militated in favour of an interpretation according to which non-taxable persons cannot be included in a tax group. In the cases against Sweden[36] and Finland[37] the Court observed that the second paragraph of Art. 11 of the VAT Directive also permits Member States to adopt any measures needed to prevent tax evasion or avoidance through the use of the first paragraph of the article and declared that the Commission had failed to show that the restriction of the application of the scheme to undertakings in the financial and insurance sector was contrary to EU law.

Once again, even though the Commission's claims were unsuccessful, the VAT grouping cases allowed for indirect harmonization, namely, in the form of a uniform interpretation of the concept of persons who can take part in a VAT grouping.

Finally, infringement cases may also help to make it clear that there is a need for modification or modernization of the current rules. For example, cases against Luxembourg[38] and France[39] concerning reduced and super-reduced VAT rates on e-books provoked a reflection at EU level concerning the justification of differential VAT treatment between e-publications and publications on tangible support. This reflection led the Commission very recently to adopt a proposal[40] which, if adopted by the Council, will put the two types of publications on the same footing.

4. What are the Elements that Make Infringement Procedures Less Effective in their Role as a "Harmonization Tool"?

4.1. From the Commission's Perspective

In all infringement cases, but even more specifically in VAT cases, the Commission has the burden of proof: it must demonstrate clearly the existence of the infringement.[41] That means for example, that it must demonstrate that the interpretation it advocates is the only correct one (see the VAT grouping cases, just mentioned). Sometimes it must demonstrate that while national legislation appears to be in

36 CJEU, 25 April 2013, C-480/10, *Commission v Sweden*, EU:C:2013:263.

37 CJEU, 25 April 2013, C-74/11, *Commission v Finland*, EU:C:2013:266.

38 CJEU, 5 March 2015, C-502/13, *Commission v Luxembourg*, EU:C:2015:143.

39 CJEU, 5 March 2015, C-479/13, *Commission v France*, EU:C:2015:141. The Court judged in these cases that application of a reduced rate of 5.5 % to e-books in France and a "super reduced rate" of 3 % in Luxembourg was contrary to the VAT Directive.

40 Proposal for a Council Directive amending Directive 2006/112/EC, as regards rates of value added tax applied to books, newspapers and periodicals (COM[2016] 758 final).

41 See for example: CJEU, 4 June 2015, C-678/13, *Commission v Poland,* EU:C:2015:358; this case was lost by the Commission on the majority of its grievances because of the absence of sufficient proof.

conformity with the VAT Directive, the manner in which that legislation is applied in reality creates inconsistencies. The specificity of VAT infringement cases (along with other tax cases) is that sometimes the proof is extremely difficult to obtain in practice. In VAT cases, infringements based exclusively on administrative practice are much more common than in other areas of EU law. One can quote as an example a Romanian infringement case concerning an administrative practice of refunding VAT with unreasonable delays.[42] Such situations present important practical problems for the Commission because, according to the case law of the ECJ, the Commission needs to demonstrate[43] a constant and consistent practice.[44] This is of course very challenging. Sometimes an illegal administrative practice can be contrary to the national legislation (which itself might be in conformity with EU law). Such situations obviously cause a number of practical problems in terms of proof. Moreover, in the VAT area, taxpayers who actually benefit from favourable fiscal treatment (like for example a reduced rate of VAT) will certainly not report the problem to the Commission. In such cases, the Commission must count on "motivated competitors", who will in principle complain only when a potential distortion of competition is relatively important. If the Commission fails to prove the infringement, it can very well happen that the Court dismisses the case on the grounds of admissibility, without giving any guidance on the relevant VAT rules. As a result, the usefulness of such procedure in terms of -indirect harmonization will be non-existent. In order to address this issue (at least to some extent), the Commission could perhaps make more effective use of the case law imposing on Member States the duty of cooperation with the Commission, in order to shift the burden of proof onto the Member States.[45]

4.2. From the Court's Perspective

In an infringement case, the Court is in a very different position from the legislature when it adopts a legally binding act. It has much more limited time and information[46] while dealing with a given case and, above all, it is not supposed to create new legal rules.

