

Extensive interpretation of the law in CJEU case law in VAT

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1. The concept of extensive interpretation

The Court of Justice of the European Union (CJEU) does not have recourse to the concept of ‘extensive’ interpretation of Union law in its jurisprudence. In general, the Court does not tend to qualify its interpretative approach in a given case as either broad or narrow. The main exception is the Court’s mantra that a derogation from the general scheme of an act of Union law is to be interpreted strictly and that, conversely, exceptions to such a derogation must be interpreted broadly.¹ Even in this particular context, however, the CJEU does not elaborate any further on the general ideas of how restrictive and broad interpretation relate to established concepts of legal methodology. Relevant scholarly treatises and contributions also do not uniformly identify “extensive” interpretative approaches in the Court’s case law as opposed to other forms of interpretation such as “narrow” or “restrictive”.² As a consequence, no authoritative or generally accepted understanding exists of what constitutes an “extensive” interpretation in the Court’s case law that the present contribution could endorse as a point of departure. The concept of “extensive” interpretation will therefore be defined in this chapter without any claim to universality and primarily in contrast to the topic of the complementary chapter on “literal” and “restrictive” interpretations in the CJEU’s case law.

The concept of literal interpretation is indeed quite well developed in (European) legal methodology. At the outset, the method of literal interpretation emphasizes the ordinary or “plain” meaning of the text of a legal provision, as it can be inferred from a dictionary or, as circumstances dictate, construed in light of legal definitions or well-established legal terminology. Since (legal) interpretation is a hermeneutic exercise that seeks to elucidate the meaning of a (legal) text, it will indeed always commence with this type of lexical analysis. Beyond that rather trivial finding, a *strictly* literal interpretation excludes interpretative arguments that are not derived from the wording of a legal provision as it is implied in the possible range of meaning of each of its constituent words. It will thus exclude legal reasoning that relies on elements such as legislative intent, broader legal context, fundamental principles underlying the relevant piece of legislation, equity and fairness considerations, or the *ratio legis* of the relevant provision (unless stated in the legal text itself). The legal theory that considers such an approach as a *generally* adequate method of interpretation is sometimes referred to as textualism, with the caveat that textualists will usually also admit a *contextual*

1 See, e.g., CJEU, 3 March 2005, C-428/02, *Fonden Marselisborg Lystbådehavn*, ECLI:EU:C:2005:126, para. 43, with further references; CJEU, 4 May 2023, C-516/21, *Finanzamt X and machines fixés à demeure*, ECLI:EU:C:2023:372, para. 35, with further references.

2 Cf., e.g., Arnall, *The European Union and its Court of Justice*, 2nd Edition (2006), pp. 607 et seq.; Lasok/Millet, *Judicial Control in the EU*, (2008), pp. 375 et seq.; Lenaerts/Gutiérrez-Fons, *Les méthodes d’interprétation de la Cour de justice de l’Union européenne* (2020), pp. 13 et seq.; Riesenhuber, *Europäische Methodenlehre*, 4th Edition (2021), § 10.

analysis. The CJEU does not generally advocate for a strictly literal interpretation, and the author is unaware of any individual judge at the Court who has been a defender of textualism. However, it has sometimes considered itself to be confined to a strictly literal interpretation “*where the meaning of a provision of EU law is absolutely plain from its very wording*”.³

A related but distinct concept consists in the *restrictive* interpretation of provisions of (Union) law. This interpretative approach addresses the linguistic ambiguity of a legal text. Most often, a particular legal terminology will have a range of possible meanings of which all could be inferred from a purely textual analysis of the wording. This is because legal terms typically have both a “core” meaning, for which the application of the provision to certain facts and circumstances is clear, and straightforward and “peripheral” (or “penumbral”) meanings and connotations. The latter can potentially be ascribed to the term but are not generally implied in it and might indeed not be covered by it depending on the context of their use and the speaker’s intentions. A well-known example given by H.L.A. Hart is the rule “*no vehicles in the park*”.⁴ The conventional meaning, and thus the core one, of the term “vehicles” comprises automobiles. It is less clear, however, whether such a prohibition also extends to bicycles or roller skates; this can only be confirmed – or ruled out – through additional methods of interpretation. This problem is indeed mirrored by the provision of Art. 135 (2) (c) VAT Directive, pursuant to which the “*letting of premises and sites for the parking of vehicles*” is excluded from the exemption provided for in Art. 135 (1) (l) VAT Directive. The CJEU relied on the purpose and general scheme of the provision to find that the concept of “vehicle” must be interpreted as covering all means of transport, including boats.⁵

