Harmonisation of VAT

in the European Union

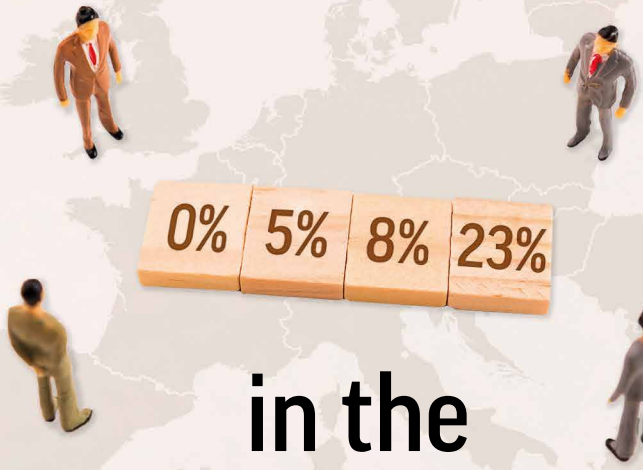
Present and Future

EDITORS
Wojciech Dmoch
Bartłomiej Kołodziej
Michał Mioduszewski
Artur Mudrecki

KOZMINSKI UNIVERSITY

Harmonisation of VAT in the European Union

Harmonisation of VAT



in the European Union

Present and Future

EDITORS
Wojciech Dmoch
Bartłomiej Kołodziej
Michał Mioduszewski
Artur Mudrecki

KOZMINSKI UNIVERSITY

Reviewer
Prof. Bogumił Brzeziński – Nicolaus Copernicus University in Toruń

Proofreading
Magdalena Liebner
Anna Goryńska

Cover design
Amadeusz Targoński, targonski.pl

Typesetting
Protext

Publikacja jest efektem konferencji pt. *Harmonizacji podatku VAT w Unii Europejskiej – teraźniejszość i przyszłość*.

Konferencja została dofinansowania z programu „Doskonała nauka” Ministra Edukacji i Nauki oraz ze środków Mazowieckiego Oddziału Krajowej Izby Doradców Podatkowych.

Warsaw 2022

ISBN: 978-83-66502-09-3
DOI: 10.7206/9788366502093

BLANK PAGES HAVE BEEN DELETED INTENTIONALLY.

Contents

Introduction

The harmonisation of VAT in the European Union is a very relevant research topic which meets with great interest in the scientific community as well as the interest of practitioners of the application of tax law.

The proper operation of the common market is a fundamental condition for the functioning of the European Union. One of the indispensable elements in the operation of the common market is a harmonised VAT system. Adhering to the fundamental principles of VAT, i.e. the principles of universality, neutrality and proportionality not only should ensure the free and competitive movement of goods and services between Member States, but it should also guarantee VAT revenue, not only for the budgets of the Member States, but also for that of the European Union.

The current system of the VAT taxation of supplies of goods between entities established in different Member States is a transitional system which was intended to operate for only four years. However, 26 years have elapsed since its introduction and therefore the system, like most of the solutions put in place as temporary solutions, functions as a permanent solution and the objective of introducing a definitive VAT system for the intra-Community supplies of goods is systematically postponed to the future.

The transitional system assumes taxation of supplies of goods made between European Union Member States in the state where the buyer of the goods has their registered office. It is reflected in regulations on the so-called intra-Community supply and acquisition of goods. According to these regulations, domestic and cross-border transactions are subject to two completely different VAT taxation systems. As a result, businesses engaging in cross-border trade incur higher compliance costs compared to businesses engaging in purely domestic trade. Moreover, by allowing cross-border acquisition of goods without charging VAT, the rules create a particular risk of fraud. Thus, the current VAT system in the European Union has significant shortcomings which make it vulnerable to fraud, resulting in particular in losses of government revenue and unequal market conditions for the operation of the single market. Finally, it results in a competitive disadvantage for honest taxpayers. Therefore, the current VAT system in the European Union needs to be amended.

The definitive system, on the other hand, involves taxing goods in the country in which they are produced, regardless of whether the place of the final consumption of those goods is in the same or another Community country. This system, therefore, treats domestic supplies from the VAT point of view in the same way as supplies to other Member States. The consequence of this system, from the fiscal point of view, is that the VAT due on the supplies is credited to the budget of the country from which the goods are sold to the rest of the Community.

The aforementioned budgetary factor is not the only one whose correct solution, for instance, through a system of so-called clearing, results in the absence of a definitive system. Another important issue is the fact that Community countries are currently applying not only different reduced VAT rates to selected products, but also different standard VAT rates. Another important issue is the ever-increasing significance of e-commerce or, to put it more broadly, the digitalisation of the economy. As a result of this phenomenon, it is necessary not only to identify its effects on the VAT system, but also to seek legislative solutions so that the taxation of these economic phenomena does not disrupt the proper functioning of the common market. The above-mentioned challenges to the harmonisation of the VAT system in the European Union are not only of a legislative or political nature, but they also provide an excellent platform for examining the views of the science, doctrine and practice of individual Member States in this area.

The monograph, thanks to the participation of eminent academics from European universities as both participants and speakers, will certainly allow for an exchange of views on the process of the harmonisation of the VAT system. The participation of representatives of the judiciary and practitioners will additionally contribute to the exchange of views, but also to the determination of the role which the case-law of the European Court of Justice of the European Union plays in the harmonisation process and what this role will look like in the definitive VAT system.

The monograph is intended to create a platform for discussion on the most important issues concerning the reform and future of the VAT system in the European Community. It will be a place for an effective exchange of reflections and experiences, including in terms of highlighting and presenting to international audiences Poland's positive experiences with mechanisms, such as split payments, reverse charge and Binding Tariff Information. Conclusions resulting from the scientific discussion will certainly be able to be used not only in national VAT legislation, but also in the practice of tax administration facing the difficult task of maintaining the budgetary effectiveness of VAT as the main source of state tax revenue.

The publication consists of four thematic parts. The first presents an analysis of the functioning of value added tax in the European Union. Michał Mioduszewski has prepared 'Introduction to the Harmonisation of Indirect Taxation: His-

tory, Objectives and Methods'. Witold Modzelewski elaborated on the topic: 'VAT Harmonisation: Pathologies of the Process or a Pathological Process?'. Ewelina Toczek, on the other hand, prepared an article entitled:

'The Use of New Technologies as a Means to Reduce the VAT Gap: The Entrepreneur's Perspective'. Marek Bełdzikowski addressed the issue of 'The Evolution of the Tax Exchange Information System in the European Union'.

The second part of the monograph is devoted to the jurisprudence of the Court of Justice of the European Union. Dominik Mączyński prepared the analysis of 'The Impact of the CJEU Case-Law on VAT Regulations in Poland'. Roman Wiatrowski elaborated on 'The Consensus Model of Interpretation of National Law in Accordance with the EU Law in the Field of Provisions on Tax on Goods and Services in the Case-Law of the Supreme Administrative Court'.

Krzysztof Lasiński-Sulecki addressed the issue of 'Fixed Establishment under the EU VAT System: Can the Old Case-Law of the Court of Justice Stand in the New Economic and Technological Reality?'. Artur Mudrecki discussed 'The Proportionality Principle and VAT Sanctions'; Marek Maliński analysed 'The Binding Force of the Final Judgement Convicting the Taxpayer's Contractor in Disputes Concerning Input VAT: Beyond the Glencore Case'.

The third part of the book is devoted to VAT in the age of digital economy – VAT in e-commerce. Emilia Sroka presented a study on: 'A Gradual Approach to Shaping VAT Policy in the Digital Age as Exemplified by OSS'. Bartłomiej Kołodziej, on the other hand, deals with the issue of 'The VAT Liability of Online Platforms in the EU (Harmonised) System'.

In the fourth part on VAT rates, Adam Bartosiewicz elaborated on the issue of the 'Reduced VAT Rates in Catering from 1 November 2019: The Scope of the National Legislature's Discretion in the Context of the Dispute over the Nature of Certain Supplies in Catering (Supply of Goods or Supply of Services)'. Wojciech Dmoch addressed the topic: 'Binding Rate Information as a Community Law Institution'.

It is an important voice in the discussion on the current state and future of VAT harmonisation, which should be of interest to EU institutions, including the European Commission and the Court of Justice of the European Union. The monograph should be of no less interest to administrative judges, tax advisors and employees of the National Fiscal Administration in Poland.

Wojciech Dmoch
Bartłomiej Kołodziej
Michał Mioduszewski
Artur Mudrecki

Michał Mioduszewski

Kozminski University, Poland

mioduszewski0@gmail.com

ORCID: 0000-0003-0288-8376

Introduction to the Harmonisation of Indirect Taxation: History, Objectives and Methods

Abstract

The aim of this publication is to indicate the history, objectives and methods of the harmonisation of indirect taxes in the European Union and the factors underlying the decision to build a common VAT system.

The article also discusses the legal basis empowering the European Union to undertake activity in the field of tax law harmonisation, taking into account actions taken by EU authorities. The article contains a discussion of the most important regulations of the EU harmonisation, however, it does not constitute an exhaustive catalogue of all passed EU acts.

Tax harmonisation is most commonly defined as 'the process by which the tax systems of different tax systems of different countries are approximated in such a way that tax issues do not affect the flow of goods, services and factors of production between these countries'.[1]

Within the harmonisation process, three very important stages are relevant:

– selection of the tax to be harmonised

– harmonisation of the tax base[2]

– harmonisation of the tax rate.

---

[1] L. Oręziak, *Konkurencja podatkowa i harmonizacja podatków w ramach Unii Europejskiej: implikacje dla Polski*, Warszawa 2007; D. Nerudova, *Harmonization of Tax Systems of European Union Countries*, 2005, p. 13.

[2] The special role of the harmonisation of provisions concerning the tax base within the common VAT system is indicated by Prof. ALK Artur Mudrecki, PhD. According to the Professor, the tax base influences not only the amount of VAT tax liabilities, but also the amount of contributions paid by Member States to the EU budget: A. Mudrecki, *Zasada proporcjonalności jako element konstrukcji podatku od towarów i usług w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej i Naczelnego Sądu Administracyjnego*, „ZNSA" 2020, No. 5, pp. 9–23; A. Mudrecki, *Rola sądów administracyjnych w harmonizacji podatków w Polsce*, in: D. Dominik-Ogińska et al., *Harmonizacja prawa podatkowego w Unii Europejskiej*, Vol. 21, 1st edition, Warszawa 2011, pp. XXI–35.