42 The Commission opened an infringement case against Romania, where such delays were up to 180 days. Finally, the Commission decided to close the case without going to Court, because the term for settling the VAT refund claims was reduced from 180 days to approximately 60 days, and there are plans to further reduce it to a maximum of 15 days.

43 According to the Court, sufficiently documented and detailed proof of the alleged practice is necessary (see CJEU, 9 July 2015, C-87/14, *Commission v Ireland*, EU:C:2015:449, para. 23).

44 CJEU, 27 April 2006, C-441/02, *Commission v Germany*, EU:C:2006:253, paras. 49–50.

45 CJEU, C-494/01, 26 April 2005, *Commission v Ireland*, EU:C:2005:250, para. 44 and CJEU, 4 May 2006, C-508/03, *Commission v United Kingdom*, EU:C:2006:287 para. 79.

46 Elaborating legal acts requires time and resources. Before submitting its proposals to the Council the Commission carries out an impact assessment, in principle proceeded by detailed studies, involving all the stakeholders. These elements, together with the opinions of the EP and ESC are carefully taken into account by the Council before the final adoption of a new act.

Dispute Resolution in VAT: status quo under the EU VAT Directive and Room for Improvement

Karoline Spies

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1. Causes of Disputes in an EU Context

1.1. Assessment of Facts and Interpretation of Norms

Disputes between taxpayers or taxable persons – the more suitable term in the area of VAT – on the one hand and authorities of Member States on the other hand arise for mainly two different reasons: the two parties may disagree (i) on the assessment of the facts or (ii) on the interpretation of the applicable legislation.[1] Although in both cases there should be only one answer or at least one solution which can be supported by the most persuasive arguments, this perfect solution is hard to find. With regard to the facts businesses and authorities may for example disagree on whether the business conducts a "genuine economic activity"[2] by using humans and technical resources located in the Member States' territories. Such requirements on economic substance are a precondition for the application of a number of VAT provisions.[3] When it comes to interpretation it is inherent in any provision that the wording is open to more than one interpretation. The correct interpretation may be identified only by taking a careful look at the teleological, historical and systematic background to the provision. Different people may weigh the various arguments differently and come to opposing solutions. Commonly, interpretation is also still influenced by the traditional domestic (civil law) understanding of certain undertakings.[4]

Distinguishing between these two different conflicts is crucial: Disputes with respect to the interpretation of a provision of EU VAT law may – and in many cases should – lead to a preliminary ruling before the CJEU which – in theory – will finally resolve the dispute.[5] Disputes with respect to the assessment of the facts, however, cannot be resolved by the CJEU, but remain within the responsibility of domestic authorities and courts.

1.2. Domestic versus EU Cross-Border Disputes

Both disputes – those on facts and those on interpretation – are burdensome for businesses and states in purely domestic situations: If businesses accept the position taken by authorities this may lead to a higher tax burden. If businesses decide to go for legal remedies this will trigger administrative work, the need for support by specialists and corresponding costs. States will also suffer the same burdens in the event of litigation.

1 Cf. T. Ecker, *Digital Economy International Administrative Cooperation and Exchange of Information in the Area of VAT*, in: M. Lang & I. Lejeune (eds.), *VAT/GST in a Global Digital Economy* (Alphen aan den Rijn: Kluwer, 2015) pp. 158 et seq.

2 CJEU, 22 December 2010, C-277/09, *RBS Deutschland Holdings*, EU:C:2010:810, para. 52; see also „*economic reality*" used in CJEU, 20 June 2013, C-653/11, *Newey*, EU:C:2013:409, paras. 49–50.