Concerning the ‘peripheral’, i.e., merely potential meanings of a legal term, a strictly textual interpretation is therefore inconclusive. The proposition of restrictive interpretation resolves this situation. Under this approach, ambiguous terms should be construed narrowly, and their meaning should be reduced to their conceptual core. They should not be understood as also addressing facts and circumstances that would only be encompassed by an extended application of the law based on the peripheral meaning of the relevant legal terminology. Strictly literal and restrictive interpretations have a commonality in that they exclude any recourse to legislative intent on the objective and purpose of the law or other sources and forms of “extra-textual” analysis for interpreting and applying legal concepts. However, restrictive interpretation furthermore reduces the margin of interpretation still allowed by a literal one. In US legal theory, the school of

3 See, e.g., CJEU, 13 July 2023, C-180/22, *Mensing II*, ECLI:EU:C:2023:565, para. 34; likewise CJEU, 26 October 2006, C-199/05, *EC / Belgium*, EU:C:2006:678, para. 42.

4 See Hart, *Positivism and the Separation of Law and Morals*, Harvard Law Review 1958, p. 593 (at p. 607).

5 See CJEU, 3 March 2005, C-428/02, *Fonden Marselisborg Lystbådehavn*, ECLI:EU:C:2005:126, paras. 41 et seq.

thought that generally favors this method of interpretation is referred to as strict constructionism.⁶ The CJEU does not *generally* endorse restrictive interpretation; it is quite the contrary as this chapter will demonstrate for the field of VAT. However, as mentioned above, the court – at least *prima facie* – invokes this approach when it is requested to interpret a derogation from the general scheme or key design principles of the relevant legal framework. This will be discussed somewhat more in-depth later (at section 3.8.).

In light of the above, this chapter will develop the concept of “extensive interpretation” as a counterpoint to the concepts of strictly literal and restrictive interpretation. Extensive interpretation of Union law – and of the harmonized system of VAT specifically – is therefore understood as being two-dimensional.

First, it places special emphasis on the overall context, purpose, and objective of the relevant legal act as opposed to a mere textual analysis. According to the Court’s own qualification, this approach is substantially equivalent to the concept of giving “effet utile” to Union law.⁷ This implies that an analysis of the provision’s wording merely constitutes a first, preliminary step in the act of interpretation. It is only relevant to assess whether the circumstances of the case that give rise to the need of an interpretation of EU VAT law by the Court might fit within a possible scope of application of the provision at issue as it is demarcated by the range of potential linguistic meaning of the provision’s terminology. The final concretization of the norm’s implications and scope is then determined by the aforementioned contextual and teleological considerations. The latter may be informed by both the legislative intent as it can be derived from travaux préparatoires or from the preamble to the relevant act of law and the foundational principles, inner logic, or specific objectives of the relevant normative framework. A reasoning based on the latter type of “objective” purposive construction typically relies on the presumption that the Union legislator pursued a coherent regulatory concept that can be inferred from the interaction between its different elements.

Notwithstanding the greater emphasis on contextual and teleological elements, a purposive construction of Union (VAT) legislation can still result in the finding that the provision whose application is under scrutiny should be interpreted narrowly in accordance with its “plain” and ordinary meaning. Stated otherwise, a purposive construction might lead to the conclusion that a restrictive interpretation of the relevant legal regime is appropriate.⁸ The second dimension to the concept of “extensive” interpretation as defined for this chapter is therefore

6 See, e.g., Smith, *Constitutional Interpretation by Strict Construction*, Journal of Social Philosophy 1988, pp. 43 et seq.