The harmonisation of the tax system is an implementation of the concept of the common market, on which the principles of economic activity are based. Joint action by EU Member States in the area of harmonisation should aim to eliminate economic differences and harmonise economic principles, taking into account the specific nature of the economic systems of individual Member States.
Moreover, the tax harmonisation is closely linked to economic integration economic integration in Europe – indeed, harmonisation is one of the key conditions for the smooth functioning of the single market in goods, services, labour and capital.[3] This follows directly form Article 2 of the Treaty establishing the European Community. According to it, one of the Union's main tasks is to establish a common internal market and to create the conditions enabling the realisation of the 'four freedoms' (freedom of movement of goods, services, labour and capital) and a system ensuring that competition is not distorted. In order to achieve the Union's main objective, it is necessary to harmonise the tax systems of all countries in the Union and, in the longer term, to create a single Community tax system.
The process of the harmonisation of legal systems, tax bases and VAT rates has taken place very differently in individual Member States. This is due to the fact that the Member States of the European Union have often been reluctant to give up their competences to pursue common interests. In the view of these countries, harmonisation leads to a limitation of tax sovereignty in terms of the power of the public authority to set taxes (and tax privileges).[4] The determination of tax privileges as an exclusive power of the public authority is sometimes an argument to oppose the harmonisation process.

Keywords: harmonisation, EU laws, VAT, excise duties, case-law, indirect taxation

[3] Z. Kuraś, *Harmonizacja systemów podatkowych państw członkowskich Unii Europejskiej*, „Studia Gdańskie" 2009, Vol. VI, pp. 229–243.

[4] K.-D. Drüen, B. Kahler, *Die nationale Steuerhoheit im Prozess der Europäisierung*, „Steuer und Wirtschaft" 2005, p. 171.

Harmonisation as the Basis for the Proper Functioning of the European Union's Common Market

The main function of European tax law must be to preserve the proper functioning of the common market and to achieve other objectives of the European Union.[5] One of the indispensable elements of the common market is a harmonised VAT system. While abiding by the fundamental principles of VAT, namely the principles of universality, neutrality and proportionality, this system should not merely ensure the free and competitive movement of goods and services between Member States, but also guarantee VAT revenue, not only for the budgets of the Member States, but also for that of the European Union.

The current system of VAT taxation on supplies of goods between entities established in different Member States is a transitional system which was intended to operate for only four years. However, almost 26 years have elapsed since its introduction and therefore this system, like most of the solutions introduced as temporary solutions, functions as a permanent solution and the objective of introducing a definitive VAT system for intra-Community supplies of goods is systematically postponed to the future.

The transitional system assumes taxation of supplies of goods made between European Union Member States in the state where the buyer of the goods has its registered office. It is reflected in regulations on the so-called intra-community supply and acquisition of goods. According to these regulations, domestic and cross-border transactions are subject to two completely different VAT taxation systems. As a result, businesses engaged in cross-border trade incur higher compliance costs compared to businesses engaging in purely domestic trade. Moreover, by allowing cross-border acquisitions of goods without charging VAT, the rules create a particular risk of fraud. Thus, the current VAT system in the European Union has significant shortcomings which make it vulnerable to fraud, resulting, in particular, in losses of government revenue and unequal market conditions for the operation of the single market. Finally, it results in a competitive disadvantage for honest taxpayers. The current VAT system in the European Union, therefore, needs to be changed.

The definitive system, on the other hand, assumes that goods are taxed in the country where they are produced, regardless of whether the place of final consumption of these goods is in the same or another Community country. This system, therefore, treats domestic supplies from the VAT point of view in the same way as it treats supplies to other Member States. The consequence of this system, from

[5] I. Andrzejewska-Czernek, *Wykładnia prawa podatkowego Unii Europejskiej dokonywana przez sądy administracyjne oraz organy administracji podatkowej*, in: *Sądowa kontrola administracji w sprawach podatkowych*, eds. B. Brzeziński, J.P. Tarno, Warszawa 2011, p. 18.

the fiscal point of view, is that the VAT due on the supplies is credited to the budget of the country from which the goods are sold to the rest of the Community.

In this respect, the application by individual EU countries of not only various reduced VAT rates for selected products, but also the application of the standard VAT rate at different levels, is of great significance. These issues imply the need to seek legislative solutions so that the taxation of these economic phenomena does not disrupt the proper functioning of the common market.

Characteristics of the Tax Harmonisation Process Within the European Union

The harmonisation process depends on the type of public duty levied by each Member State. Some public levies are subject to full harmonisation within the European Union (e.g. customs duties), indirect taxes are subject to partial harmonisation and direct taxes have been harmonised to a limited extent. It should be noted that with regard to certain public levies (e.g. local taxes) Member States retain almost full freedom of regulation.

The above differences result from the impact on external relations and the economic situation of individual Member States (in particular, the ratio of public expenditure as well as the overall level of taxation to GDP). The individual economic situation of countries associated with large differences between EU members affects the very targeted tax harmonisation process in the Union.

There should be no doubt that only the removal of barriers and differences between the tax systems of individual Member States will make it possible to realise the concept of the internal market. The complicated system of tax barriers (often explained as an element of state tax sovereignty) is a very significant barrier to an internal market based on free competition between EU entrepreneurs.

Treaty Bases for the Harmonisation of VAT

The harmonisation of tax legislation is not in itself one of the main cooperation activities within the European Union. In the Treaty on the Functioning of the European Union (TFEU), this area is not mentioned as falling within the exclusive competence of the Union (Article 3), nor is it mentioned as one in which the Union shares competence with the Member States (Article 4).

As a result, this area is of a limited nature. This is because the power to shape taxes is a prerogative of the Member States, assessed through the prism of State sovereignty. In turn, this means that measures taken at European Union level require the unanimous agreement of those states. They are therefore implemented

to the minimum necessary in accordance with the principle of subsidiarity as expressed in Article 5 of the Treaty on European Union.

Particular importance must be attached to the following articles of the TFEU, in which we find explicit reference to taxation: Articles 65(1) and (4), 110–113, 114(2), 173(3), second sentence, 223(2). Articles 21, 29, 30–32, 34–37, 45, 49–55, 56, 63 and 65 TFEU also provide a normative benchmark for national tax law.[6]

An important role in the context of the general objectives of tax harmonisation should be attributed to Articles 110–113 TFEU. Articles 111 and 112 TFEU, on the other hand, are complementary to Article 110 and prohibit the subsidising of exports through the use of the tax system for this purpose.[7]

The jurisdictional basis for the harmonisation of tax laws is not only Article 113 TFEU, concerning the harmonisation of legislation relating to turnover taxes, excise duties and other indirect taxes in so far as such harmonisation is necessary to ensure the establishment and functioning of the internal market and to avoid distortions of competition, but also Article 114 TFEU, under which measures shall be adopted for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.[8]

Article 113 TFEU states that the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopts provisions for the harmonization of laws. The extent of this harmonization relating to turnover taxes, excise duties and other indirect taxes is to ensure the establishment and functioning of the internal market and to avoid distortions of competition.[9]

Article 114 TFEU confers upon the EU the competence to enact 'measures for the harmonisation of national rules regarding the establishment and functioning of the internal market. Whenever a proposal is concerned with consumer protection (which is often the case), the EU legislature must seek a 'high level' of such protection.

The analysis of the above provisions leads to the conclusion that taxation issues have been regulated in the Treaty in a relatively cautious and limited way, so

---

[6] B. Brzeziński, M. Kalinowski, *Prawo podatkowe Wspólnoty Europejskiej*, ODDK, 2005, p. 12.

[7] D. Dominik-Ogińska et al., *Harmonizacja prawa podatkowego w Unii Europejskiej*, Vol. 21, 1st edition, Warszawa 2011, pp. XXI–4.

[8] D. Mączyński, *The Impact of Judgments of the Court of Justice of the European Union on the Drafting of Provisions on Other Public Levies*, in: *The Impact of the Judgments of the Court of Justice of the European Union on the Drafting of Polish Tax Law*, Warszawa 2021; E. Juchniewicz, *Prawo podatkowe Unii Europejskiej*, in: *System prawnofinansowy Unii Europejskiej*, eds. A. Drwiłło, A. Jurkowska-Zeidler, Warszawa 2017.

[9] L. Oręziak, *The Evolution of the Process of the Harmonization of Value Added Tax (VAT) Within the European Union*, https://doi.org/10.33067/SE.4.2020.5.

as not to encroach on the competences of the Member States. However, the lack of explicit competence over direct taxation conferred by the Treaties may raise legitimate doubts. On the other hand, the general formulation of Article 113 TFEU and its accessory nature is an obvious indication that EU action will primarily concern tax implications in cross-border relations. Such scope is primarily related to trade and thus transactions across the European Union. This character has to be attributed to indirect taxes (VAT, excise duties and other turnover taxes).

A distinction should also be made between EU rules and procedures that do not explicitly refer to taxation, but give Member States powers to harmonise. The following should be noted in particular:

– the regulations relating to the concept of a common market establishing an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured (Article 26 TFEU)
– the competence of the European Union to establish competition rules for the functioning of the internal market (Article 3(1)(b) TFEU)
– shared competence with the Member States as regards other internal market issues (Article 4(2)(a) TFEU)
– provisions conferring on the Council the power to adopt directives 'for the approximation of such laws, regulations and administrative provisions of the Member States as directly affecting the establishment or functioning of the internal market'
– the consultation procedures provided for in Articles 116 to 117 TFEU as well as the power of the European Parliament and the Council to adopt appropriate measures if the consultations do not result in an agreement.

Indirect Tax Harmonisation Process in the European Union

The process of the harmonisation of indirect taxes in the European Union began in the late 1960s and early 1970s. Already in the findings of the so-called Neumark Commission[10] of the early 1960s, assumptions were made concerning income taxes. These concerned, in particular, the cross-border nature of taxation and the adoption of the principle that it should be related not to goods or services, but to income.[11]

It should be recalled that from the outset the bodies of the European Communities attached particular importance to the harmonisation of the three taxes. References to VAT harmonisation can already be found in the founding acts of the

[10] In 1960, the Fiscal and Financial Committee was appointed under the chairmanship of Fritz Neumark to study tax harmonization. The Committee's findings are contained in EEC Commission (1963).

