment of VAT by his customers and, thus, should not be held liable in case the supplier becomes insolvent. It is, however, unclear as to why the CJEU additionally refers to the need for "due diligence" measures by the warehouse keeper. As the CJEU emphasized the need for due diligence measures, even though the case concerned non-payment due to insolvency (and presumably not fraud), this case might indicate that circumspect traders may also be required to check the potential insolvency risk of their business partners.[64] It is, however, unclear what such due diligence measures might look like in practice.

As AG Kokott rightly highlighted in her opinion to the *ALTI* case, the *Scialdone* case supports a limited reading of "due diligence" obligations. In *Scialdone*, the CJEU held that the failure to pay *declared* VAT is not covered by Art. 325(1) of the TFEU obligating Member States to combat VAT fraud.[65] This supports that Member States are not permitted to apply restrictive unilateral measures (such as, for example, JSL rules) to combat the risk of non-payment caused by insolvency of the primary person liable to pay VAT.[66]

4.2.3. *Macikowski*

According to Polish JSL rules, court enforcement officers were made subject to the obligation to calculate, collect, and pay the VAT on the sale of immovable

62 CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 24.

63 CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 26.

64 That "due diligence" might not only relate to involvement in fraud, but could also cover other aspects leading to non-payment, could also be supported by the specific wording in the *Vlaamse Oliemaatschappij NV* judgment: "*Accordingly, the fact that the person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that person can be obliged to account for the VAT owed*" (CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2011:871, para. 26). Based on this wording, "exhibiting due diligence", "taking reasonable measures", and the "exclusion of participation in fraud" are "important points" for the proportionality analysis which seem to be independent from each other.

65 CJEU, 2 May 2018, C-574/15, *Scialdone*, EU:C:2018:295, para. 40.

66 Cf Opinion of AG Kokott, 14 January 2021, C-4/20, *ALTI*, EU:C:2021:12, paras. 61–66.

property effected through enforcement. Additionally, the court enforcement officers could be held liable with their entire assets for the VAT due on the proceeds of the sale of immovable property effected through enforcement where they do not discharge the obligation to collect and pay that tax. Interestingly, different to the *Federation of Technological Industries* and *Vlaamse Oliemaatschappij NV* cases, the Polish referring court did not address Art. 205 of the VAT Directive in its preliminary questions, but referred to the principle of proportionality as a legal benchmark on a stand-alone basis. This might also be the reason why the CJEU does not explicitly address Art. 205 in its judgment.[67] The CJEU even states – without further explaining it – that the legislation would "*not provide that the court enforcement officer is jointly and severally liable with that taxable person for the payment of VAT*".[68]

Similar to the *Vlaamse Oliemaatschappij NV* case, the *Macikowski* case does not concern any (presumably) fraudulent transaction. Mr Macikowski, acting in his capacity as a court enforcement officer in enforcing proceedings against a company established in Poland, carried out a compulsory sale by auction of immovable property of this company. According to Polish law, Mr Macikowski was obliged to remit the VAT on the sale to the authorities. Mr Macikowski appealed against a decision on this liability as paying agent, arguing that he had not been able to dispose over the proceeds of the auction sale of the immovable property, as the proceeds had been in the court's deposit account until the plan for dividing the proceeds had been put forward. The Polish referring court asked the CJEU whether the principle of proportionality must be interpreted as precluding a provision under which a court enforcement officer must be liable with his entire assets for the amount of VAT due on the proceeds of the sale of immovable property effected through enforcement where he does not discharge his obligation to collect and pay that tax.

Similar to the *Federation of Technological Industries* and *Vlaamse Oliemaatschappij NV* cases – but without referring to them – the CJEU emphasized that:

- a liability rule which would hold a person liable "*for conduct which is not attributable to him personally cannot be considered to be proportionate*";[69] and
- the liability rule should not depend "*on factors over which he has no influence, including actions or omissions attributable to third parties*".[70]

In the light of the facts of the case, the reasoning in particular seems to refer to the enforcement officer's lack of disposal rights over the proceeds of the auction sale at the point in time when the VAT was due.

67 AG Kokott discusses Art. 205 explicitly (Opinion of AG Kokott, 6 November 2014, C-499/13, *Macikowski*, EU:C:2014:2351 paras. 58 et seq.).
68 CJEU, 26 March 2015, C-499/13, *Macikowski*, EU:C:2015:201, para. 44.
69 CJEU, 26 March 2015, C-499/13, *Macikowski*, EU:C:2015:201, para. 49.
70 CJEU, 26 March 2015, C-499/13, *Macikowski*, EU:C:2015:201, para. 50.

Interestingly, and different to the *Vlaamse Oliemaatschappij NV* case, the CJEU did not refer to any due diligence obligations of the court enforcement officer.

4.2.4. Interim conclusions

These CJEU judgments on JSL rules in VAT may be summarized as follows:

- The proportionality principle, as applied in conjunction with the VAT Directive, seems to prohibit an unconditional strict liability, i.e. persons cannot be made jointly and severally liable for unpaid VAT, if the conduct leading to non-payment is fully out of their control (for example, insolvency).
- JSL can only be applied to persons:
  - who knew or should have known that they are involved in a fraudulent transaction; and/or
  - who have not carried out the due diligence of a circumspect trader.
- It is unclear whether and under which circumstances presumptions for "bad faith" and/or lack of due diligence are permissible; the *ALTI* case points in the direction that the CJEU – in potential contradiction to direct tax case law – still allows for such presumptions in VAT law;[71] in any case, such presumptions must be rebuttable.

The scope of measures to be carried out in order to fulfil the "due diligence of a circumspect trader" seems to be *the* crucial point. As the level and specific measures of due diligence might depend on the specific case (industry, transaction, business partner), a general definition of due diligence is impossible to provide. This leads to legal uncertainty in practice.

Furthermore, it is unclear based on the case law on JSL rules so far whether the "violation of due diligence" is to be understood as a synonym for the "should have known"-test (in other words: a violation of due diligence always means that you should have known about involvement in fraud) or whether the due diligence criterion could also have an independent meaning.[72] This also relates to the question of whether the CJEU requires a causal link between the violation of due diligence obligations and the detection of fraud (in other words: can the violation of due diligence obligations also lead to JSL, if a person could not have detected the fraudulent behaviour, even if it had fulfilled all due diligence obligations [i.e. because the fraudulent taxpayer is following all formal rules]?). These proportionality issues are particularly important if domestic law provides an (exhaustive) definition/presumption of due diligence obligations (for the sake of legal certainty), as is the case, for example, under the Austrian JSL rules for online marketplaces (see section 5.2.).

71 CJEU, 20 May 2021, C-4/20, *ALTI*, EU:C:2021:397, para. 36–39.

72 The latter understanding could, for example, involve that due diligence obligations do not only cover measures that prevent non-payment of VAT caused by evasion and/or fraud, but could potentially also cover other reasons for non-payment (e.g. insolvency of the primary person liable to pay VAT).