3 In particular the place-of-supply rules for services in Arts. 44 and 45 VAT Directive.

4 See for an example of diverging interpretation of the applicable place-of-supply rules for leasing agreements: CJEU, 22 December 2010, C-277/09, *RBS Deutschland Holdings*, EU:C:2010:810, para. 20.

5 See Section 4.2.

- *"[…] taxpayers who have committed tax evasion consisting, inter alia, in the concealment of taxable transactions and the resulting revenue are not in a situation comparable to that of taxpayers who comply with their obligations in relation to accounting, filing VAT returns and the payment of VAT […]".*[13]

All the considerations mentioned above led the Court to the conclusion that EU rules:[14] *"[…] must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, where goods are not in the warehouse of the taxable person to whom they have been supplied and the tax documents of relevance to those goods have not been recorded in the accounts of that taxable person, tax authorities may presume that the taxable person subsequently sold those goods to third parties and determine the taxable amount of the sale of those goods according to the factual information at hand pursuant to rules not provided for in that directive."*

Even if the attention of the reader focuses only on this point, there cannot be any doubt that this judgment is extremely useful. The benefit is mainly provided to the tax administration (not only the Bulgarian, but also the Italian administration), because it represents a sort of extension to the VAT system of the codification of the presumption commonly used for general tax assessment purposes. This outcome gives rise to some significant effects taking into account the taxation mechanism of VAT and its purpose: taxing the consumption of goods or services. The consumption, as settled by the rules (i.e. Art. 1(2) of the VAT Directive) and the European case law, must be effective and not presumed.[15] In addition to the con-

13 CJEU, 5 October 2016, C-576/15, *Maya Marinova*, EU:C:2016:740, para. 49.

14 CJEU, 5 October 2016, C-576/15, *Maya Marinova*, EU:C:2016:740, para. 50.

15 In order to clarify that concept, and strengthen the theory of the birth of the tax obligation at the point of realization of the economic operation, in other words, the supply of goods or services, it is necessary to reflect on the variables that can influence the taxable event if the supply is not consumed. This is the case, for example, with the theft of goods, where goods are snatched for consumption before the economic chain has ended. In CJEU, 14 July 2005, C-435/03, *British American Tobacco International and Newman Shipping*, EU:C:2005:464, para. 26, the CJEU is of the view "*The theft of goods […] does not have the effect of empowering him to dispose of the goods under the same conditions as their owner. A theft cannot therefore be regarded as effecting a transfer, within the meaning of Article 5(1) of the Directive, from the victim to the thief*". Moreover, the theft as such should not be considered a chargeable event for tax (see CJEU, 14 July 2005, C-435/03, *British American Tobacco International and Newman Shipping*, EU:C:2005:464, para. 40). This approach is confirmed also by the *PIGI* case, where the Court, dealt with the theft of goods and consequently the obligation to adjust the tax related to the purchase of the stolen goods, because they were snatched from the market: "*[…] since property which was stolen can no longer be used by the taxable person for taxable output transactions, theft is such a change which should, in principle, give rise to an adjustment of the input VAT deduction*" (CJEU, 4 December 2012, C-550/11, *PIGI*, EU:C:2012:614, para. 34). However, *"[…] by way of derogation from the principle laid down in Article 185(1) of the Directive, the first subparagraph of Article 185(2) provides that no adjustment is to be made, inter alia, in the event of 'theft of property duly proved'. Under the second subparagraph of the latter provision, that derogation is made optional. It follows that the Member States may provide for adjustments of input VAT deductions in any cases of theft of property giving rise to entitlement to VAT deduction, irrespective of whether or not the circumstances surrounding the theft have been fully elucidated*" (CJEU, 4 December 2012, C-550/11, *PIGI*,

sumption for the application of the tax it is relevant also the consideration for the supply in the light of what is provided by Art. 2(1)(a) and (c) of the VAT Directive. The provision states that where the supply is not carried out for consideration it cannot be considered as constituting an economic activity and therefore relevant for VAT purposes.[16] The application of this principle has consequences for the determination of the taxable amount. According to the CJEU's case law on Art. 73 of the VAT Directive, *"[…] the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria"*.[17]