[11] W. Modzelewski, *Harmonization of Tax Systems in the European Union*, "Olympus: Scientific Journal" 2008, No. 1, pp. 58–69.

European Community. In particular, in the Agreement on the establishment of the European Economic Community, in the chapter entitled 'Provisions Concerning Taxation', we find provisions in which the Member States undertook not to subject products from other Member States to a national direct or indirect tax in excess of that imposed directly or indirectly on similar domestic products.

At the same time, Member States have undertaken that none of them will tax the products of another Member State with any national tax which would indirectly protect other products. The agreement on the establishment of the European Economic Community stressed that, in the interests of the common market, the European Council would consider how to harmonise legislation on turnover tax, excise duties and other forms of indirect taxation. It should be pointed out that the subject of tax harmonisation has become increasingly important with the accession of subsequent states to the European Union. It follows from the above that the European Community has been striving for tax harmonisation from the very beginning. One of the first postulates put forward was to create a common one. Therefore, harmonisation first of all affected the taxes conditioning the free movement of goods (VAT, excise duty).

In the first stage, the introduction of VAT in all Member States was considered, and in the second stage the introduction of uniform legislative regulations and the harmonisation of VAT rates were considered. It should be recalled that of the six countries that established the European Economic Community in 1958, five applied cumulative taxes. Their disadvantage was that part of the input tax was de facto a tax at subsequent stages of marketing, resulting in an additional increase in price. The cumulative system encountered frequent criticism, notably from a working committee appointed by the European Commission as well as the Fiscal and Finance Committee. This situation has contributed to the preparation and implementation of common rules for the operation of the system, which would provide a framework for the regulation of individual Member States.

First Council Directive 67/227/EEC of 11 April 1967[12] on the harmonisation of the laws of the Member States relating to turnover taxes obliged the Member States to replace (by 1.1.1979) their existing individual turnover tax systems with a new type of value added tax. In accordance with Article 2(1) of Council Directive 67/227/EEC, the principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

[12] Council Directive No. 67/227/EEC of 11 April 1967 on the harmonization of the laws of the Member States relating to turnover tax, Official Journal EC L 71, p. 1301. Directive as amended by Directive 69/463/EEC, OJ. WE L 320, p. 34.

This provision therefore underpins the fundamental features of VAT:
1) universality
2) effective taxation of consumption
3) application of the tax to goods and services at all stages of economic turnover.

The Directive provided for a common system of VAT based on the fact that a general excise duty would be applied to goods and services in proportion to the price of the goods and services, regardless of the number of operations carried out in the production and distribution process.

It should be pointed out that Article 3 of the directive in question provided for the adoption of another act of the same rank, which would regulate in a more detailed manner the principles of application of VAT (*inter alia*, the definition of taxable transactions, taxable bases, time and place of tax obligation).

On the basis of this provision, the Council adopted the Second Directive 67/228/EEC on the structure and methods of application of the common system of value added tax, laid down the general structure of this tax.[13]

The purpose of the Second Directive was to define the structure of the common VAT system and the procedure for its application. On the basis of this directive, it was indicated that the supply of goods and services within the territory of the country for remuneration and the importation of goods are subject to tax on goods and services. Significantly, the introduction of different VAT rates as well as mechanisms facilitating tax avoidance were left to individual Member States.

The implementation of VAT regulations has been met with resistance from Member States due to the fear of threatening state budget revenues. For this reason, the following directives were adopted:[14]
– the Third Council Directive No. 69/463/EEC, which extended the period for the introduction of value added tax in Belgium until the end of 1972.
– the Fourth Council Directive 72/250/EEC and Fifth Council Directive 72/250/EEC, which progressively extended the period for the introduction of value added tax in Italy until the end of 1973.

It was not until the Sixth Council Directive 77/388/EEC of 17.5.1977 on the harmonisation of the laws of the Member States relating to turnover tax, creating a common system of value added tax.[15] However, border controls were maintained

[13] Council Directive No. 67/228 / EEC of 11 April 1967 on the structure and methods of applying the common system of value added tax, OJ. WE L 71, p. 67.

[14] K. Prievozníková, K. Červená, A. Románová, Wybrane aspekty harmonizacji podatku od wartości dodanej w ramach UE, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego" 2014, nr 84.

[15] Council Directive No. 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – common system of value added tax, Official Journal EC L 145, p. 1. Directive as last amended by Directive 2006/69, OJ. WE L 221, p. 9.

in order to make border tax adjustments for differences in VAT rates between Member States. According to the Member States, abolishing border controls would have negative economic, administrative and political consequences.

The Sixth Directive provided that the sale of goods and provision of services within the territory of the country by a person liable for VAT and the importation of goods were subject to VAT. The Directive defined as taxable persons all persons who independently carry out any economic activity, which includes activities relating to production, trade and the supply of services – regardless of the purpose of the activity.

The concept of creating a common market was further developed in the Single European Act[16] adopted in 1985. It reaffirmed the need to harmonise indirect taxes in the implementation of the internal market.[17]

The Single European Act was based on the European Commission's White Paper on completing the single internal market of June 1985. The White Paper included a number of directives that were intended to harmonise particular issues, such as tax refunds for entities established or resident outside the Community, or tax exemptions for the carriage of goods in small consignments of a non-commercial character.

Moreover, in June 1985, the Commission published its strategy for the establishment of the single European market – Completing the Internal Market – setting 1 January 1993 as the date for abolishing border controls between Member States. The Commission's aim was to harmonise the legal systems of the states towards a single economic area. Initially this solution did not meet with the approval of Member States because its implementation would reduce differences in national VAT rates.

During its period of application, i.e. until 31.12.2006. The Sixth Directive was amended dozens of times. The most important changes occurred in connection with the introduction of a single internal market on the territory of all Community countries on 1.1.1993.

Further work on harmonization, the need to abolish border controls, as well as the accession of subsequent countries to the European Union contributed to the adoption of Council Directive 91/680/EEC of 16.12.1991 (which amended the Sixth Directive)[18] and Council Directive 92/77/EEC of 19.12.1992 on completing the common system of value added tax and amending the Sixth Directive (which

---

[16] Single European Act of 17 February 1986, O.J. L 169, 1987 – amendment to the Treaties of Rome, ratified in 1987. The signatories were: Belgium, Denmark, France, Greece, Spain, the Netherlands, Ireland, Luxembourg, Portugal, Germany, Great Britain and Italy.

[17] B. Brzeziński, M. Kalinowski, *Prawo podatkowe Wspólnoty Europejskiej*, „ODDK" 2005, p. 14.

[18] Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers OJ EU.L.1991.376.

amended the Sixth Directive) as well as Council Directive 92/77/EEC of 19 December 1992 on supplementing the common system of value added tax and amending the Sixth Directive – approximation of tax rates.[19]

According to the amendments – it was established that the standard rate of tax should not be lower than 15%, and each Member State could maintain one or two reduced rates, but not lower than 5%. These rates could be assigned to goods and services of a social or cultural nature (e.g. food, medicines, books, newspapers and magazines, passenger transport services).

Then, by virtue of the provisions of Directive 91/680/EEC, many provisions regulating taxation of intra-Community transactions were introduced to the Sixth Directive. Significant changes to the Sixth Directive were also introduced by Directive 2001/115/EC, which among others, allowed the possibility of issuing and storing invoices in electronic form.

The other principal amendments to the Sixth Directive are:

– Directive 89/465/EEC of 18 July 1989, abolishing certain derogations.
– Directive 91/680/EEC of 16 December 1991, introducing the Single Market transitional provisions.
– Directive 92/77/EEC of 19 October 1992, on the approximation of VAT rates.
– Directive 92/111/EEC of 14 December 1992, providing certain simplification measures for the VAT transitional system.
– Directive 94/5/EC of 14 February 1994, concerning special arrangements for second-hand goods, works of art, etc.
– Directive 95/7/EC of 10 April 1995, providing certain simplification measures for the VAT transitional system.
– Directive 96/95/EC continuing a minimum standard rate of VAT throughout the EC.

The introduction of the Internal Market within the EU created the need for further harmonisation of value added tax within the Community. 'In 1996 the Commission prepared a document entitled "The Common VAT System: The Common Market Programme"'.[20]

In the document, the Commission noted that work should focus on harmonising VAT rates in the Member States and on tightening up the entire system to ensure that VAT covers all transactions carried out within the Community.[21]

---

[19] Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC OJ. EU. L. of 1992 No. 316, p. 1.

[20] COM (1996) 328 final.

[21] A. Cieśliński, *Wspólnotowe prawo gospodarcze*, Warszawa 2007.

Proposals to tidy up, unify and simplify the provisions of the Sixth Directive were presented by the Commission in April 2004.[22] As a result of the work in progress, the text of Council Directive No. 2006/112/EC of 28.11.2006 on the common system of value added tax was prepared, which entered into force on 1 January 2007.[23] It repealed 34 previous directives in the field of turnover tax, including the First and Sixth Directives, implying their provisions into its content.[24]

Harmonisation of Excise Duties

Excise duty has been subject to harmonisation since the beginning of the European Economic Community, although it has been subject to the harmonisation process to a slightly lesser extent than VAT. This is because from the outset it was assumed that competition in trade in goods between Member States would be eliminated. Initially, proposals were put forward to maintain excise duties of relatively high importance in the budget revenues of individual countries (excise duties on alcoholic beverages, tobacco products, mineral oils), while at a later stage, proposals were made to maintain local consumption taxes without harmonisation, as they had no significant impact on the competitiveness of products from individual countries in international trade.

The aim of excise harmonisation was to create the conditions for the free movement of excise goods within the common market. The difficulty of the task was to allow the circulation of excise goods while ensuring appropriate supervision over them. This difficulty arises, *inter alia*, from the numerous obstacles encountered in the process of harmonising excise duty, namely the wide-ranging differences in excise duties, the different forms and techniques of collecting this duty and the different tax rates in the individual Member States. The harmonisation process was also hampered by the fact that in some countries excise duty revenue belongs to the national budget, while in others it is revenue for local budgets. In addition, in some countries some excise goods are the privilege of the sovereign state authority. In any case, the Commission presented its first draft in 1972, which provided for the harmonisation of excise duty on mineral oils, processed tobacco, spirits, beer and wine. The draft provided for the elimination of all barriers to trade in products that do not require border controls.