4.3. Case law in other fields of law

4.3.1. Overview

Remarkably, despite the CJEU's emphasis on the proportionality principle in its VAT case law when analysing JSL rules, a strict liability for taxes is not alien to the EU law framework. Such strict JSL rules may, in particular, be found in the area of customs[73] and excise duties.[74] Moreover, the CJEU has already accepted domestic strict liability rules linked with withholding obligations, limited to cross-border scenarios, in the area of direct tax law as being in conformity with the fundamental freedoms.[75]

In these subject areas, the EU legislator and the CJEU seem to justify the need for these measures with the high risk of non-collection, and tax evasion and avoidance in the underlying situations, which the case law discussed in sections 4.3.2.–4.3.3. illustrates.

4.3.2. Excise duties: *Kapnoviomichani*

Regarding excise duties, the CJEU seems to confirm in the *Kapnoviomichani* case of 2016 that strict liability rules could be in line with EU law. Art. 20(1) of the former Excise Duty Directive 92/12 made the authorized warehouse keeper liable for the payment of excise duty on cigarettes kept in the warehouse in the event of an irregularity or offence committed during the movement of products under a duty suspension arrangement.[76] A similar rule is to be found in Art. 8 of the new Excise Duty Directive 2008/118/EC.[77]

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73 See, for example, CJEU, 18 May 2017, C-154/16, *Latvijas Dzelzceļš*, EU:C:2017:392, paras. 75–82 on Art. 96(2) of the Community Customs Code, according to which, notwithstanding the principal's obligations, the carrier of the goods is also responsible for their production intact to the customs office of destination. If the carrier has failed to fulfil his obligation to produce, intact, goods placed under the external Community transit procedure, he must be regarded, by the same token, as being the debtor in respect of the customs debt, which means that under Art. 213 of the Community Customs Code he, together with the principal, is jointly and severally liable for payment of the debt. According to the CJEU, the liability imposed upon the principal is independent of the principal's good faith and the fact that the breach of the external Community transit procedure was extraneous to him. The principal is liable for payment of the customs debt arising in relation to goods placed under the external Community transit procedure, even if the carrier did not fulfil the obligations to which he was subject under Art. 96(2) of the Community Customs Code. This strict liability aims at ensuring the diligent and uniform application of the provisions relating to that procedure and the proper functioning of transit operations in order to protect the financial interests of the European Union and its Member States.

74 CJEU, 2 June 2016, C-81/15, *Kapnoviomichania Karelia AE*, EU:C:2016:398.

75 CJEU, 3 October 2006, C-290/04, *Scorpio*, EU:C:2006:630; CJEU, 18 October 2012, C-498/10, *X*, EU:C:2012:635.

76 See on the provisions Opinion of AG Bot, 28 January 2016, C-81/15, *Kapnoviomichani*, EU:C:2016:66, para. 33.

77 Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ L 9, 14 Jan 2009, pp. 12–30.

According to the analysis by AG Bot, the liability of the authorized warehouse keeper of dispatch is very broad in scope: the provision imposed on the authorized warehouse keeper is:

> a *system of liability for risk* from which he may exonerate himself only by providing proof of force majeure […] The fact that the liability of the authorised warehousekeeper of dispatch is expressly founded on the concept of risk and, in the case of losses, gives way only upon proof of *force majeure* demonstrates that it is an *objective liability* based not on the proven or presumed fault of the warehousekeeper but on his *participation in an economic activity. Being the counter-concession for the right to produce, process, hold, receive and dispatch products under a duty suspension arrangement, that liability attaches to the authorised warehousekeeper by reason of that characteristic alone*.[78] [Emphasis added.]

In its judgment, the CJEU explicitly referred to this analysis by AG Bot and confirmed that Directive 92/12:

> imposes on the authorised warehousekeeper a system of *liability for all risks inherent in the movement of products subject to excise duty* under such an arrangement, and that warehousekeeper is, consequently, designated as liable for the payment of excise duties in cases where an irregularity or offence has been committed involving the chargeability of such duties in the course of the movement of those products. *That liability is thus strict and is based not on the proven or presumed fault of the warehousekeeper, but on his participation in an economic activity*.[79] [Emphasis added.]

Moreover, the CJEU highlighted with reference to earlier case law that "***the cigarette market particularly lends itself to the development of unlawful trade***" and that the liability rules "*must be interpreted in the light of that finding*" [emphasis added].[80] The CJEU did not question the validity of these strict liability rules in Directive 92/12.[81]

A similar reasoning could potentially also be used for VAT and direct tax law, in particular for JSL rules applied to persons acting in business areas which are evidently subject to a high risk of tax evasion and non-collection of taxes.

78 Opinion of AG Bot, 28 January 2016, C-81/15, *Kapnoviomichani*, EU:C:2016:66, paras. 34–36.

79 CJEU, 2 June 2016, C-81/15, *Kapnoviomichania Karelia AE*, EU:C:2016:398, para. 32; in a similar vein for customs agents: CJEU, 14 May 1996, Joined Cases C-153/94 and C-204/94, *Faroe Seafood and others*, EU:C:1996:198, para. 115: "*[A] customs agent […] renders itself liable, by the very nature of its functions […] Therefore, even the fact that the amount claimed is a large one comes within the category of professional risks which the agent undertakes.*"

80 CJEU, 2 June 2016, C-81/15, *Kapnoviomichania Karelia AE*, EU:C:2016:398, para. 37. This is mentioned by the Court in settled case law (see, inter alia, CJEU, 10 December 2002, C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, EU:C:2002:741, para. 87, and CJEU, 29 April 2004, C-222/01, *British American Tobacco*, EU:C:2004:250, para. 72).

81 CJEU, 2 June 2016, C-81/15, *Kapnoviomichania Karelia AE*, EU:C:2016:398, para. 33: "*In the present case, it is common ground that an authorised warehousekeeper such as Karelia has strict liability in respect of payment of the excise duties.*" When analysing the additional existing joint and several liability put on the authorized warehouse keeper for payment of sums corresponding to the financial penalties imposed on the perpetrators of a smuggling offence, the CJEU, however, referred to the proportionality principle (CJEU, 2 June 2016, C-81/15, *Kapnoviomichania Karelia AE*, EU:C:2016:398, paras. 34 et seq.).

4.3.3. Direct taxes: *Scorpio and X*

Finally, also direct tax law jurisprudence provides examples for strict liability rules that were considered to be in line with the proportionality principle of EU law.

The landmark case is the *Scorpio* case of 2006. A non-resident musician entered into a contract with Scorpio, a German event organizer, and performed a concert in Germany. Under German tax law, Scorpio as the service recipient was obliged to withhold tax at source upon payment of the remuneration and to transfer this tax to the authorities. As Scorpio did not do so, it was held liable for the tax. This liability may be classified as "strict" because it does not require that the service recipient knew or should have known of any misconduct at the level of the service provider. The service recipient can only free himself from liability by withholding the tax at source. The CJEU was asked whether this liability put on Scorpio, only applicable in case of non-resident service providers, is in line with the free movement of services. The CJEU found the liability rules to be in line with EU law:

> The procedure of retention at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State of residence and the State where the services are provided.[82]

This reasoning has been confirmed in the *X* case of 2012. In the *X* judgment, the Court additionally stressed that the framework of cooperation provided by the Tax Recovery Assistance Directive 76/308 (now replaced by Directive 2010/24/EU) does not provide a less restrictive means to collect the taxes in the hands of the non-resident supplier.[83] A similar reasoning could be applied to the Regulation (EU) 904/2010 on administrative cooperation and combating fraud in the field of VAT.