Considering the taxable amount as an element made by the real value perceived leaves scope for questioning the legal evaluation of the taxable base from a tax assessment perspective, that is, without linking the results of a tax assessment to any real parameters, simply basing it on presumptions. This issue has already been brought to the attention of the CJEU in the past and has been solved by the Court clarifying the conditions for accepting a determination of the value for VAT purposes where there is a disconnection between the real value of the supply and its presumed value (which is obviously greater than the value declared).[18]

EU:C:2012:614, paras. 28 et seq.). From that assumption it is possible to submit that the fact that the good in question does not end the chain of consumption determines, from the output point of view, the non-existence of the supply, without binding, from the input point of view, the tax adjustment related to the purchase of the stolen good. In fact, the recovery of the tax in that case was discretionary and not obligatory for the Member States.

16 Only in the case of a supply of goods or deemed supplies, whose relevance is recognized with the aim of the tax recovery (ultimately) can VAT from purchases be levied in cases of auto consumption (see CJEU, 16 June 2016, C-229/15, *Mateusiak*, EU:C:2016:454).

17 CJEU, 7 November 2013, C-249/12 and C-250/12, *Tulică and Plavoşin*, EU:C:2013:722, para. 33. In the same sense, amongst others, CJEU, 5 February 1981, C-154/80, *Coöperatieve Aardappelenbewaarplaats*, EU:C:1981:38, para. 13; CJEU, 26 April 2012, C-621/10 and C-129/11, *Balkan and Sea Properties and Provadinvest*, EU:C:2012:248, para. 43.

18 The principle is enshrined in the European case law, starting with CJEU, 10 April 1984, C-324/82, *Commission v Belgium*, EU:C:1984:152, para. 31, where, the Court gave its interpretation of the requirement that the Tax administration determines the sales value of auto vehicles on the basis of presumptions linked to their catalogue prices: "*[…] the Belgian legislation entails such a complete and general amendment of the basis of assessment that it is impossible to accept that it contains only the derogations needed to avoid the risk of tax evasion or avoidance in particular, it has not been proved that , in order to attain the aim in view, it is necessary that the taxable amount should be fixed on the basis of the Belgian catalogue price or that the taking into account of any form of price discount or rebate should be excluded in such a comprehensive manner*". For further CJEU case law on the same subject matter, see CJEU, 5 February 1981, C-154/80, *Coöperatieve Aardappelenbewaarplaats*, EU:C:1981:38, para. 13; CJEU, 23 November 1988, C-230/87, *Naturally Yours Cosmetics*, EU:C:1988:508, para. 16; CJEU, 27 March 1990, C-126/88, *Boots*, EU:C:1990:136, para. 19, CJEU, 9 July 1992, C-131/91, *"K" Line Air Service Europe*, EU:C:1992:315, para. 24; CJEU, 16 October 1997, C-258/95, *Julius Fillibeck Söhne*, EU:C:1997:491, para. 13; CJEU, 29 March 2001, C-404/99, *Commission v France*, EU:C:2001:192, para. 38; CJEU, 20 January 2005, C-412/03, *Hotel Scandic Gåsabäck*, EU:C:2005:47, para. 28; CJEU, 9 June 2011, C-285/10, *Campsa Estaciones de Servicio*, EU:C:2011:381, para. 28; CJEU, 26 April 2012, C-621/10 and C-129/11, *Balkan and Sea Properties and Provadinvest*, EU:C:2012:248, para. 43.

supply of services. That conclusion applies where the contracting parties are in fact seeking a combination of the three components to that supply, where the use of the sporting facilities is objectively necessary to train the race horses and where the supplies linked to the stabling, feeding and care of the horses are primarily intended to accompany and assist their training and the use of sports facilities.[33]