The basic legal standards for excise duties have historically been constituted by directives and regulations:

---

[22] COM (2004) 246 final.

[23] Council Directive No. 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal WE L 347, p. 1.

[24] *Mechanisms of European Integration*, 4th Congress of Scientific Circles of the University of Adam Mickiewicz in Poznań, Poznań 2015.

– Council Directive 69/169/EWG of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel[25]
– Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products[26]
– Commission Regulation (EEC) No 2719/92 of 11 September 1992 on the accompanying administrative document for the movement under duty-suspension arrangements of products subject to excise duty[27]
– Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco[28]
– Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils[29]
– Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages[30]
– Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duty on mineral oils[31]
– Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages[32]
– Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes[33]

---

[25] Council Directive 69/169/EWG of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel, OJ EC L 133, p. 6.

[26] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ EC L 359, p. 30.

[27] Commision Regulation (EEC) No 2719/92 of 11 September 1992 on the accompanying administrative document for the movement under duty-suspension arrangements of products subject to excise duty, OJ EC L 276, pp. 1-10.

[28] Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, OJ EC L 303, p. 1.

[29] Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils, OJ EC L 316, p. 12.

[30] Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, OJ EC L 316, pp. 21–27.

[31] Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duty on mineral oils, OJ EC L 316, p. 19.

[32] Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages, OJ EC L 316, pp. 29–31.

[33] Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes, OJ EC L 316, pp. 8–9.

– Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes.[34]

The doctrine points out that the extent of harmonisation in excise duties, to a greater extent than for VAT, allows Member States to define the scope of taxation autonomously.[35]

It is also worth pointing out that the application of the country of destination principle to excise duty taxation does not, in many cases, make it possible to bring about a real equivalence in terms of taxation between the competitiveness of the same goods manufactured in different countries when excisable raw and auxiliary materials are used in their manufacture. Therefore, when excises cover goods both for final consumption and for further production, harmonisation is a necessary process in a relatively short period of time. On the other hand, with regard to excises applied only to consumer goods, this matter does not seem to be so necessary.

References

Andrzejewska-Czernek I., *Wykładnia prawa podatkowego Unii Europejskiej dokonywana przez sądy administracyjne oraz organy administracji podatkowej*, in: *Sądowa kontrola administracji w sprawach podatkowych*, eds. B. Brzeziński, J.P. Tarno, Warszawa 2011.

Brzeziński B., Kalinowski M., *Prawo podatkowe Wspólnoty Europejskiej*, ODiDK, 2005.

Cieśliński A., *Wspólnotowe prawo gospodarcze*, „Studia Prawnicze", Warszawa 2007.

Council Directive No. 67/227/EEC of 11 April 1967 on the harmonization of the laws of the Member States relating to turnover tax, Official Journal EC L 71, p. 1301. Directive as amended by Directive 69/463/EEC, OJ. WE L 320, p. 34.

Council Directive No. 67/228/EEC of 11 April 1967 on the structure and methods of applying the common system of value added tax, OJ. WE L 71, p. 67.

Council Directive No. 77/388 / EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – common system of value added tax, Official Journal EC L 145, p. 1. Directive as last amended by Directive 2006/69, OJ. WE L 221, p. 9.

[34] Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes, OJ EC L 316, pp. 10–11.

[35] D. Dominik-Ogińska et al., *Harmonizacja prawa podatkowego w Unii Europejskiej*, Vol. 21, 1st edition, Warszawa 2011, pp. XXI–35.

Council Directive No. 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal WE L 347, p. 1.

Council Directive 69/169/EWG of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel, OJ EC L 133, p. 6.

Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ EC L 359, p. 30.

Commission Regulation (EEC) No. 2719/92 of 11 September 1992 on the accompanying administrative document for the movement under duty-suspension arrangements of products subject to excise duty, OJ EC L 276, pp. 1–10.

Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, OJ EC L 303, p. 1.

Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils, OJ EC L 316, p. 12.

Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, OJ EC L 316, pp. 21–27.

Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duty on mineral oils, OJ EC L 316, p. 19.

Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages, OJ EC L 316, pp. 29–31.

Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes, OJ EC L 316, pp. 8–9.

Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes, OJ EC L 316, pp. 10–11.

Dominik-Ogińska D. et al., *Harmonizacja prawa podatkowego w Unii Europejskiej*, Vol. 21, 1st edition, Warszawa 2011.

Drüen K.-D., Kahler B., *Die nationale Steuerhoheit im Prozess der Europäisierung*, Steuer und Wirtschaft, 2005.

Juchniewicz E., *Prawo podatkowe Unii Europejskiej*, in:, *System prawnofinansowy Unii Europejskiej*, eds. A. Drwiłło, A. Jurkowska-Zeidler, Warszawa 2017.

Kuraś Z., *Harmonizacja systemów podatkowych państw członkowskich Unii Europejskiej*, „Studia Gdańskie" 2009, Vol. VI, pp. 229–243.

Mączyński D., *Bezpośredni wpływ orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej na stanowienie prawa podatkowego w Polsce (wstęp do badań)*, Poznań 2019.

Mechanisms of European Integration, 4th Congress of Scientific Circles of the University of Adam Mickiewicz in Poznań, Poznań 2015.

Modzelewski W., *Harmonization of Tax Systems in the European Union*, "Olympus: Scientific Journal" 2008, No. 1, pp. 58–69.

Mudrecki A., *Rola sądów administracyjnych w harmonizacji podatków w Polsce*, in: D. Dominik-Ogińska et al., *Harmonizacja prawa podatkowego w Unii Europejskiej*, Vol. 21, 1st edition, Warszawa 2011.

Mudrecki A., *Zasada proporcjonalności jako element konstrukcji podatku od towarów i usług w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej i Naczelnego Sądu Administracyjnego*, „ZNSA" 2020, No. 5.

Nerudova D., *Harmonization of Tax Systems of European Union Countries*, 2005.

Oręziak L., *Konkurencja podatkowa i harmonizacja podatków w ramach Unii Europejskiej: implikacje dla Polski*, Warszawa 2007.

Oręziak L., *The Evolution of the Process of the Harmonization of Value Added Tax (VAT) Within the European Union*, https://doi.org/10.33067/SE.4.2020.5.

Prievozníková K., Červená K., Románová A., *Wybrane aspekty harmonizacji podatku od wartości dodanej w ramach UE*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego" 2014, nr 84.

Single European Act of 17 February 1986, O.J. L 169, 1987 – amendment to the Treaties of Rome, ratified in 1987.

Witold Modzelewski

University of Warsaw, Poland

biuro@isp-modzelewski.pl

ORCID: 0000-0002-6449-9897

VAT Harmonisation: Pathologies of the Process or a Pathological Process?

Abstract

The article deals with how the harmonisation of value-added tax translated in the period 2004–2021 into a lower fiscal efficiency of VAT, given the unprecedented scale of tax evasion and the extortion of undue refunds. This appears to have been characteristic of most of the EU versions of VAT, compared to those elaborated in non-Member States, including Poland's VAT that was in force in 1993–2004. Protection of the fiscal interest of Member States is not the officially declared objective behind the harmonisation, and they have only had a narrow margin of freedom to develop their own legal solutions to this end. Most of the pathological phenomena that have durably debilitated the fiscal efficiency of VAT were developed based on legal solutions launched resulting from the implementation of the EU solutions. Also, all the essential legal solutions conceived to restrict such pathologies ensuing from the implementation of the EU solutions – such as the boundary payment of VAT related to intra-Community purchase of certain goods, and obligatory split payment – have been considered contrary to, or deviating from, the laws of the EU. The author poses the question whether efficient eradication of VAT evasion and fraud in line with the EU laws is at all possible. He aptly observes that most of the 'sealing' actions have proved (in Poland and elsewhere) to be apparent or ostentatious – to mention the telling example of the national reverse charge mechanism in force in Poland from 2011 to 2019.

Keywords: EU laws, VAT harmonisation, reverse charge, fiscal efficiency of tax, tax evasion, tax fraud, tax refund, fraudulent returns/refunds, pathological effects of VAT harmonisation, good or bad faith in VAT harmonisation

1. A characteristic of the Community – that is, harmonised – versions of the value-added tax is, unimpeachably, their lower fiscal efficiency compared to the versions elaborated in non-EU countries.[1] This is particularly true with the VAT that was in force in Poland from 1993 to 2004,[2] proving much more productive fiscally and incomparably less pathology-inducing compared to the Community version launched in 2004.[3] The lower fiscal efficiency is due not so much to the differences in rate models, for the rates are quite similar (the basic rate is approx. 18%–27%, the reduced rate for most foodstuffs and medicaments, financial services exempted, tax refunds for exports of goods and services). The actual reason is the actual acquiescence (deliberate or owing to incompetence) to:
   – organised fraudulent VAT returns, carried out through apparent or sham, bogus or fictitious foreign transactions, especially intra-Community deals (intra-Community supply/delivery of goods [ISG/IDG])
   – the scale of tax evasion, much larger than in the other VAT versions, resultant from legal as well as illegal actions.

They both result mainly from the application of the legal solutions launched as the EU law was implemented.[4] The list of these solutions is known and has been described in the literature on tax law and reports compiled for the public authorities.[5] Let me then show, as an example, presumably one of the most spectacular examples of Community solutions whose implementation irreversibly reduced at that time, for eight years, the fiscal efficiency of VAT and implied the development of new methods of refund extortion. This exemplary solution, which was outright recommended by Directive 2006/112/EC, and in 2011–2019 led to an objective reduction in VAT in Poland and encouraged the dissemination of new tax frauds, was the so-called national reverse charge mechanism (Directive 2006/112/EC, Article 199(a)). Let me come back to the fact that its application was believed to help prevent tax fraud (sic!). I cannot believe that those who made

[1] The published tax gap data (marking the difference between the potential and actual income) for European states as of 2010–2018 confirm the argument that EU Member States, having applied the Community version of VAT, have incurred, on average, a materially higher loss in the related revenue/income compared to the countries where a non-Community version is binding.

[2] The Value-Added Tax and Excise Tax Act of 8 January 1993 (i.e. Journal of Laws of 1993, No. 11, item 50, as amended).

[3] The Value-Added Tax Act of 11 March 2004 (Journal of Laws of 2020, item 106, as amended).