One relevant aspect in the proportionality test in these scenarios might be that the service recipient, as payee of the remuneration subject to tax, has access to the relevant payment. By having access to the payment, the service recipient can escape the risk that the withholding tax becomes a final burden for him (as he can withhold the tax upon payment). This also might be a relevant difference to the *Macikowski* case, in which the court enforcement officer presumably did not have access to the sale proceeds on time.

To sum up: the lack of enforcement jurisdiction on the "primary" person liable to pay the tax (which is usually the supplier in VAT and direct tax law) may potentially justify a (strict) liability rule put on another resident person involved in the transaction. Furthermore, access to the payment and the corresponding possibility to limit

82 CJEU, 3 October 2006, C-290/04, *Scorpio*, EU:C:2006:630, para. 36.

83 CJEU, 18 October 2012, C-498/10, *X*, EU:C:2012:635, paras. 39 et seq.: the withholding obligation and liability put on the resident service recipient would still be proportionate, since this Directive's "*aim […] was not to replace the taxation at source as a method of collecting tax*".

the risk that the tax becomes a final burden for the (jointly) liable party may also support the proportionality of a JSL rule.

4.3.4. Interim conclusions

From this case law on other fields of law, the following conclusions can be drawn:

- In areas where experience shows that there is an increased risk of unlawful trade (for example, the cigarette market) or of non-collection of taxes (for example, a lack of enforcement jurisdiction on non-residents), the EU and/or national legislature might be permitted to set strict(er) JSL rules (compared to less risky areas).
- A strict liability could potentially be justified with (the right to) the participation in a specific (risky) economic activity (i.e. the counter-concession for the right to take part in this activity).
- Access to the payment (that is subject to tax) by the (jointly) liable party may support the proportionality of a JSL rule.

5. Examples of JSL rules in Austria and their compatibility with the proportionality principle

5.1. JSL for the business customer for VAT on supplies of goods by non-resident suppliers

The Austrian legislator has implemented a special JSL rule for supplies taxable in Austria carried out by non-resident suppliers (which are not covered by the Austrian reverse charge rules). According to prevailing opinion, these liability rules have their legal basis in Art. 205 of the VAT Directive.[84]

According to section 27(4) of the Austrian VAT Code, a taxable person receiving a supply taxable in Austria (in particular a supply of goods) shall withhold the VAT due on this supply and transfer it to the competent tax authority in the name and on account of the supplier if the supplier has neither a domicile (seat) nor his usual place of residence or a permanent establishment in Austria. If the recipient of the supply does not fulfil this obligation, he shall be liable for the resulting loss of VAT. The provision hence establishes a withholding tax obligation linked with liability for the recipient of the supply similar to the one discussed in the *Scropio* and *X* cases (see section 4.3.3.).

According to prevailing opinion in Austria, this liability rule is considered to be in line with the VAT Directive and EU law. Since Art. 194 of the VAT Directive

84 See W. Berger & S. Tschiderer in: W. Berger et al. (eds.), *UStG*, 3rd edition (Vienna: Manz, 2018) § 27 para. 1; T. Ecker, T. Epply, F. Rößler & D. Schwab, *Mehrwertsteuer: Kommentar*, 62. supplement, January 2020, § 27 paras. 33–35 and 43.

permits Member States to apply the reverse charge mechanism to the supply (of goods) by non-resident suppliers (optional rule), it is argued that the JSL rule – as a "less" burdensome rule than the reverse charge mechanism – should be in line with the VAT Directive.[85]

According to the author's opinion, a JSL rule is, however, not necessarily less burdensome for the business customer than the reverse charge mechanism. The assessment of whether the conditions of the specific JSL rule in section 27(4) of the Austrian VAT Code are met and VAT needs to be withheld requires a critical assessment of the supplier's status by the recipient (in particular, whether the supplier has a permanent establishment in Austria). This assessment depends on information which might not be easily accessible to the recipient. Furthermore, the assessment is complicated by the fact that section 27(4) of the Austrian VAT Code uses terms which deviate from the common EU definitions (in particular for the Austrian term "permanent establishment", a separate definition of which is available under domestic tax law, which is not in line with the EU definition of a "fixed establishment"[86]). It might be argued that reverse charge rules, based on the common understanding of the terms used in the VAT Directive, would involve less uncertainty in practice.

The direct tax case law, described in section 4.3.3., may, however, support that the JSL rule is nevertheless in line with the proportionality principle of EU law, since this JSL rule seems to be comparable to the discussed withholding tax in *Scorpio*. Both sets of rules address scenarios involving *non-resident* suppliers (as primary persons liable to pay the tax). The lack of enforcement jurisdiction on the supplier and the presumably increased risk of non-collection in these situations could potentially justify the strict JSL rule.

Moreover, the Austrian Supreme Administrative Court (VwGH) ruled that the tax authority must take into account the principle of proportionality when issuing a notice of liability in the individual case. In particular, the authority should consider whether the potentially liable party had or should have had knowledge of the occurrence of the liability-relevant circumstances (i.e. non-existence of a domestic permanent establishment).[87]

85 G. Kollmann in: S. Melhardt & M. Tumpel (eds.), *UStG*, 3rd edition (Vienna: Linde, 2021) § 27 para. 21; H.G. Ruppe & M. Achatz, *UStG*, 5th edition, (Vienna: Facultas, 2018) § 27 para. 4; with criticism C. Kindl, *Gesamtschuld und Haftung im nationalen und europäischen Umsatzsteuerrecht* (Vienna: LexisNexis-Verl. ARD Orac, 2010) pp. 113 et seq.

86 If, in individual cases, it is unclear for the recipient whether the supplier has a permanent establishment in Austria, he may ask the supplier to apply for a certificate on the existence of a domestic permanent establishment (form U71) at the competent Austrian tax office. If the recipient receives such a certificate, he can assume that a permanent establishment exists in Austria and that there is no liability. The certificate loses its validity one year after the date of issue.

87 Austrian Supreme Administrative Court, 7 July 2011, case 2008/15/0010, AT:VWGH:2011:20081500 10.X00; Austrian Supreme Administrative Court, 28 January 2005, case 2002/15/0157, AT:VWGH: 2005:2002150157.X00.