7 See CJEU, 17 October 2018, C-503/17, *Commission v UK*, ECLI:EU:C:2018:83, para. 43.

8 See, e.g., CJEU, 5 February 1981, C-154/80, *Staatsecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats*, ECLI:EU:C:1981:38 (strict interpretation of the concept of “consideration” based on a contextual analysis).

related to the outcome of the hermeneutic exercise. The CJEU practices extensive interpretation when it finds that the ‘effet utile’ of a provision of EU (VAT) legislation requires an understanding that exceeds the meaning of its terminological core and expands its scope by relying on a peripheral – merely possible but not obvious – meaning of its wording.

Since extensive interpretation is analyzed here with a view towards the CJEU case law in VAT and therefore as a descriptive rather than a theoretical or normative concept, it shall furthermore be understood to also include an application of Union (VAT) law that goes beyond the range of or deviates from the possible meanings of the relevant wording. Most scholars posit – in the author’s view, convincingly so – that an extension of a legal provision’s scope of application beyond the ‘outer’ periphery of semantic information potentially conveyed by its wording no longer constitutes an act of interpretation *strictu sensu* but instead constitutes judicial development of the law. Its most common manifestation is reasoning by analogy. Similarly, an application of the law that disregards the plain and ordinary meaning of the relevant legal provisions to reach an outcome that is more in accordance with the spirit of the law, i.e., with the legislative intent or with foundational principles, should not be designated as an act of interpretation *strictu sensu*. While such a correction of the wording is not necessarily *contra legem* because it might be justified for avoiding, e.g., “non-sensical” outcomes or infringements of primary Union law, the classification as the judicial development of the law again seems more appropriate than the concept of interpretation. This methodological differentiation signals to the judge that going beyond or against the wording of a legal provision is subject to specific requirements and clear limits with a view towards the (democratic) legitimacy of the decision and the respect for the rule of law and for legal certainty in particular. However, as will be explored further below, the CJEU usually does not make this distinction in its case law and also refers to the above type of purposive construction of EU VAT legislation as an act of interpretation. Accordingly, this category of “extensive application” of the law will also be discussed in this chapter.

2. Primary law principles that inform the decision to interpret extensively

Art. 19 (1) TEU stipulates that the CJEU shall ensure that the law is observed when interpreting and applying Treaties. It shall also rule on the validity and interpretation of acts of secondary Union law either explicitly, e.g., under the preliminary ruling procedure of Art. 267 TFEU, or implicitly, e.g., in infringement proceedings initiated pursuant to Art. 258 TFEU. The Treaties and other primary Union law, however, do not expressly stipulate the methodology that the CJEU shall employ in fulfilling this task apart from the context-specific requirement to take into account the jurisprudence of the European Court of Human Rights (ECtHR) and

common constitutional traditions when interpreting the fundamental rights recognized in the EU Charter of Fundamental Rights (“the Charter”).⁹ This notwithstanding, the CJEU is not entirely at liberty when selecting its interpretative approach. The latter must be guided by certain primary law principles of which some may require an extensive interpretation whereas others can militate against or establish limits to it. While the CJEU arguably still has certain methodological discretion, it is limited and must seek to adequately balance the principles that are conflicting in the interpretative task at issue.

As one of the Union’s institutions, the CJEU is peremptorily requested in Art. 13 (1) TEU to promote the Union’s values and advance its objectives as well as ensure the consistency, effectiveness, and continuity of its policies and actions. Vis-à-vis the Court’s specific responsibility for interpreting secondary Union law, the CJEU therefore has a mandate to secure that the underlying objectives of Union legislation are achieved both effectively and consistently. This is a direct reference to the need to give “effet utile” to the provisions of harmonizing EU legislation, including those of the common VAT system. It is thus already the Court’s institutional role that suggests that an extensive interpretation of the VAT Directive and supporting EU legislation can be required through purposive construction and to promote its underlying principles. Moreover, Art. 13 (1) TEU also provides justification for extensive interpretation when this is needed to maintain the coherence of Union legislation and avoid a situation in which a strictly literal interpretation would lead to contradictory or inconsistent legal requirements. Finally, to the extent that the VAT Directive can be instrumental for implementing or enhancing the values and objectives of the Treaties, such as establishing the internal market and promoting its underlying goals of allocative efficiency and economic welfare, Art. 13 (1) TFEU provides arguments for an extensive interpretation when it is needed to facilitate or safeguard this effect.