[4] Initially, the Sixth Directive and thereafter, Directive 2006/112/EC of 28 November 2006 on the common system of value added tax; implemented by ECJ.

[5] See, *inter alia*, W. Modzelewski, *Mechanizm podzielonej płatności w podatku od towarów i usług. Problematyka prawna*, Warszawa 2020, pp. 1–21; *Raport na temat przyczyn, skali i metod wyłudzeń podatku od towarów i usług w latach 2007–2015 oraz odpowiedź Ministerstwa Finansów i podległych mu struktur i służb*, Instytut Studiów Podatkowych, 2018.

these regulations were so naive that they could have said or written something like that in public, on a *bona fide* basis. After all, even a rather simple analysis of the principle and rationale behind this solution enables one to identify its thoroughly negative impact on VAT's fiscal efficiency, along with its pathology-inducing effects that facilitate and extend the potential for new forms of tax fraud aimed at gaining fraudulent returns and evasion of the tax.

Let me recall, at this point, what the essence of the problem is: earning budgetary income in the Community, and any other, version of VAT (and other sales/turnover taxes) is conditional upon indirect charging of the purchaser/service recipient by an increase in the arm's-length price of the taxed goods/service by the inclusion of the output tax amount (passing the applicable tax on). The obvious condition for such a solution is that only the supplier or service provider is recognised as the taxpayer (taxable person), with the purchaser/service recipient thereby becoming taxpayers (taxable persons) 'in economic terms only', since they actually bear the tax's economic burden through passing the tax on, whereas:

- For consumers to whom the tax burden has been passed on, any such entity cannot pass such a burden to any other entity whatsoever.[6]
- The taxpayer being the purchaser/service recipient of taxed goods or services may not only pass the tax burden on to another taxpayer (being the purchaser of goods sold or service provided by the passing party), but also, in economic terms, as far as VAT is concerned, only pay the tax liability at the amount of difference between the burden that they have borne and the nominal tax burden incumbent on the same (through reduction of the output tax by the input tax, according to the economic neutrality principle).[7]
- For the taxpayers performing supplying goods or rendering services outside the country or to the taxpayers residing outside the said country, the entire burden of indirect taxation of these entities is returnable to the said taxpayers (tax refund).

The reverse model of VAT (hence 'reverse burden') – where the taxpayer (taxable person), in both legal and economic terms, is the purchaser or service recipient only (tax on purchase of goods/services) – has never been commonly launched into practice. In fact, it is unfeasible in objective terms: there are thousands more purchasers/service recipients, whether or not they are taxpayers conducting a business, than fiscally important suppliers or service providers, the taxation of which determines the amount of the related budgetary revenue. The national reverse VAT

[6] Instead, the burden of the tax may be 'rejected' through demanding an increase in remuneration or other revenue expended on consumption.

[7] The general conception of VAT essentially consists in the actual elimination of any indirect taxation (passing the tax burden) of the taxpayers that perform actions that give the right to have the tax deducted.

charge was (if not has been) an attempt to partly introduce the model in the trading with taxpayers, with the obvious results being:

- The entity being the supplier or service provider performs a taxed action which on its part implies no output tax; however, such entity has to have the right to have the input tax related to such an action refunded. As a result, the entity's status is, objectively, no different from that of a taxpayer performing an action taxed at the rate of 0%, and it has the identical right to have the tax refunded.
- The tax liability is incumbent on the taxpayer being the purchaser of goods or recipient of a service to which the reverse charge extends, related to such an action. What it means is that, in legal terms, an actual output tax appears with no correspondence to the real events, which, however, is an input tax in the case that the goods/service to which the reverse charge pertains are meant to serve the purchaser/service provider of the action giving the right to deduction.[8]

Furthermore, this means that, while not actually being taxed (implying no tax liability), the actions covered by the model in question do imply the obligation to refund the supplier's/service provider's input tax in its entirety, thus causing an objective and durable gap in the budgetary revenue related to such actions. What would, then, be the 'sealing' effect of such a solution? This remains the secret of those who devised and recommended it.[9] In parallel, any entity supplying goods/providing services to which the reverse charge is pertinent may use such an action to gain refunds both due and undue through multiple sale and repurchase of goods/services to which the solution applies (so-called steel deals).[10]

2. The question thus arises whether the EU law solutions that favoured, enabled or outright suggested the types of behaviour resulting in tax evasion or offered the possibility of defrauding undue refunds, as eventually implemented in the Polish law, were conceived out of someone's incapacity or incompetence or were launched in bad faith? Usually, an evasive or a vague reply can be heard that the harmonisation of VAT has never been meant to ensure or protect its fiscal efficiency. Instead, the solution's purpose was non-fiscal (so as to ensure competitiveness and the free flow of goods, services and capital), whereas Member States are obligated, using a narrow margin of freedom left to them, and in spite of the binding EU prescriptions, to ensure the tax's fiscal efficiency on their own in a way that would not contradict these prescriptions.[11] What

[8] In a reverse charge situation, the 'taxation' of the purchaser (service recipient) is solely a registration/documenting-oriented action taken to (inaptly) camouflage the lack of effective taxation

[9] They might have as well acted in bad faith, which demonstrates – not for the first time ever – that at times the making of tax law tends to be mystification that does not have much to do with public interest.

[10] For more on this point, see, *inter alia*, *Raport na temat przyczyn…*, pp. 23–25.

[11] In a number of cases, it is a 'squaring the circle' situation since the prescription based on the EU

it apparently means is that the Community law is not to be challenged, whereas the pathologies related to VAT, especially fraud and fraudulent returns, is the responsibility of the Member States that have counteracted such phenomena incompetently or in bad faith.

Consequently, more questions need to be posed in seeking to explain the core of the problem:

1) Has the harmonisation that ignores the fundamental and paramount goal of any tax, i.e. ensuring budgetary revenue (this is what taxes are for; they are completely useless for any other purpose, such as fraudulent VAT returns), been carried out in good faith, that is, with the erroneous assumption that the pathology-inducing effects of the implementation of the Community solutions are objectively limitable or eliminable on initiative on Member States themselves?
2) Is the harmonisation of VAT that mainly aims at ensuring the free flow of goods and services between Member States objectively reconcilable with the fiscal efficiency of the same tax, even if carried out competently and thoroughly in good faith?
3) In the event that the answer to question (2) above is 'yes', have the Member States – and the Polish legislator in particular – really intended to efficiently fight the pathologies arising in this context or have they perhaps acted in bad faith or were extremely incompetent?

It is undisputable that all, or at least part, of the relevant legal solutions that were meant to efficiently oppose the limitation of the VAT-related pathologies have been regarded as contrary to the Community laws; otherwise, their implementation required consent for deviation from EU authorities. (This concerned two solutions: the boundary payment of VAT related to intra-Community purchase of certain goods and obligatory split payment.)

The question about good or bad faith on the part of the public authorities, on the Community as well as national level, related to actions aimed at eliminating or limiting tax evasion and fraudulent returns proves particularly legitimate given the occurrence of the following never-before-known facts:

1) The recognition by national public authorities and EU authorities of entities professionally dealing with tax evasion ('tax optimisation') as essential, number-one experts in rectifying ('sealing') the VAT/
2) Hiring as officials individuals representing tax evasion business, who never severed their ties with the tax business specified in (1) above.

---

law implies an unconditional gap that might only be eliminated through no implementation of this prescription.

3) The appearance of so-called legislative investments, implying efficient influence on tax regulations by stakeholders who thereby gained legal tax benefits ('investments in the legislative market').

3. There are three main, outright conceptual reasons behind the lower tax efficiency of the EU version of VAT:
   1) Relative to the obligation to harmonise the VAT, Member States had inherently defective basic rules of the tax's structure superimposed, in particular:
      – Intra-Community supply of goods: in spite of numerous 'improvements', the solution seems to merely invite tax fraud resulting in fraudulent returns. Apparently, the EU legislator is (deliberately) persistently helpless with regards to these pathologies.
      – Intra-Community purchase of goods – in particular, the right to have the related input tax deducted. In delivering the legislator's instructions implementing the EU law, the taxpayer is only meant to disclose the registered output tax, which in the same settlement period is also the input tax, should the piece of commodity have been purchased in order to perform an action giving the right to deduct the VAT. This means that such an action is not effectively taxed, which directly encourages common 'broken price' fraud.[12]
      – The reverse charge option applicable in domestic trading (as aforementioned), which additionally extends the potential for a fraudulent refund. The goods to which this solution pertains do not even have to be fictitiously exported into another country for undue refunds to be extracted. The supply/delivery may actually take place, whilst the output tax is inherently fictitious.
      – The assumption of the essentially pathology-inducing 'place of delivery/supply' concept for services rendered to taxpayers (service recipients) being foreign entities: such a 'place' is the registered office/place of business, thus offering the unlimited possibility of evading tax and defrauding undue refunds by service providers (unverifiable fictitious offices/places of business of the service recipients outside the country concerned).
   2) The 'law-making' activity of the ECJ, which all too often decides that the law of a Member State or its interpretation aimed at rectifying the deficiencies of EU solutions or increasing the fiscal efficiency of VAT as well as eradicating tax fraud (emerging owing to the solutions imposed by the EU), is basically 'contrary to the laws of the EU'.

[12] This kind of fraud essentially consists in supply of goods by a fictitious entity that has made an intra-Community purchase below the net purchase price, with losses on the deal funded by the unpaid output tax due on the supply.

3) No national legal solutions have been adopted that would have opposed tax evasion or fraudulent returns with use of implemented Community solutions. The years 2004–2016 in Poland are a brilliant example of legislative forbearance or apparent actions, stemming probably not merely from incompetence or incapacity, or, not less probably, a bad faith action.

Particularly thought-provoking has so far been the indiscriminate (to put it mildly) attitude towards the legal solutions implemented particularly with respect of VAT among some expert, and even scholarly, circles. Initially, in 2003–2007, I accepted invitations to sessions of parliamentary committees or subcommittees dealing with bills regarding VAT. These meetings were dominated by experts (lobbyists, perhaps) who saw to it that the Community solutions were implemented without securing, in any way whatsoever, the fiscal interest of Poland. Their opinion was that those provisions from the directives that had, to their minds, been implemented ought to be made part of the VAT Act of 11 March 2004; those who pointed to the pathology-inducing effects of such solutions were not even allowed to take the floor. Until 2016, no real legislative action was taken in view of protecting the public interest, though the absolutely unprecedented scale at which VAT evasion and fraud were taking place – exactly based on the implemented the EU solutions and with the legislator's inactivity in counteracting these pathologies – could not be hidden anymore.