5.2. JSL for online marketplaces for VAT on facilitated supplies of goods and services

5.2.1. Scope of the JSL rules

Starting with January 2020, the Austrian legislature has implemented JSL rules for online marketplaces in section 27(1) of the Austrian VAT Code, further defined in a regulation by the Minister of Finance (MoF).[88] These rules are based on Art. 205 of the VAT Directive. In the following, a short summary on the rules is provided. As the rules are quite complex in detail, this summary may not be fully comprehensive and does not aim at addressing and discussing all potential interpretational questions arising from these rules. Different to Art. 14a of the VAT Directive, the JSL rules are not limited to third-country scenarios and the supply of goods, but also apply to purely domestic scenarios and certain supplies of services facilitated or supported by the online marketplace. Similar to Art. 14a of the VAT Directive, the JSL rules are limited to B2C supplies.

According to the JSL rules, a platform may be subject to JSL if the following (cumulative) conditions are met:

- the platform facilitates[89] supplies with a turnover connected to Austria[90] exceeding EUR 1 million per year (i.e. it is a "big" platform); *and*
- the platform is not itself liable to pay VAT for the supplies (i.e. Arts. 14(2)(c), 14a and 28 of the VAT Directive in conjunction with Art. 9a of the EU VAT Implementing Regulation 282/2011 do not apply); *and*
- a breach of due diligence obligations by the platform takes place.

It should be noted that the Austrian JSL rules also extend to certain types of platforms/electronic interfaces that are not covered by the definition of "facilitation" as used for the purposes of Arts. 14a and 242a of the VAT Directive. These other types of covered platforms are defined as taxable persons who are "involved"[91] in the underlying supplies by directing potential customers to the web shop or the supplier's website via an electronic interface. A direction of customers may only lead to the applicability of the JSL if the remuneration received by the platform/electronic interface depends (at least in part) on the occurrence and amount of the underlying supplies (this in particular covers certain search engines and price

88 Regulation of the Minister of Finance determining record-keeping and due diligence requirements in the area of e-commerce and mail order business (published in the federal law gazette II No. 315/2019) [known as "*Sorgfaltspflichten-UStV*"].

89 The term "facilitated" is to be understood similar to the one used for the purposes of Art. 14a and 242a of the VAT Directive (see Arts. 5b and 54b VAT Implementing Regulation).

90 This concerns, on the one hand, supplies of goods whose transport or dispatch ends in Austria and, on the other hand, supplies of services taxable in Austria (place of supply in Austria); in both cases the recipient as a rule needs to be a non-taxable person (or a customer pursuant to Art. 3(4) of the Austrian VAT Code).

91 In German language: "*beteiligt*".

comparison sites). This JSL rule is also limited to "big" platforms (i.e. those who are involved in supplies with a turnover threshold of EUR 1 million).[92] For the sake of simplification and limitation, this aspect of the JSL rules is not discussed in detail in this chapter.

The most interesting condition is the breach of due diligence obligations. At first sight and based on a traditional understanding of these terms, this condition seems to require an individual case-by-case analysis of whether the platform has acted as a circumspect trader. However, upon a closer look, this does not seem to be the case under the Austrian rules. Section 27(1) last sentence of the Austrian VAT Code provides that the MoF shall determine by a regulation when there is insufficient due diligence within the meaning of this provision. Relying on this authorization, the MoF issued a regulation according to which a breach of due diligence by the platform is assumed by virtue in the following cases only (exhaustive list[93]):[94]

- the platform violates its obligation to keep records on the facilitated supplies or to automatically report the recorded data (by 31 January of the following year) pursuant to section 18(11) or (12) of the Austrian VAT Code;[95] *or*
- the underlying supplier (provider) carries out supplies of goods connected to Austria (transport ends in Austria) exceeding EUR 10,000 per year or supplies of services taxable in Austria exceeding EUR 35,000 per year via the platform and the platform has no proof of the trader's VAT compliance. According to the Regulation by the MoF, VAT compliance by the underlying supplier should be verified by an Austrian VAT ID, an EU-OSS or IOSS-number (depending on the supply) or "*other evidence proving that he/she meets his/her tax obligations*". Other evidence might, for example, include a general tax number in the case of small enterprises falling within the small and medium-sized enterprise (SME) exemption.[96]

The (non-binding) administrative guidelines by the tax authorities provide clarifications on the timing of the due diligence obligations. According to the guidelines, the platform/electronic interface should verify the turnover threshold of the

92 See sections 1 and 2 of the Regulation of the Minister of Finance determining record-keeping and due diligence requirements in the area of e-commerce and mail order business (published in the federal law gazette II No. 315/2019) [known as "*Sorgfaltspflichten-UStV*"].

93 Cf V. Bendlinger & T. Ecker, *Die Rolle von Plattformen im E-Commerce – Plattformen und ihre umsatzsteuerlichen Pflichten*, in: M. Achatz et al. (eds.), *Neuerungen bei innergemeinschaftlichen Umsätzen* (Vienna: Linde, 2020) p. 249; dissenting S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* (Vienna: Linde, 2020) pp. 45–48.

94 Section 3 of the Regulation of the Minister of Finance determining record-keeping and due diligence requirements in the area of e-commerce and mail order business (published in the federal law gazette II No. 315/2019) [known as "*Sorgfaltspflichten-UStV*"].

95 The data to be recorded is listed in the Regulation by the Minister of Finance and, in principle, corresponds to the list in Art. 54c of the VAT Implementing Regulation. An obligation to automatically report the data by 31 January of the following year exists for "big" platforms (EUR 1 million threshold) only.

96 Administrative VAT Guidelines (UStR), para. 3462.

underlying suppliers at least once per calendar quarter.[97] Furthermore, the guidelines state that the platform/electronic interface should exclude suppliers from using the platform if he/she does not provide the necessary evidence (for example, a VAT ID) within one month. Otherwise, the platform will be held liable for the VAT on the supplier's transactions from that time onwards.[98]

The Austrian legislator, hence, has implemented proxies, linking to formal requirements, under which circumstances an operator of a platform does not act with due diligence.[99] The list seems to be exhaustive,[100] i.e. if the platform fulfils the formal requirements listed in the Regulation (record keeping, reporting, collection of VAT ID), the platform should not be held liable, even if it knows (or could have known) for other reasons about the underlying supplier's non-compliance with VAT obligations.[101]

Overall, the Austrian JSL rules for online marketplaces therefore follow model II on past liability as described in section 2. with adaptions. JSL applies if the platform has a reasonable expectation that the supplier should be registered for VAT/GST (based on the turnover), but has not. In order to achieve more legal certainty, the Austrian JSL rules do not rely on the general condition of due diligence but provide an exhaustive definition of a breach of due diligence obligations. The JSL rules do not link to any notice/published alerts on non-compliant suppliers by the tax authorities.

The law does not provide any escape clause in favour of the platform. Based on the wording of the law it thus seems that the platform cannot bring forward any evidence that it acted in good faith and/or did not act with negligence or intent. If one of the criteria listed above is met (for example, non-reporting or late reporting of data), the breach of due diligence obligations is deemed to exist without any possibility for the platform to rebut this presumption.