The Court’s institutional authority for extensive interpretation is further corroborated by general principles of Union law. The principle of equality before the law has long been recognized as a general principle of Union law by the CJEU.¹⁰ It is now also enshrined in Art. 20 of the Charter and requires that comparable situations must not be treated differently, and different situations must not be treated in the same way unless such treatment is objectively justified.¹¹ The equality principle thereby provides strong arguments for principle-based teleological

9 See Art. 52 of the Charter.

10 See, e.g., CJEU, 19 October 1977, C-117/76, *Ruckdeschel*, ECLI:EU:C:1977:160, para. 7; CJEU, 29 October 2009, C-174/08, *NCC Construction Danmark*, ECLI:EU:C:2009:669, para. 45; CJEU, 14 September 2010, C-550/07 P, *AKZO Nobel Chemicals*, ECLI:EU:C:2010:512, para. 54; CJEU, 17 October 2013, C-101/12, *Schaible*, ECLI:EU:C:2013:661, para. 76.

11 See, e.g., CJEU, 16 December 2008, C-127/07, *Arcelor Atlantique and Lorraine and Others*, ECLI:EU:C:2008:292, para. 23; CJEU, 7 March 2017, C-390/15, *RPO*, ECLI:EU:C:2017:174, para. 41, with further references.

reasoning when interpreting the law. It may thus require an extensive interpretation of EU VAT legislation utilizing purposive construction to avoid unjustified discrimination between economic operators or transactions. It may furthermore justify a reasoning by analogy when the legislator did not foresee future technological or economic developments whose economic effects are comparable to those of certain other transactions that are addressed in the common system of EU VAT.

Moreover, as expressly stated in Art. 2 and 10 TEU, the Union is founded on the principle of democratic representation.¹² Its citizens are represented at Union level in both the European Parliament (directly) and the European Council and the Council (indirectly). These institutions in turn provide democratic legitimacy to the EU Commission through the election and confirmation procedure stipulated in Art. 17 (7) TEU. They thereby also have a democratic mandate to shape the Union's policies within the framework established by primary Union law. Regarding the common system of VAT specifically, the formulation of its objectives and its technical design are primarily the responsibility of the Council acting upon the initiative of the Commission under the special legislative procedure stipulated in Art. 113 TFEU. When proposing and adopting legislative acts – or implementing acts – on the common system of VAT, they are typically guided by certain policy objectives, however, that might not be fully reflected in the wording of the relevant provisions of secondary law. To a certain degree, this is indeed unavoidable due to the vagueness of language and limited awareness in the abstract rule-making process of future concrete transactions that should be covered by a particular VAT provision or regime. It is then the CJEU that must ensure that the choices of the aforementioned law-making institutions regarding the relevant policy objectives and in setting priorities between conflicting objectives are consistently implemented when applying the law. Extensive interpretation may thus be required to overcome the inherent limitations and technical imperfections of abstract rule setting and to guarantee an outcome that aligns with the “true” will of the peoples of the Member States, as represented by the relevant Union institutions in the process of EU VAT legislation. In this sense, the Court's mandate clearly surpasses the traditional concept of the judge as “*la bouche qui prononce les paroles de la loi*”.¹³

Similarly, the Union legislator sometimes has to resort to dilatory formula compromises when enacting provisions of EU (VAT) legislation without actually reaching an agreement on their precise content. This is then often glossed over by vague, open-textured language or reflected in the use of somewhat divergent terminology in the different official language versions of the text. To the extent that such a provision therefore requires further concretization, the Union legislator thereby

¹² See also CJEU, 19 December 2019, C-418/18, *Puppinck*, ECLI:EU:C:2019:1113, para. 64.