The years 2016–2019 saw the adoption and implementation of merely two fiscally effective solutions in Poland in order to restrict, if not eliminate, the pathological effects of the EU solutions. The first of them introduced an actual taxation of the intra-Community purchase of certain goods (Article 103a of the VAT Act of 11 March 2004[13]), being the boundary payment of VAT related to such actions; the second abolished the domestic reverse charge and launched obligatory split payment for the trading in goods and services to which this privilege thitherto pertained as well as for certain other goods (Article 108(a–d) of the said Act). These solutions restricted, in common perception, the evasion and fraud of VAT, thus contributing to a lasting increase in budgetary revenue. Let me recall that the first version of these regulations appeared in the new VAT bill prepared in 2015.[14]

Both of the said solutions were regarded as contrary to the EU laws; the former was challenged by the ECJ in its Decision of 9 September 2021 (C-855/19), whereas the latter required a deviation consent.[15]

---

[13] A list of goods and services covered by split payment regime is included in Annex 15 to the Act.

[14] The bill was compiled by Instytut Studiów Podatkowych on commission of an opposition party's electoral committee.

[15] Council Implementing Decision (EU) 2019/7310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of valued-added tax.

Incidentally, with a considerable propagandist effort, other solutions were implemented at the same time, which were described as meant to 'seal' the VAT – albeit they could imply no such effect whatsoever and, indeed, they reduced the fiscal efficiency of the tax in question.[16]

4) To conclude, the question stands out: why to develop a tax law in the name of some non-fiscal objectives to which public interest, which essentially is the amassment of budgetary revenue (the only rationale behind imposing any taxes), appears to be inferior? It looks pretty absurd: after all, bringing money that is to become a piece of budgetary revenue, rather than 'encouraging competition' or 'freedom of goods and services', is the actual purpose of taxation – and there is no other one. With any other purpose in mind, no tax ought to ever be introduced. Yet, the issue is apparently much more complex: the non-fiscal objective of harmonisation is unattainable in the event that harmonised regulations trigger or enable legalisation of pathologies such as fraudulent refunds of VAT or options for irreversible and unpunished evasion of the tax. If some competitors operating in a given market resulting from such harmonisation pay no taxes or receive undue refunds, then the declared paramount goal of the harmonisation – described as ensuring competitiveness in the Community market – is likewise unattainable.[17] Given that the paramount objective cannot objectively be implemented, what one should need to bother about a harmonisation for?

It is probably even worse: efficient legislative actions taken by Member States in view of eliminating tax fraud have oftentimes appeared contrary to the EU laws, in the light of ECJ decisions. The most telling example is the aforementioned Decision of 9 September 2021, Case C-855/19, whereby, based on some woolly argument, the ECJ gives grounds for the view that the launch in 2016 of the Polish payer's boundary payment related to the intra-Community purchase of goods in order to eliminate fraud in the fuels market contradicts the laws of the EU. This should suffice to conclude my present argument.

Yet, a remark is owed at this point to make things essentially precise. All the legislative, organisational and technical actions proposed in the recent years in view of 'sealing' the VAT should be categorised into two groups:

---

[16] These solutions are best illustrated by the attempted abolishment of VAT-7 and VAT-7K tax returns, which were to be replaced by some 'uniform control file', thus leading to computerisation of some of the ledgers or books of account. The proponents of these ideas were finally brought around that no budgetary revenue or tax refund would ever be possible without the returns, which eventually saved the latter.

[17] The final economic effect of this implementation is a higher profitability of intra-Community trading compared to domestic trading, which obviously breaches the principle of the free flow of goods and services.

1) Ostensible actions, whose sealing effect is low or insignificant; such actions stem from lobbyists' activities, particularly IT business-related ('earning on sealing')
2) Real actions that do block or hinder legal and illegal tax evasion/fraudulent refund methods.

How to differentiate between the two? The answer is overly simple: apparent actions are ardently praised by tax business, liberal commentators and opinion-forming media. Instead, real actions are noisily criticised by 'exponents of entrepreneurs'. The number-one argument against their launch is, obviously, their 'contradicting the EU laws'. The ECJ has repeatedly made efforts to confirm this observation – sincerity that calls for appreciation indeed.

References

Modzelewski W., *Mechanizm podzielonej płatności w podatku od towarów i usług. Problematyka prawna*, Warszawa 2020.

Raport na temat przyczyn, skali i metod wyłudzeń podatku od towarów i usług w latach 2007–2015 oraz odpowiedź Ministerstwa Finansów i podległych mu struktur i służb, Instytut Studiów Podatkowych, 2018.

Ewelina Toczek

Kozminski University, Poland

toczekewelina@gmail.com

ORCID: 0000-0003-0629-1331

The Use of New Technologies as a Means to Reduce the VAT Gap: The Entrepreneur's Perspective

Abstract

The aim of this paper is to show what consequences for taxpayers are associated with the introduction of solutions aimed at combating the VAT gap through the use of new technologies. Using examples of solutions introduced in Poland in the last few years, it is shown what additional obligations these new solutions create for taxpayers, what additional costs they impose on taxpayers and whether the frequency and manner of the introduction of the changes violate the principles of tax law making.

The paper uses mainly the dogmatic-legal method by analysing the legal regulations in the field of introducing solutions to combat the VAT gap, as well as by analysing the statements of authors presented in papers examining the effects of introducing solutions to combat the VAT gap in Poland.

The paper shows that besides the additional obligations imposed on taxpayers due to the introduction of new technologies to reduce VAT gaps, taxpayers were also obliged to bear the costs of adapting to the introduced changes, and the introduction of changes or new solutions was itself introduced in violation of the basic principles of tax law making in Poland.

The paper mainly focuses on the business context and does not fully examine how the solutions have contributed to reducing the VAT gap. Therefore, at the end of the paper, it is pointed out that there is a need to consider whether the introduced tools for combating the VAT gap violate the principle of proportionality, i.e. whether the public interest in the form of reducing the VAT gap is more important and outweighs the interest of taxpayers, i.e. the possibility of conducting their business activity without the need to waste time and money on additional administrative and reporting obligations to tax authorities. In addition, the paper presents and examines only selected tools introduced to combat the VAT gap and not all of them that have been implemented in the Polish tax system (including those that do not use new technologies).

In general, there has been much more literature on the tools introduced to combat the VAT gap in terms of improving state revenue efficiency than on the consequences for taxpayers. The bibliography contains several references to this issue, but the topic has not yet been thoroughly explored.

Keywords: VAT gap, new technology, taxpayer obligations, tax fraud, digitalisation

Introduction

Technology has developed rapidly over several decades, which has influenced the rapid growth of the economy. This economic development could not have occurred without the internet, which not only made it easier to access information, but also meant that large amounts of information could be made available to the general public or easily sent to specific addresses.

Technological transformation has forced changes not only in the private sector, but also in the public sector. Economic development and digitisation have meant that public administration has also begun to take advantage of the technological benefits.

In the case of tax authorities, it is digitalisation and the development of technology that has made communication with tax authorities more accessible to taxpayers – most tax returns or documents are submitted to tax authorities by electronic means. Correspondence, including official correspondence with the authorities, is also more frequent conducted by use of electronic means. New technologies have also found their way into the fight against tax fraud, particularly in VAT.

The solutions introduced to combat the VAT gap are mainly based on transferring or making available a large amount of information, which is then analysed by the tax authorities. The information transmitted relates mainly to commercial transactions, but the tax authorities also have access to bank information regarding, for instance, cash movements in the bank accounts.

It can be considered that the first tool to fight the VAT gap introduced in Poland that uses new technologies is the Standard Audit File of Tax (*Jednolity Plik Kontrolny – JPK*). Subsequently, other tools were introduced, such as the split payment mechanism, the IT System of the Clearing House (*System Teleinformatycznej Izby Rozliczeniowej – STIR*) or online cash registers.

1. VAT Frauds

The construction of VAT establishes a specific manner of determining the amount of VAT liability for a given settlement period which is based on the determination of two amounts, i.e. the amount of output tax (resulting from sales subject to VAT) and the amount of input tax (resulting from VAT-taxed purchases of goods and services made by the taxpayer for the cost of producing goods or services).[1] Where the value of output tax is lower than the value of input tax, there is a basis for the refund of overpaid VAT. The excess of input VAT over output VAT may occur, for

[1] P. Kardas, *Prawnokarne aspekty uchylania się od wykonania zobowiązania podatkowego w podatku VAT – oszustwo skarbowe czy oszustwo klasyczne?*, „Prokuratura i Prawo" 2006, No. 5, pp. 28–49.

instance, in the case of domestic purchases taxed at the standard VAT rate and further sales of those goods as part of an intra-Community supply of goods, which may be taxed at the rate of 0%.[2] VAT fraud is committed both by criminal groups and by taxpayers who want to reduce VAT amount due to the tax authorities.

VAT evasion by criminal groups takes place through so-called tax carousels or VAT carousels. Carousel fraud is defined in practice and in doctrine as a specific type of tax fraud, usually related to trade in goods, and as a fraud using cross-border trading patterns.[3] A tax carousel is a structure of several or more entities which, under the guise of legitimate business transactions, claim VAT refunds not paid at an earlier stage of trade.

The dishonest taxpayers frequently try to reduce the amount of VAT due by understating the sales that are subject to VAT or by understating VAT rates. In the case of retail sales, taxpayers understate the VAT taxable amount by failing to record sales on a cash register (in practice, not issuing receipts to the purchaser). In the case of trading with other VAT taxpayers, the taxable base is understated by not issuing VAT invoices. Such entities, by not recording such transactions for VAT purposes, may sell goods cheaper – without applicable VAT amount, which they do not have to pay to tax authorities due to the lack of reporting. Considering the above, dishonest taxpayers are also a source of unfair competition.[4]

VAT frauds, in particular those involving the deduction of input VAT, had led to the widening of the VAT gap in Poland as well as in other EU Member States. The VAT gap is defined in the literature as 'lost VAT revenue for the state budget'[5] or as 'the difference between potential tax revenue for the state budget and the amount of tax actually paid by taxpayers'.[6] The VAT gap is not only affected by criminal activities of organised groups or tax evasion of dishonest taxpayers, but VAT fraud is considered to be its main source.