In this respect, the administrative guidelines hold with reference to Art. 5c of Implementing Regulation 282/2011 that it should have no consequences if information recorded or reported by the platform later proves to be incorrect if the platform neither knew nor could have known of the incorrectness of the information.[102] This good faith-limitation for proportionality reasons, however, seems to apply to the correctness of the information only, not to the timing of reporting.

97 Administrative VAT Guidelines (UStR), para. 3462.

98 Administrative VAT Guidelines (UStR), paras. 3462–3463.

99 S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* (Vienna: Linde, 2020) p. 42.

100 Cf V. Bendlinger & T. Ecker, *Die Rolle von Plattformen im E-Commerce – Plattformen und ihre umsatzsteuerlichen Pflichten*, in: M. Achatz et al. (eds), *Neuerungen bei innergemeinschaftlichen Umsätzen* (Vienna: Linde, 2020) p. 249.

101 Dissenting S. Hammerl & L. Zechner, who argue that the platform could also be made liable for VAT in case it fulfils all formal requirements listed in the Regulation, if it actually knows about fraud. The authors do not provide a detailed explanation of how they arrive at this result (S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* (Vienna: Linde, 2020) pp. 47–48).

102 Administrative VAT Guidelines (UStR), para. 2596.

Moreover, it finds no reflection in the law itself, but is mentioned in the (non-binding) administrative guidelines only.

As the wording of the JSL rules rather generally refers to a liability for the "tax on the supplies" facilitated, the JSL potentially could also cover non-paid import VAT for distance sales of goods imported.[103] The JSL rules do not require that the tax authority tries or endeavours to collect the VAT from the underlying supplier first.

5.2.2. Evaluation

The evaluation of the Austrian JSL rules for online platforms in the light of the EU proportionality principle as developed by the CJEU is not a clear-cut case. In the author's opinion, certain elements of the JSL rules seem to be disproportional.[104]

5.2.2.1. Arguments in favour of a violation of the proportionality principle

The most critical point rests with the non-rebuttability of the breach of due diligence obligations (lack of any escape clause).[105] As the CJEU held in the *Federation of Technological Industries* case, "*any* ***presumptions*** *may not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person* ***to rebut*** *them with evidence to the contrary*" [emphasis added].[106] The Austrian JSL rules deem a breach of due diligence to exist if the platform does not meet its record keeping and reporting obligations or has no proof that the trader is VAT compliant (if the trader exceeds a certain turnover per year). It may be questioned whether collecting and keeping detailed records on all supplies facilitated by the platform, including VAT-relevant data and the continuous monitoring of the individual suppliers' turnover, is still covered by the "due diligence of a circumspect trader" as developed by the CJEU in its case law on JSL rules or goes beyond this requirement. In particular, the failure to fulfil certain *formal* requirements on time (for example, reporting) does not automatically include the engagement in fraud and/or that the "should have known"-test is met.[107] If "due dil-

103 V. Bendlinger & T. Ecker, *Die Rolle von Plattformen im E-Commerce – Plattformen und ihre umsatzsteuerlichen Pflichten*, in M. Achatz et al. (eds.), *Neuerungen bei innergemeinschaftlichen Umsätzen* (Vienna: Linde, 2020) p. 247.

104 According to S. Hammerl & L. Zechner, the Austrian JSL rules for online marketplaces are in line with the proportionality principle with minor exceptions (S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* [Vienna: Linde, 2020] pp. 42–49).

105 In a similar vein, but less critical S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* (Vienna: Linde, 2020) p. 43.

106 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries*, EU:C:2006:309, para. 32.

107 Cf I. Lejeune, S. Kotanidis & E. Cortvriend, *European Union – Joint and several liability relating to intra-Community acquisitions*, IVM 2009, p. 365. S. Hammerl & L. Zechner argue that the Austrian approach is in line with CJEU case law and the proportionality principle, since a platform which does not collect and verify the relevant data (turnover, VAT ID, etc.) would indirectly accept its involvement in fraud and would, hence, be covered by the notion "*knew or should have known*" (S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* [Vienna: Linde, 2020] p. 43).

igence" is to be understood as a synonym for the "should have known"-test, the Austrian JSL rules seem to be clearly disproportionate.

Most remarkably, based on the wording of the Austrian law, a breach of due diligence obligations is also deemed to exist if the platform violates its record keeping and reporting obligations, even if there is only a minor mistake or minor negligence involved. In the case of minor mistakes/negligence, this liability for VAT seems excessive and disproportional.[108] Moreover, the violation of the record keeping and reporting obligation (for example, non-reporting, late reporting or false reporting) may (additionally) trigger financial criminal sanctions based on the Austrian Financial Criminal Code in the event of gross negligence or intent (a fine of up to EUR 25,000/50,000 maximum per offence). Hence, the failure to record the data or to report on time could, in fact, lead to a "double penalty" (VAT and a fine).[109] Even if the tax authorities – based on the administrative guidelines – might apply the good faith principle with respect to the *correctness* of the information,[110] similar mitigations for late or non-reporting do not seem to be available (neither under the Austrian VAT law nor the administrative guidelines). In the author's opinion, it seems sufficient to sanction the violation of record keeping and reporting obligations with (administrative) penalties only rather than third-party VAT liability.[111]

Moreover, in the light of recent direct case law, it might even be questioned whether Member States' legislators are permitted to implement general (rebuttable or non-rebuttable) presumptions for involvement in fraud at all (see section 4.2.1.). Therefore, even if the presumptions of a breach of due diligence obligations could be interpreted as rebuttable, legal uncertainty regarding their compatibility with EU law is still in place.

Another critical point in the light of the proportionality principle relates to the fact that the Austrian JSL rules also apply if the platform does not handle the payment.[112] From the perspective of the platforms, this approach involves the risk that the VAT might become a final burden for them. Of course, platforms covered by the JSL rules could potentially restructure their business models in order

108 According to R. Ismer, JSL can only be applied in case of gross negligence or intent (cf R. Ismer, *Rechtswissenschaftliches Gutachten – Die geplanten Neuregelungen zu Aufzeichnungspflichten und zur Haftung von Marktplatzbetreibern in § 22f und § 25e UStG-E aus rechtstechnischer und europarechtlicher Sicht*, September 2018, available at https://www.bitkom.org/sites/default/files/file/import/20180924-Reform-Umsatzsteuer-Ismer-Studie.pdf (accessed on 19 April 2021), pp. 21–23).

109 Cf I. Lejeune, S. Kotanidis & E. Cortvriend, *European Union – Joint and several liability relating to intra-Community acquisitions*, IVM 2009, p. 367.

110 Administrative VAT Guidelines (UStR), para. 2596.

111 In a similar vein I. Lejeune, S. Kotanidis & E. Cortvriend, *European Union – Joint and several liability relating to intra-Community acquisitions*, IVM 2009, p. 367.