¹³ *Montesquieu*, *De l'esprit des lois* (1748).

effectively delegates its norm-setting powers to the CJEU, at least within the outer linguistic limits drawn by the compromising text(s). The Court then actually has no other alternative than to conduct an extensive interpretation based on the context as well as the purpose and objective of the legislation at issue. This has been repeatedly acknowledged by the CJEU itself regarding incongruent language versions.¹⁴

Apart from the aforementioned principle of equality, other quasi-constitutional values of the Union, and especially its other fundamental rights and general principles, may also require the CJEU to resort to extensive interpretation. Pursuant to the Court's settled and convincing case law, secondary Union law must be interpreted, to the extent possible, in conformity with the requirements of primary Union law.¹⁵ In particular, when the wording of a provision of secondary law is ambiguous but only one of its possible meanings can be reconciled with primary Union law requirements – such as, e.g., the principle of proportionality – the latter interpretation must, in principle, be given preference unless legislative intent or the *ratio legis* clearly militate against it. This “conservative” approach can be justified by the need to preserve the effectiveness of legislated Union actions that would otherwise have to be declared void. It also demonstrates the CJEU's due deference to the Union legislator whose democratically legitimized choices should not be set aside without a real need to do so. Such reconciliatory interpretation will often suggest an understanding of the norm at issue that relies on a peripheral meaning of the relevant terminology and thus amounts to extensive interpretation. In rare cases, an extensive interpretation of secondary Union law may also be required to avoid logical contradictions that would undermine the rule of law that constitutes one of the foundational values of the Union pursuant to Art. 2 TEU.

It is sometimes stated in scholarly literature that the general principle of effective judicial protection can also militate for extensive interpretation of secondary Union law. When the Union legislator has left normative *lacunae* or has resorted to obscure language, the European judges must nevertheless establish the applicable legal consequences according to this opinion because a refusal do to so would constitute a denial of justice.¹⁶ However, in areas of administrative law, and specifically tax law, this conclusion cannot necessarily be drawn because the rights and obligations at issue typically concern the relationship between the state, on the one hand, and an individual or another private sector entity, on the other hand. In this relationship, any interference with the fundamental rights of the (potential) taxpayer must be provided for by law. This is explicitly stated in Art. 52 (1) of the Charter; in the case of VAT liabilities, the relevant fundamental

¹⁴ See below at section 3.4.

¹⁵ See, e.g., CJEU, 29 June 1995, C-135/93, *Spain/Commission*, ECLI:EU:C:1995:201, para. 37; CJEU, 19 December 2012, C-549/11, *Orfey Bulgaria*, ECLI:EU:C:2012:832, para. 32, with further references.

¹⁶ See, e.g., K. Lenaerts & J. Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (2020), p. 3, with further references.

rights are typically the freedom to conduct a business and the right to property guaranteed by Art. 16 and 17 of the Charter. In this context, the need for a proper legal basis can furthermore be inferred from the general principles of legal certainty and democratic legitimacy of taxation. It is settled CJEU case law that the requirement of legal certainty must be observed strictly in the case of rules liable to entail financial consequences.¹⁷ More recently, the Court has repeatedly clarified that the principle of legality of taxation forms part of the legal order of the European Union as a general principle of law. It requires that any obligation to pay a tax and all of the essential elements defining the substantive features thereof must be provided for by law.¹⁸

In light of the above, the CJEU cannot be obligated to fill any legal *lacunae* through extensive “interpretation” if the Union legislator has created them deliberately; it is quite the contrary. Likewise, it does not amount to a denial of justice to rule out legal obligations when the wording of the relevant provisions is too obscure to establish them with sufficient certainty. Admittedly, in the specific case of harmonization through directives – as is predominantly the case in the field of VAT – the secondary Union law to be interpreted does not directly establish any obligations for the private sector. This is because it lacks direct effect and is binding only upon the Member States as stipulated in Art. 288 TFEU. However, the Union legislator is still bound by the Charter when enacting such directives. In addition, the democratic legitimacy of any harmonized tax liability must still be ensured – at least primarily – at the Union level because its imposition is no longer a deliberate political choice of the national legislator. Moreover, since national tax authorities and courts of the Member States must interpret and apply their national laws that transpose the VAT Directive and complementary directives in conformity with the latter, to the extent possible,¹⁹ those directives may by themselves – indirectly – entail the imposition of tax burdens. Arguably, the Council must therefore still respect the principles of legal certainty and legality of taxation when harmonizing national VAT laws through directives. The above caveats to the “denial of justice” argument therefore fully apply also in the context of the common system of VAT even though it is primarily harmonized through directives.