The situation related to the widening of the VAT gap, particularly between 2008 and 2012, caused the search for solutions to reduce budget losses in VAT. The VAT gap is a permanent feature of VAT, therefore, the tax authorities and the legislator, as a rule, strive to reduce the VAT gap rather than eliminate it.[7]

---

[2] W. Kotowski, *Karuzele podatkowe*, in: I. Ożóg (ed.), *Przestępstwa karuzelowe i inne oszustwa w VAT* (pp. 19–33), Warszawa 2017.

[3] Ibidem.

[4] A. Deresz, M. Podstawka, *Mechanisms of tax Frauds Based on VAT*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu. Finanse Publiczne" 2015, No. 403, pp. 42–53, https://doi.org/10.15611/pn.2015.403.04.

[5] M. Majczyna, *Odwrotne obciążenie a oszustwa w VAT*, in: I. Ożóg (ed.), *Przestępstwa karuzelowe...*, p. 329.

[6] R. Koszewski, B. Oręziak, M. Wielec (eds.), *Identyfikacja przyczyn przestępczości w wybranych obszarach gospodarki w Polsce i na świecie*, Warszawa 2020, p. 58.

[7] M. Budzyński, *Fiscal Aspects of Value Added Tax in Poland*, "Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia", 2016, No. 1(50), pp. 611–619, https://doi.org/10.17951/h.2016.50.1.611.

The first solution introduced by the Polish legislator in order to increase the fiscal efficiency of VAT can be considered the introduction and subsequent expansion of the reverse charge mechanism in domestic transactions.[8] The domestic reverse charge mechanism was introduced in Poland in 2011.[9] The reverse charge mechanism was (and still is) applied for settling intra-Community goods transactions (intra-Community acquisition of goods and intra-Community supply of goods). As in the case of intra-Community transactions, in the domestic reverse charge mechanism output VAT was charged by the purchaser and at the same time this amount was deducted by this purchaser as input VAT.

Another solution introduced in Poland in 2013[10] in order to avoid irregularities in VAT settlements was the mechanism of joint and several liability. Joint and several liability consists of the liability of the buyer of goods for the seller's VAT arrears in the part of the tax proportionally attributable to the supply made to that buyer.

Both of the above-mentioned solutions, implemented in order to fight against the VAT gap, generally did not used new technologies. As already indicated, the SAF-T files (JPK files) may be considered as the first solution which used the new technology. The following parts of the paper will present several examples of tools that use new technologies and were introduced by the Polish legislator in order to fight with VAT frauds.

2. SAF-T Files (JPK Files)

As it has already been mentioned, the JPK file has been introduced by the Polish legislator[11] as one of the tools aimed at 'tightening up' the VAT gap. Similar mechanisms have also been introduced in other EU countries. In general, a tool known as SAF-T files (Standard Audit File for Tax) was developed and recommended by the Organisation for Economic Co-operation and Development (OECD) for the purpose of combating VAT fraud.

In general, obligation to submit JPK files consists in reporting data from VAT purchases and VAT sales records until the 25th day of the month for the previous

[8] M. Bełdzikowski, *Uszczelnianie systemu VAT" – próba oceny skuteczności podjętego wysiłku legislacyjnego i organizacyjnego*, „Kwartalnik Prawa Podatkowego" 2018, No. 3, pp. 111–148, https://doi.org/10.18778/1509-877X.2018.03.06.

[9] Introducing act: the Act of 18 March 2011 amending the Act on Goods and Services Tax and the Act – Law on Measures (Journal of Laws of 2011, No. 64, item 332) in force as of 1 April 2011.

[10] Introducing act: the Act of 26 July 2013 amending the Value Added Tax Act and certain other acts (Journal of Laws of 2016, item 1027) in force as of 1 October 2013.

[11] Introducing act: the Act of 13 May 2016 amending the Tax Ordinance Act and certain other acts (Journal of Laws of 2016, item 846), in force as of 1 July 2016.

month by means of electronic communication (in XML format).[12] Between 2017 and 2019, minor changes were made to the structure of the JPK file itself. In 2019, changes to the regulations regarding the combination of JPK files with the VAT return were published.[13] The consequence of the announcement of these changes was the publication of a regulation[14] containing information on the data contained in the new structure of JPK files combined with the VAT return (monthly files – JPK_V7M – or quarterly files – JPK_V7K).

Apart from quite a significant change in JPK file structures (merger of return and records parts), on the basis of new regulations VAT taxpayers were also obliged to mark in their JPK files particular sales and purchase transactions (invoices) with codes of goods and services, tax procedures or types of documents. On the basis of the wording of regulations, it was not clear which exact transactions and in which manner should be marked in the new structure of the JPK file.[15] Afterwards, uncertainties regarding the regulations were clarified by the tax authorities (the Minister of Finance) by publishing explanations[16] to the introduced provisions, information on the Ministry of Finance's website in the form of a Q&A section[17] or by providing answers to VAT taxpayers' questions in press articles.[18]

3. Split Payment Mechanism

The split payment mechanism was first introduced into the Polish legal system as a mechanism to be applied by VAT taxpayers on a voluntary basis.[19] The split payment mechanism involves the division of the gross amount due for the supply of goods or services (B2B) into two parts: the net amount and the VAT amount. The

---

[12] M. Bełdzikowski, op. cit.

[13] Introducing act: the Act of 4 July 2019, amending the Act on Value Added Tax and other acts (Journal of Laws of 2019, item 1520), in force as of 1 October 2020.

[14] The Regulation of the Minister of Finance, Investment and Development of 15 October 2019 on the detailed scope of data contained in tax declarations and records with respect to tax on goods and services (Journal of Laws of 2019, item 1988).

[15] K. Koślicki, *Miały być uproszczenia w VAT, będą utrudnienia*, https://www.prawo.pl/podatki/jpk-zamiast-deklaracji-vat-problemy-zamiast-uproszczen,496485.html (accessed: 9.02.2022).

[16] See more: The Polish Ministry of Finance (June 2020). *Information Sheet on JPK_VAT Structure with Tax Return*, https://www.podatki.gov.pl/media/6169/broszura-informacyjna-jpk-vat-z-deklaracja.pdf (accessed: 9.02.2022).

[17] See: The Polish Ministry of Finance (May 2021). *Answers and Questions: JPK_VAT File with Tax Return*, https://www.podatki.gov.pl/jednolity-plik-kontrolny/jpk-vat-z-deklaracja/faq-jpk-vat-z-deklaracja (accessed: 9.02.2022).

[18] See: M. Szulc, *GTU_09 nie tak kłopotliwe, jak się wydawało*, https://podatki.gazetaprawna.pl/artykuly/1497272,jpk-vat-gtu_09-kod-sprzedaz-lekow-wyrobow-leczniczych-podatki.html (accessed: 9.02.2022).

[19] Introducing act: the Act of 15 December 2017 amending the Act on Value Added Tax and certain other acts (Journal of Laws of 2018, item 62).

net amount is generally transferred to seller's settlement bank account, while the VAT amount is transferred to the seller's special bank account, the so-called VAT account.[20]

An incentive for a VAT taxpayer (acting as the purchaser in the transaction) to use the voluntary split payment mechanism was to exclude the joint and several liability. In the event that the purchaser paid the invoice by using the split payment mechanism, i.e. he or she paid the VAT amount to the supplier's VAT account, this purchaser was not liable for VAT not paid by the supplier for the supply of goods or services.

The voluntary split payment mechanism has not been widely used by VAT taxpayers. While for purchasers of goods it has in principle brought benefits (such as the exclusion of joint and several liability for the supplier's unpaid VAT), suppliers receiving payment in this way have experienced cash-flow problems. Namely, the disposal of funds accumulated by a VAT taxpayer in a VAT account was regulated. Funds collected in this account could be used to make payments to the VAT account of the seller (amount corresponding to all or part of the VAT resulted from purchases). These funds could be also used to make due VAT payments (along with interests) to the tax authority. It was also possible to release funds collected on the VAT account to the VAT taxpayer's settlement account, however, such release could be made only based on a decision issued by the competent tax authority (head of the tax office). Therefore, a tendency to contractually exclude the possibility of using split payments between buyer and supplier has become apparent.[21]

Shortly after the introduction of the voluntary form of the split payment mechanism, the Polish legislator decided to introduce an obligatory split payment mechanism for sale transactions for certain goods and services (in principle, those covered by the previously introduced domestic reverse charge mechanism). This solution is a deviation from EU regulations and, as a consequence, its introduction in Poland required the prior consent of the EU authorities.[22]

The obligatory split payment mechanism was introduced[23] as of 1 November 2019. The mandatory split payment mechanism is applied when invoices for transactions fulfil the following cumulative conditions: (1) the total receivable resulting

---

[20] A. Nowak-Piechota, *Mechanizm podzielonej płatności – ocena nowej regulacji*, „Kwartalnik Prawa Podatkowego" 2018, No. 2, pp. 119–132, https://doi.org/10.18778/1509-877X.2018.02.06.

[21] B. Gryziak, *Mechanizm podzielonej płatności (split payment) jako narzędzie przeciwdziałania oszustwom podatkowym w zakresie VAT – podsumowanie pierwszego roku funkcjonowania w Polsce na tle doświadczeń europejskich*, „Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych" 2019, No. 8, pp. 8–14, https://doi.org/10.5604/01.3001.0013.3750.

[22] The consent has been given in the Council Implementing Decision (EU) 2019/310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (OJ L 51, 22 February 2019, pp. 19–27).

[23] Implementing act: the Act of 9 August 2019 amending the Act on Value Added Tax and certain other acts (Journal of Laws of 2019, item 1751).

from the invoice (i.e. the gross value of the entire invoice) exceeds PLN 15,000, (2) at least one item on the invoice concerns sensitive goods or services (as specified in VAT regulations), (3) the seller and the buyer are VAT taxpayers. Along with the introduction of the obligatory application of the split payment mechanism, a number of sanctions for its non-application were introduced both for the buyers and the sellers (in case of failure to pay with the use of the split mechanism or in case of failure to include a note on the sale invoice that the transaction is subject to the split payment mechanism). Moreover, through the amendment of regulations, the possibilities of using the VAT account funds were extended – apart from using the funds to pay VAT liabilities to contractors and tax authorities, the funds in the VAT account may be used to pay other public levies to the competent authorities, e.g. income tax, customs duty, excise duty or social security contributions.