112 This is similar within the scope of the deemed reseller provision of Art. 14a of the VAT Directive. This broad scope of the rules obviously serves the aim of hindering the platforms from circumventing the application of the rules by mere outsourcing of the payment procedure.

to have control on the payment of the consideration to the underlying supply.[113] In the light of the neutrality principle, it is though questionable whether VAT rules should have such an effect on business decisions. The *Faroe Seafood* case might, however, indicate that the CJEU could be fine with such an effect of tax rules under specific circumstances. In this judgment, the Court held with respect to liability for customs agents, potentially leading to a final tax burden for the agent, that it is "*the responsibility of professional traders to make the necessary arrangements in their contractual relations in order to guard against such risk*".[114]

Overall, in order to avoid JSL, the platform is in fact taking over tasks and responsibilities that are usually left to the state, namely tax supervision and market regulation. The platform has to collect VAT-relevant data, to monitor the supplier's turnover, and to block traders from using the platform if they do not provide a VAT ID or other evidence that they fulfil their VAT obligations. The fulfilment of all of these tasks necessarily brings additional costs for the platform, which have to be taken into account in the proportionality analysis.

5.2.2.2. Arguments against a violation of the proportionality principle

There are also arguments supporting that the JSL rules (or certain aspects of them) are in line with the proportionality principle.

First and foremost, it has to be noted that the EUR 1 million-threshold for the JSL rules (ie limitation to "big" platforms) avoids disproportionate compliance costs and risks for small platforms and start-ups. This threshold, hence, clearly mitigates the effect of the rules.

On the positive side, it should also be noted that the exhaustive list of (deemed) breaches of due diligence obligations (presumption) contributes to legal certainty and, hence, seems to be more practical than a general reference to "due diligence obligations" or the vague condition "knew or should have known" as developed by the CJEU in its fraud jurisprudence.[115]

Moreover, even though the platform needs to monitor the turnover of individual suppliers and require a VAT ID, the platform is not under any obligation to verify whether the underlying supplier is, in fact, declaring and paying VAT on the individual facilitated supplies to the tax authorities. Taking into account that platforms might have to deal with a vast number of suppliers, such a check would be

113 Cf S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* (Vienna: Linde, 2020) p. 46.

114 CJEU, 14 May 1996, Joined Cases C-153/94 and C-204/94, *Faroe Seafood and others*, EU:C:1996:198, para. 114: "*the fact that action for post-clearance recovery is taken does not constitute an infringement of the principle of proportionality, even if the duties claimed are no longer recoverable from the buyer of the imported products. It is the responsibility of professional traders to make the necessary arrangements in their contractual relations in order to guard against such risk.*"

115 Cf S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* (Vienna: Linde, 2020) pp. 42–44.

practically impossible.[116] The law and guidelines also do not seem to require the platform to check whether the provided VAT ID/EU-OSS/IOSS number is valid. It is also worth noting that, as an alternative to the VAT ID, the Regulation by the MoF provides that the platform may also rely on "other evidence" that the underlying supplier is meeting his tax obligations. This rule arguably gives the tax authorities a certain degree of flexibility when verifying the application of the JSL rules and issuing a notice for liability. This could support the proportionality of the rules.

Furthermore, it could also be argued that the area of e-commerce and the platform economy is an area that involves increased risk of tax evasion and non-collection of taxes.[117] Along these lines, for example, the German legislator justifies the JSL rules for online marketplaces in VAT law with reference to a "risk liability" ("*Gefährdungshaftung*"). More precisely, the German legislator argues that the aim of this "risk liability" is to hold operators of electronic marketplaces responsible not only for their own economic interests but also for the VAT arising from the activities provided through the electronic marketplace and not paid to the tax authorities.[118] The German legislator highlights in this respect that the online marketplaces "*offer a modern medium*" through which businesses who are resident in Germany, the European Union or a third country may sell goods. In other words: the German legislature seems to be of the opinion that the JSL for online marketplaces could be regarded as the counter-concession for the right to offer a "modern medium" (i.e. take part in the e-commerce business) and a risk inherently linked to this activity.[119] In this respect, it may also play a role that the online platforms in particular operate in areas with a lack of enforcement jurisdiction, since they allow non-resident (third-country) suppliers to sell their products to EU consumers in a smooth and easy way. Following the German legislator and the case law in the field of excise duties, it could, hence, be argued that the e-commerce sector (similar to the cigarette market) "*particularly lends itself to the*

116 S. Hammerl & L. Zechner, *SWK-Spezial Plattformhaftung* (Vienna: Linde 2020), p. 42.

117 See, inter alia, E.C.J.M. van der Hel-van Dijkeugh & M. A. Griffioen, *Online Platforms: A Marketplace for Tax Fraud?* Intertax 2019, p. 391.

118 Bundestag Drucksache 19/4455, p. 61: *"Der Betreiber eines elektronischen Marktplatzes haftet für die nicht entrichtete Umsatzsteuer aus der Lieferung eines Unternehmers, die auf dem von ihm bereitgestellten Marktplatz rechtlich begründet worden ist. Damit wird eine Gefährdungshaftung normiert. Ziel der Gefährdungshaftung ist es, Betreiber von elektronischen Marktplätzen, die damit ein modernes Medium anbieten, über das Unternehmer, die im Inland, in der Europäischen Union oder im Drittland ansässig sind, Waren anbieten und Kaufverträge tätigen, neben ihren eigenen wirtschaftlichen Interessen unter bestimmten Voraussetzungen auch für die aus diesen Aktivitäten entstandene und nicht an den Fiskus abgeführte Umsatzsteuer in Verantwortung zu nehmen. Dies ist erforderlich zur Sicherstellung der Umsatzbesteuerung und liegt damit im Interesse der Allgemeinheit."*

119 In a similar direction: OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20 June 2019, p. 64: "*JSL builds on the assumption that it is in the interest of platforms as well, to ensure a level playing field for all of their sellers and remove 'bad actors' from their sites, incl. from a reputational viewpoint. It should also be in the platforms' interests to help their suppliers to be fully compliant with their VAT/GST liabilities so that they are able to continue to trade on their platforms*".

development of unlawful trade"[120] and tax evasion and the non-collection of taxes. This increased risk might justify strict(er) liability rules (than in other areas). In the author's opinion, it might, however, be rather questionable as to whether the digital economy indeed proves to be more vulnerable to fraud and tax evasion than the traditional economy.

Finally, it could also be argued that the CJEU itself has developed similar JSL rules in its jurisprudence on missing trader fraud (by judicial development of the law). Starting with the *Optigen* and *Kittel and Recolta* cases and particularly confirmed in *Italmoda*, the CJEU repeatedly held that suppliers who "knew or should have known" about a fraudulent transaction by another trader acting upstream or downstream in the supply chain should be denied the rights and benefits under the VAT Directive (for example, input VAT credit, exemption of intra-Community supplies).[121] Also, this established line of case law – similar to the JSL rules put on platforms in Austria – leads to the result that private economic operators have to fulfil supervisory and monitoring tasks (on behalf of the state) in order to avoid additional (VAT) costs. They also might be forced to refrain from doing business with certain traders in order to minimize their risks (denial of input VAT deduction or zero-rating). The CJEU itself has thereby indirectly outsourced a State's responsibilities to private economic operators, even though the VAT Directive does not provide a clear legal basis for this result.[122] Against this background, the CJEU might also approve a similar further outsourcing as indirectly triggered by JSL rules. When relying on this line of argument, it should however not be ignored that the CJEU is constantly emphasizing the principle of proportionality also in this line of case law; in particular, the Court highlights that businesses cannot take over a State's responsibilities in full and that the initial burden of proof of involvement in fraud – in principle – still rests with the authorities[123] (see also section 4.2.1.).