The aforementioned principles furthermore generally militate against an overly extensive interpretation of secondary Union law and especially of the VAT Direc-

17 See, e.g., CJEU, 21 February 2006, C-255/02, *Halifax and Others*, ECLI:EU:C:2006:121, para. 72, with further references.

18 See CJEU, 8 May 2019, C-566/17, *Związek Gmin Zagłębia Miedziowego w Polkowicach*, ECLI:EU:C:2019:390, para. 39; CJEU, 8 November 2022, joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler*, ECLI:EU:C:2022:859, paras. 96-97.

19 Settled case law; see, e.g., CJEU, 15 June 2000, C-365/98, *Brinkmann Tabakfabriken*, ECLI:EU:C:2000:323, para. 40; CJEU 19 April 2007, C-63/06, *Profisa*, ECLI:EU:C:2007:233, para. 13; CJEU, 11 April 2013, C-138/12, *Rusedespred*, ECLI:EU:C:2013:233, para. 37; CJEU, 5 September 2019, C-331/18, *TE*, ECLI:EU:C:2019:665, para. 56.

tive. As the circumstances dictate, they can instead suggest a strictly literal interpretation or at least one that respects the clear wording of EU VAT legislation. Legal certainty is impaired when the interpretation and application of the law is not foreseeable so that those concerned cannot precisely know the extent of the obligations that they impose on them.²⁰ When the Court seeks to give “effet utile” to a provision of Union law by interpreting it extensively beyond its plain and-obvious (core) meaning, the sources of interpretation that it relies on to this effect – especially legislative intent, the *ratio legis* inherent to the provision, or the general scheme and logic of the legislation – must be sufficiently clear to make the relevant method of interpretation operational and to allow for the conclusions that the CJEU wants to draw. An extensive “interpretation” of the VAT Directive and associated Union law that even goes beyond or is contrary to the wording of the relevant provisions to the potential detriment of taxpayers can only exceptionally be admitted. The linguistic deficiency to be remedied must be obvious in light of the fundamental design principles or policy objectives underlying the tax regime at issue or in view of primary law requirements. It must also be sufficiently clear which development of the law is required by the general scheme or objectives of VAT in general or of the specific VAT regime concerned. The same applies regarding the general principle of legality of taxation. Moreover, as the CJEU has rightly held, it is generally not within its institutional competence to “interpret” secondary Union law in a manner that would modify or correct choices and preferences that the Union legislator has clearly made deliberately.²¹ Since the latter has greater democratic legitimacy than the CJEU, the Court may only review inadequate but intentional provisions of (VAT) legislation as to their compatibility with primary Union law, but it must not replace them by its own case law. Desirable or necessary amendments instead fall within the exclusive competence of the institutions responsible for initiating and enacting EU legislation.

3. Causes and justifications of extensive interpretation in the case law in VAT

The CJEU case law on matters of the common VAT system consists of almost 1.000 judgements that span approximately five decades. The author of this chapter has not carried out a full analysis of all of those rulings to empirically establish the frequency of an extensive interpretation of EU VAT legislation in comparison to the number of rulings in which the Court preferred a strictly literal or even a restrictive interpretation of the relevant provisions. However, having studied

20 See, e.g., CJEU, 21 February 2006, C-255/02, *Halifax and Others*, ECLI:EU:C:2006:121, para. 72, with further references.

21 See, e.g., CJEU, 5 May 1982, 15/81, *Schul*, ECLI:EU:C:1982:135, paras. 37 et seq.; CJEU, 8 November 2001, C-338/98, *Commission / Netherlands*, ECLI:EU:C:2001:596, paras. 55-56; CJEU, 13 July 2023, C-180/22, *Mensing II*, ECLI:EU:C:2023:565, paras. 34 and 40.