According to the Court, and subject to determination by the referring court, the training services and use of the sporting facilities constituted two components of that composite supply which were, in the light of its purpose, of equal status, whereas the supplies linked to the stabling, feeding and care of the horses were of an ancillary nature in relation to those two components.[34]

However, the Court ruled that, in so far as only the use of the sporting facilities fell within the scope of the reduced rate provided for in Art. 98 of the VAT Directive, read in conjunction with point 14 of Annex III thereto, that reduced rate could not be applied to the single composite supply at issue in the main proceedings.[35]

Finally, the CJEU was asked about prize money and supplies. The Court thought that an owner does not make a supply to a race organizer by entering his horse in a race in the hope of winning a prize. There is only a supply by the owner if he is paid a fee by the organizer whether or not the horse wins a prize (that is to say the owner is paid money for the horse turning up, or a guaranteed sum for the horse participating in the race, win or lose). The CJEU did not think that the prize money itself was consideration for a supply. Here the Court parted company from the Advocate General who thought prize money was consideration for a supply, despite the uncertainty regarding who would receive the money.[36]

Earlier, in the *Tolsma* case[37] the Court emphasized the criteria of establishing a direct link between the services provided and the consideration received. A legal relationship between the provider of the service and the recipient does not however in itself assure that there has been a service supplied for consideration. The consideration is a subjective value based on what is actually received for the service rather than a value assessed on objective criteria.

2.1.2. "High Seas" VAT Exemption Extends to Loading and Unloading Cargo by Subcontractor

In the pending case *A Oy* [38] the Court has been asked to rule on the question whether the loading and unloading of cargo onto and off a vessel are supplies of services made to meet the direct needs of the cargo of vessels.

33 CJEU, 10 November 2016, C-432/15, *Baštová*, EU:C:2016:855, para. 74.
34 CJEU, 10 November 2016, C-432/15, *Baštová*, EU:C:2016:855, para. 75.
35 See also: CJEU, 19 July 2012, C-44/11, *Deutsche Bank*, EU:C:2012:484.
36 CJEU, 10 November 2016, C-432/15, *Baštová*, EU:C:2016:855, para. 54.
37 CJEU, 3 March 1994, C-16/93, *Tolsma,* EU:C:1994:80.
38 CJEU, C-33/16, *A Oy*, EU:C:2016:929 (pending).

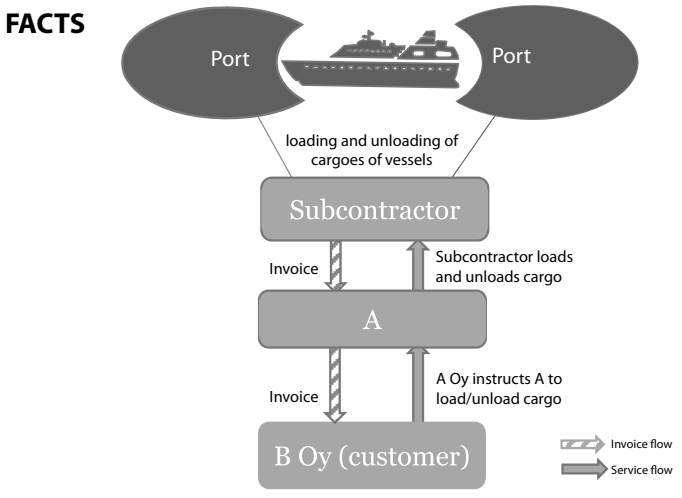

Figure 7: The Dispute in the *A Oy* case © Law Square 2017

The facts in the case at hand are the following:[39]

A Oy, which is a subsidiary of the company B Oy, operates in two ports, where it supplies loading and unloading, warehousing, shipping agency and freight forwarding services. The package of services supplied by A includes the loading and unloading of the cargoes of vessels used for navigation on the high seas and for the purposes of a commercial activity. Those services are performed by a subcontractor which invoices them to A, which in turn invoices them on to its customer, who, depending on the circumstances, may be B Oy, the holder of the goods, the loader, the forwarding company or the shipowner. The details of the vessel and the cargo concerned are sent to the subcontractor and set out both on its invoice and on the invoice issued by A.