6. Conclusion and outlook

The VAT Directive provides an option for Member States to implement JSL rules. In the course of the digital revolution, this option has gained momentum and is increasingly used by Member States to make operators of online marketplaces jointly and severally liable for non-paid VAT on supplies facilitated by their platform. Member States have implemented different models of JSL rules for online plat-

120 CJEU, 2 June 2016, C-81/15, *Kapnoviomichania Karelia AE*, EU:C:2016:398, para. 37; see also CJEU, 10 December 2002, C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, EU:C:2002:741, para. 87.

121 See in particular CJEU, 18 December 2014, C-131/13, *Italmoda*, EU:C:2014:2455 and the case law cited.

122 See on this aspect in detail C. Wäger, *Abuse vs. Fraud in VAT: legal basis and legal consequences*, in: Kofler et al (eds.), *CJEU – Recent Developments in Value Added Tax 2019* (Vienna: Linde, 2020) p. 3.

123 See, inter alia, CJEU, 21 June 2012, Joined Cases C-80/11 and C-142/11, *Mahagében and Dávid*, EU:C:2012:373, paras. 61–62

forms – which leads to a fragmentation of the internal market and might create obstacles for operators of online marketplaces.

Even though Art. 205 of the VAT Directive does not set substantive requirements – relating to due diligence or good faith – the CJEU has established in its settled case law that the general principles of EU law – namely the principle of proportionality and legal certainty – set limits to the scope of JSL rules. The case law, however, does not seem to be fully consistent. Whereas the CJEU found strict liability rules in VAT to be in conflict with EU law, in other fields of law the CJEU seems to accept comparable strict rules.

The key criteria when assessing the proportionality of a JSL rule are:

- level/degree of a risk of tax evasion of VAT: the higher the risk in a specific area/industry, the stricter the JSL rules;
- lack of enforcement jurisdiction: if the primary person liable to pay VAT is not established in the State where VAT is due, this could justify stricter JSL rules;
- counter-concession for a right: limiting JSL to persons who enjoy certain benefits under the (VAT) law might justify a stricter JSL rule;
- good faith/acting as a circumspect trader: the possibility to rebut any presumptions of involvement in fraud/violation of due diligence obligations (escape clause) supports the proportionality of a JSL rule. Whereas the CJEU VAT jurisprudence indicates that an escape clause (in case of good faith and fulfilment of due diligence) is an absolute minimum requirement, the jurisprudence to other fields of law is less strict on this point;
- access to the payment: access to the payment (that is subject to tax) by the (jointly) liable party may support the proportionality of a JSL rule. However, this does not seem to be a mandatory prerequisite for all JSL rules; and
- legal certainty: the scope of application and conditions for JSL should be defined as clearly as possible.

In the light of the various different forms of JSL rules available in Member States, a case-by-case analysis on their compatibility with EU primary law is required. As the example of the Austrian JSL rules on online marketplaces demonstrates, a balance between the objective of ensuring effective tax collection on the one hand and limiting administrative burdens for businesses on the other hand is not easy to achieve. JSL rules based on model I (forward looking, see section 2.) as described in the OECD Report on the platform economy would guarantee proportionality and conformity with EU law. Making JSL rules conditional upon the issuance/publication of an alert on non-compliant suppliers by the tax authorities could, however, make JSL rules less of a deterrent and, therefore, less effective in practice.

More case law on the scope and limits of JSL rules based on Art. 205 of the VAT Directive is to be expected in the coming years, both at EU and national level. As

the option in Art. 205 of the VAT Directive leaves discretion to Member States, persons subject to JSL rules might not only challenge those rules to be in conflict with EU primary law, but could potentially also successfully claim a conflict with fundamental rights guaranteed by domestic constitutions.[124]

We should also not be lose sight of the fact that any new rule put on platforms or other economic operators may also have an effect on their business models and the market situation, which is difficult to reconcile with the principle of neutrality. In particular, the administrative burden put on platforms could have the (undesired) side effect of increasing the already existing monopoly/oligopoly market situation:[125] only "big" platforms with comprehensive tax compliance teams might arguably be in a position to fulfil and manage all of these new record keeping, reporting, and VAT collection obligations in different jurisdictions globally.

In the author's opinion, in the long run, it is, nevertheless, without doubt that online marketplaces and other electronic interfaces will play an increasing role in the VAT compliance and collection process – probably even similar to financial institutions (which have been collecting withholding taxes on dividends and interest for decades) and employers (who have been collecting wage taxes for decades). Unilaterally implemented JSL rules, based on the option in Art. 205 of the VAT Directive, differing in scope and effects in all Member States, should, however, not be the preferred way forward. Clearly, in an internal market, like the EU (VAT) system, a more harmonized approach should be favoured and achieved.

124 For example, in 2020, preliminary questions on the compatibility of the quite extensive Belgian JSL rules in VAT law have been submitted to the Belgian Constitutional Court (referral of 9 November 2020, by Court of First Instance, East Flanders, Ghent Division [Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent]). Under Belgian JSL rules, a customer can be held jointly and severally liable for VAT accounted for by the supplier if the invoice has not been issued or has certain missing elements. In addition, if the customer knew or could have known that part or all the VAT due in respect of a supply or any previous supply of the particular goods or services would not be remitted with fraudulent purposes, the customer can be held jointly and severally liable for the VAT due (Art. 51bis of the Belgian VAT Code, see M. Govers, *Belgium – Value Added Tax – Country Tax Guides*, last reviewed 1 February 2021, IBFD online, section 10.4.)

125 Cf S. Härtwig, *Gesetzliche Neuregelung zur Haftung von Plattformen*, UR 2018, p. 777 (780).

Good Faith and Legitimate Expectations in VAT

Mariken van Hilten

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1. Introduction

Both the principle of good faith and the principle of legitimate expectations are in essence about trust: the trust that the taxable person derives from information given by trade partners and, respectively, the trust he derives from actions or statements by the executive (tax authorities). Both principles deal with the applicability of legal provisions – in this context, those of the VAT directive(s) – and the conditions under which the taxpayer's trust may be honoured. As will be shown in this chapter, the requirements for protection under each of these principles are not dissimilar. One could say that, in a sense, the principle of good faith and the principle of legitimate expectations are two sides of the same coin; this is a reason to deal with both.

2. Principle of good faith

As such, the principle of good faith is not laid down as a specific principle in Union legislation, nor is it defined in the case law of the CJEU. Nevertheless, from the case law of the CJEU it appears that taxable persons who act in what is commonly named "good faith" are protected. Section 2. is dedicated to elements that constitute "good faith" in the CJEU's case law on VAT.

2.1. Unpaid tax collector: Risks

The position of the taxable person in VAT as the unpaid tax collector does not only bear responsibilities but it also bears – especially – risks. These are caused by the fact that the application and administration of VAT by taxable persons depend, to a certain extent, on information provided by trade partners. In particular, in situations where the taxable person bears the burden of proof – the application of a zero rate,[1] the deduction of input VAT – the evidential value of this information is great. This information, however, is not always easy to verify by the taxable person who has to act upon it. How extensively, for example, has the taxable person to screen his suppliers when claiming a deduction of input VAT? May the taxable person go by the buyer's statement that he will transport the supplied goods to another Member State in the context of the supply? How far do the obligations to obtain additional information reach in order to prove the correctness of the application of VAT rules?[2] Especially when information given by trade partners turns out to be incorrect, the legal implications – sanctions, assessments – depend on the taxable person's justification of his trust in his trade partners.

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1 More precise: the exemption meant in Arts. 138 or 146 of the VAT Directive, being an exemption carrying the right to deduct input VAT.

2 On the exchange of information and the difficulties for traders obtaining information, see – far more extensively – F.J.G. Nellen, *Information Asymmetries in EU VAT* (Alphen aan den Rijn: Wolters Kluwer, 2017).

2.2. Requirement for protection: Comportment as a diligent trader

From the CJEU's case law, it is evident that blind trust is not enough to satisfy the burden of proof. To be allowed to rely on information given by trade partners, the comportment of the taxable person is essential.

Apart from taxable persons who *know* that information given by trade partners is false and those who actually *know* that a trade counterpart intends to evade tax – and who are consequently "partners in crime" – the CJEU has clarified that those *who should have known* about fraudulent actions in the chain of transactions of which their supply is part, are also to be denied the right to the application of a zero rate or to the deduction of input VAT, regardless of whether they are benefiting from the fraud.[3]

From *R*[4] and *Italmoda*[5] it has become clear that the denial of these "rights"[6] extends to the situation in which the information given to the taxable person, as such, is correct. In *R*, the information about the destination of the cars sold (Portugal) and the status of the buyers (taxable persons) was correct; in *Italmoda*, the computer parts were actually sold and transported to taxable persons in another Member State. The reason why the zero rate was denied in these cases boils down to the comportment of the trader, which was, basically: if he did not know outright, he should not have neglected indications about possible misconduct of his counterparts and/or should have taken more precautions to avoid being drawn into a fraudulent VAT-scheme.[7] By neglecting to do so, it is assumed that the taxable person should have known about the fraud, and that means that he loses the right to a zero rate or deduction, even if he did not actually know about the fraud.

If a taxable person exercises due diligent care and takes every measure to avoid his participation in VAT evasion or fraud, he is, however, according to stated case law of the CJEU, protected and may apply the zero rate (or deduct input VAT) even though his counter parts in trade provided false information in order to evade VAT. In this context, reference can be made to *Teleos*[8] (intra-Community

3 Cf. CJEU, 22 October 2015, C-277/14, *PPUH Stehcemp*, EU:C:2015:719, para. 48.

4 CJEU, 7 December 2010, C-285/09, *R*, EU:C:2010:742.

5 CJEU 18 December 2014, C-131/13, *Schoenimport "Italmoda" Mariano Previti vof*, EU:C:2014:2455.

6 In this author's inaugural lecture, 24 November 2016, *Gaat het btw-systeem het houden, onder druk van rechtsmisbruik en fraude* (Amsterdam University Press, 2016), it was argued that neither the zero rate, nor the deduction of input VAT constitute "rights", but are, on the contrary, essential elements in the character of VAT. Refusing the zero rate on goods transported to a taxable person in another Member State means that the essentials of the VAT system are set aside.

7 From CJEU, 27 September 2007, C-146/05, *Collée*, EU:C:2007:549 and CJEU, 8 November 2018, C-495/17, *Cartrans Spedition*, EU:C:2018:887, it appears that only VAT fraud leads to this consequence, the reasoning of the CJEU apparently being that there was no loss of VAT revenue.

8 CJEU, 27 September 2007, C-409/04, *Teleos plc.*, EU:C:2007:548. In the same vein, CJEU, 14 June 2017, C-26/16, *Santogal M-Comércio e Reparação de Automóveis*, EU:C:2016:453. It should be noted

supply) and *Netto Supermarkt*[9] (export). Both cases concern a supplier who had relied on information/documents provided by buyers of his products that pointed to the applicability of a zero rate. Afterwards, the information given turned out to be false. This did, however, not preclude the application of the zero rate by Teleos, respectively Netto Supermarkt. The CJEU reasoned that these entrepreneurs should not be affected in their right to apply a zero rate since each acted with all the due diligence of a circumspect trader.[10] Citing para. 27 of *Netto Supermarkt:*

> It follows that a supplier must be able to rely on the lawfulness of the transaction that he carries out without risking the loss of his right to exemption from VAT, if, as in the case in the main proceedings, he is in no position to recognise – even by exercising due commercial care – that the conditions for the exemption were in fact not met, because the export proofs provided by the purchaser had been forged.

In this author's opinion, this "exercise of due commercial care" may be translated as "acting in good faith". Acting in "good faith" consequently requires more than simply not knowing or simply closing one's eyes to indications of misconduct.[11] On the contrary: the taxable person should try his best to be safe from losing his "rights". Nevertheless, the term "acting with due diligence" or "acting as a circumspect trader" leaves room for interpretation and varies depending on the facts and circumstances of a case.

2.3. Interpretation of "due diligence"

Acting with "due diligence" in respect of a chargeable event supposes, first of all, alertness for signs of "fishiness" about a transaction and, if such signs are present, that some investigative measures are taken. The case law of the CJEU gives some indications about actions required from the taxable person to be considered to have been acting in good faith – and, therefore, not to be confronted with the conclusion and the consequences of a "should have known" scenario.

As for the application of a zero rate on intra-Community supplies (Art. 138 of the VAT Directive), the CJEU has held the rule that the supplier of the goods has to furnish the proof that the conditions laid down for the application of Art. 138(1) of the VAT Directive are met.[12] This author takes it to mean that the taxable person will have to procure information confirming the rightful application of the

that in *Teleos*, the CJEU considers that the fraudulent recipient should pay VAT in the Member State where the supply took place.

9 CJEU, 21 February 2008, C-271/06, *Netto Supermarkt GmbH*, EU:C:2008:105. It should be noted that *Netto Supermarkt* dealt with a provision in German law protecting taxable persons who act in good faith.

10 The "circumspect trader" is borrowed from CJEU 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij NV*, EU:C:2010:871.

11 Cf. F.J.G. Nellen, *Information Asymmetries in EU VAT* (Alphen aan den Rijn: Wolters Kluwer, 2017) p. 236.

12 CJEU, 27 September 2012, C-587/10, *VSTR,* EU:C:2012:592, para. 43.