Following a request by A Oy for a tax decision on whether, under Art. 71(3) of the Arvonlisäverolaki (i.e. Finnish law on VAT, hereafter "AVL"), the loading and unloading operations which it performs as a subcontractor acting on behalf of its customers were eligible for exemption from VAT, the Keskusverolautakunta (i.e. the Finnish Central Tax Board), by decision of 1 October 2014, held that loading and unloading services were not to be regarded as services exempt from VAT under Art. 71(3) of the AVL, which transposes Art. 148(a), (c) and (d) of the VAT Directive, because, according to the case law of the Court of Justice,[40] the supply of services to vessels operating in international traffic or to their cargoes may be exempt

39 Opinion of Advocate General Bot, 7 December 2016, C-33/16, *A Oy*, EU:C:2016:929.

40 CJEU, 3 September 2015, C-526/13, *Fast Bunkering Klaipeda*, EU:C:2015:536; CJEU, 26 June 1990, C-185/89, *Velker*, EU:C:1990:262; CJEU, 14 September 2006, C-181/04 to C-183/04, *Elmeka*, EU:C:2006:563.

from VAT only if those services are provided at the end of the commercial chain, and, in the circumstances contemplated in the request, the loading and unloading services are provided at a stage earlier than the end of the commercial chain.

A Oy lodged an appeal against that decision before the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

(i) *"Is Article 148(d) of the VAT Directive to be interpreted as meaning the loading and unloading of cargo onto and off a vessel are supplies of services made to meet the direct needs of the cargo of vessels for the purposes of Article 148(a)?*
(ii) *Given the findings of the Court of Justice of 14 September 2006 (Elmeka) according to which the exemption provided for in those rules could not be extended to services supplied at an earlier stage in the commercial chain, is Article 148(d) of [the VAT Directive] to be interpreted as meaning that it applies also to the services at issue in the case in the main proceedings in which the service supplied by A's subcontractor in the first phase of operations concerns a service which has a direct physical relationship to the cargo, which A invoices to the forwarding or transport company?*
(iii) *In light of the findings of the Court of Justice in paragraph 24 of the judgment of 14 September 2006 (Elmeka), according to which the exemption provided for by the rules in question apply[sic] only to services which are supplied to the ship-owner, is Article 148(d) of [the VAT Directive] to be interpreted as meaning that that exemption cannot apply if the service is supplied to the cargo holder, such as the exporter or importer of the cargo concerned?"*

Regarding the first question, the Advocate General emphasized that Art. 148(d) of the VAT Directive does not exhaustively list the services that are exempt but defines them generally on the basis of a criterion relating to the objective pursued, which must be to meet the direct needs of vessels and of their cargoes. In his view, the activities of loading and unloading a ship are indisputably services supplied to meet the needs of cargoes.[41]

The Advocate General also pointed out the differences between divergent language versions of Art. 148(d) of the VAT Directive. Some versions use *"the supply of services […] to meet the direct needs of the vessels referred to in point (a) and of their cargoes"*, whereas other language versions use "or" instead of "and" as a coordinating conjunction. The difference creates some uncertainty as to whether the exemption from VAT concerns only supplies of services that are capable of cumulatively satisfying the needs of vessels and their cargoes or applies to all supplies of services that meet the direct needs of vessels and all supplies of services that meet the needs of their cargoes. As none of the language versions prevails, the provision must be interpreted by reference to the purpose and general scheme of

41 Opinion of Advocate General Bot, 7 December 2016, C-33/16, *A Oy*, EU:C:2016:929, para. 19.