It should be noted that the introduction of the obligatory split payment mechanism brought many doubts as to the application of this solution, for instance, corrective transactions or advance payments. Therefore, shortly after the introduction of these regulations, the Ministry of Finance issued clarifications[24] to the regulations explaining their application in specific situations.

4. The IT System of the Clearing House (System Teleinformatycznej Izby Rozliczeniowej)

The IT System of the Clearing House (*System Teleinformatycznej Izby Rozliczeniowej – STIR*) introduced by Polish legislator in 2018,[25] in principle, is used to process data provided by banks in order to determine the risk index of using the banking sector to commit tax evasion. The purpose of the introduced mechanism was to 'eliminate from economic turnover the "entrepreneurs" who deceive honest taxpayers and thus strengthen honest taxpayers' security in economic transactions'.[26]

Data provided by banks to tax authorities, including data covered by banking and professional secrecy, are analysed by tax authorities using a special algorithm, the content of which has not been made public available. In case a certain level of

[24] The Polish Ministry of Finance (December 2019). *Tax Clarification of 23 December 2019 on the Split Payment Mechanism*, https://www.gov.pl/web/finanse/objasnienia-podatkowe-z-23-grudnia-2019-r-w-sprawie-mechanizmu-podzielonej-platnosci (accessed: 9.02.2022).

[25] Implementing act: the Act of 24 November 2017 on amending certain laws to prevent the use of the financial sector for fiscal fraud (Journal of Laws of 2017, item 2491), in force as of 13 January 2018.

[26] M. Macudziński, *System Teleinformatyczny Izby Rozliczeniowej (STIR) – nowe narzędzie zwalczania wyłudzeń skarbowych*, „Prawo Budżetowe Państwa i Samorządu" 2018, No. 3(6), p. 73, https://doi.org/10.12775/PBPS.2018.017.

risk occurs according to the algorithms set up by the system, the tax authority (Head of the National Tax Administration) is entitled to block a company's bank account for 72 hours with an option to extend the blockade for another three months. In general, the taxpayers have the possibility of challenging decisions on account blockades before the administrative courts.

So far, the system is being used to search for fraudulent taxpayers. For instance, in 2020, the STIR system scanned 19 million bank accounts and the Head of the National Tax Administration blocked around PLN 96 million in 1,000 accounts belonging to 196 companies[27]. Some entities took advantage of the possibility of appealing decisions on an account blockade to administrative courts, which resulted in a number of judgments issued by Polish administrative courts assessing the legitimacy of the premises for applying this tool.[28]

5. Online Cash Registers

Another tool aimed at tightening the VAT gap that use new technologies are online cash registers. Online cash registers are implemented in Poland since 2019.[29] This tool is aimed primarily at combating dishonest taxpayers who do not register sales to consumers on fiscal cash registers. As a rule, at this moment, the obligation to keep such cash registers applies only to those VAT taxpayers who – in general – operate in areas more susceptible to fraud when recording sales to consumers.[30] Industries such as gastronomy, the hotel industry, the sale of coal, coke and other heating fuels, construction, the legal sector, beauty and hairdressing services, medical services provided by doctors and dentists, and the fitness industry are considered as sectors more susceptible to fraud. Ultimately, the new type of fiscal cash registers is to be used in all industries.

Online fiscal cash registers have built-in functionality for continuous, automated and direct transfer of data from the cash register to the Central Repository of Cash Registers. The Repository is a tool that is used to receive and collect data from cash registers, especially sales data, as well as to analyse and control data from the cash register. Therefore, in order to operate, such an online cash register

---

[27] J. Królak, *Fiskus zablokował firmom prawie 100 mln zł*, https://www.pb.pl/fiskus-zablokowal-firmom-prawie-100-mln-zl-1107093 (accessed: 9.02.2022).

[28] J. Rudowski, *Instrumenty uszczelniające system podatkowy w praktyce orzeczniczej sądów administracyjnych*, „Kwartalnik Prawa Podatkowego" 2022, No. 4, pp. 9–38, https://doi.org/10.18778/1509-877X.2020.04.01.

[29] Implementing Act: the Act of 15 March 2019, amending the Act on Tax on Goods and Services and the Act on Measures (Journal of Laws of 2018, item 62), in force as of 1 May 2019.

[30] T. Nowak, *Rozwiązania prawne wprowadzone w latach 2015–2019 w Polsce w celu uszczelnienia systemu podatku od towarów i usług – analiza i ocena wpływu na dochody budżetowe, pewność obrotu gospodarczego i koszty prowadzenia działalności gospodarczej*, „Studia Biura Analiz Sejmowych" 2020, No. 4(64), pp. 51–67, https://doi.org/10.31268/StudiaBAS.2020.30.

should have permanent online connection to the Central Repository of Cash Registers provided by the user (taxpayer). The taxpayers are also obliged to buy such online cash registers. The regulations provide for reimbursement for the purchase of equipment with new functionalities, however, expenses are only partially reimbursed (up to PLN 700).

6. Impact of the Introduction of New Technological Solutions on VAT Taxpayers

The introduction of solutions to combat the VAT gap has undoubtedly had an impact on reducing VAT fraud. By receiving large amounts of data in electronic form and using appropriate algorithms, tax authorities have a chance to quickly identify which entities commit abuses or fraud. Consequently, the introduction of new solutions has resulted in a reduction in the VAT gap.

However, the new regulations introduced, especially those related to new technologies, cause concern even for honest taxpayers. With a number of new obligations arising from the tools introduced to combat the VAT gap, the exposure to liability before the tax authorities is becoming ever greater, especially in the midst of unclear regulations.[31] It is also pointed out that the constant changes in taxation are problematic primarily for taxpayers 'that have to monitor the tax law on an ongoing basis in order to implement timely and appropriate modifications in the organisation, including ERP systems. This is usually time-consuming and costly'.[32]

From the perspective of VAT taxpayers, the introduction of the JPK file has resulted in the fact that most businesses incurred additional costs associated with updating accounting software and IT maintenance and, to a lesser extent, costs associated with staff training.[33] It should be noted that each change in the JPK file schema involved adapting accounting systems to its requirements and the next major change consisting in including the VAT return part in the JPK file resulted in the taxpayers having to incur, once again, costs related to the adaptation of accounting software and staff training.

With regard to split payment mechanism, an additional obligation for taxpayers, particularly concerning the mandatory split payment mechanism, is the need to verify whether an invoice documenting a given transaction is subject to the man-

[31] M. Stopiak, *Nowe technologie a walka z oszustwami VAT*, „Przegląd Prawno-Ekonomiczny" 2018, No. 44/2, pp. 249–260.

[32] A. Kowal, W. Lichota, *Proces cyfryzacji podatku VAT w Polsce*, „Studia Prawno-Ekonomiczne" 2020, No. 115, p. 266, https://doi.org/10.26485/SPE/2020/115/15.

[33] J. Góralska, *Wdrożenie jednolitego pliku kontrolnego w praktyce działalności gospodarczej małych i średnich przedsiębiorstw*, „Finanse, Rynki Finansowe, Ubezpieczenia" 2017, No. 4(88/1), pp. 263–271, https://doi.org/10.18276/frfu.2017.88/1-25.

datory split payment mechanism or not – both on the part of the seller and that of the buyer. Furthermore, in such a case, when making a payment, the purchaser should pay attention to obligatory pay invoice, using the split payment mechanism. As also indicated above, some entities may also find it burdensome to be restricted in their ability to dispose of funds in their VAT account, which may lead to cash-flow problems.

Although the STIR does not, in principle, oblige taxpayers to perform additional duties for tax authorities, as the authors point out, the effects of the STIR may 'pose a significant threat to the smooth operation of businesses, given the fact that they stem exclusively from the system's fully automated functions'.[34] Given the fact that the rules of the algorithm for selecting entities suspected of fraudulent activities are not made available to taxpayers and that the blocking of the account generally takes place immediately, the taxpayer has no chance of effective defence or explanation before the blocking is carried out by the tax authorities.

What is more, already at the stage of work on the introduction of the STIR, the issue of the scope of judicial control of the bank account blockade of qualified entities was raised. It was stressed that the court may examine the content of the file illustrating the findings of the programme, but it has no legal tools to examine the correctness of the construction of the algorithm or knowledge about the specifics of its operation. Therefore, a review of the legality of such provisions may be illusory, if not impossible.[35] It is also stressed that 'the use of this tool makes it impossible to dispose of the funds accumulated in the account, which significantly affects the ability to conduct business'.[36] Simply challenging the blocking decision does not even entail a temporary unblocking of funds, and given that it takes weeks to receive a court decision, not being able to use the funds accumulated in the account may lead to the necessity of suspending or even closing the business.

The introduction of online fiscal cash registers poses a challenge for taxpayers in the context of possible difficulties in ensuring permanent connection and data transmission (e.g. related to the location of the point of sale).[37] Moreover, the replacement of fiscal cash registers with online cash registers causes additional costs on the part of taxpayers – it is possible to obtain only a partial refund (up to PLN 700). As a rule, devices compatible with the requirements of online cash registers are much more expensive.

---

[34] J. Fornalik, J. Ziętek, *Rewolucja technologiczna w podatkach*, „Krytyka Prawa" 2019, Vol. 11, No. 2, p. 46, https://doi.org/10.7206/kp.2080-1084.294.

[35] M. Szubiakowski after: J. Rudowski, *Instrumenty uszczelniające system podatkowy w praktyce orzeczniczej sądów administracyjnych*, „Kwartalnik Prawa Podatkowego" 2020, No. 4, pp. 9–38, https://doi.org/10.18778/1509-877X.2020.04.01.

[36] J. Rudowski, *Instrumenty uszczelniające…*, p. 46.

[37] S. Adamczyk-Kaczmara, *Zmiany w zakresie kas rejestrujących jako przejaw działań zmierzających do uszczelniania systemu podatkowego*, „Krytyka Prawa" 2019, Vol. 11, No. 2, pp. 12–26, https://doi.org/10.7206/kp.2080-1084.292.

In addition to incurring the costs and obligations mentioned in the paragraphs above, additional factors, such as the large number of solutions introduced, frequent changes and unclear regulations, cause further difficulties for taxpayers trying to meet the tax obligations imposed on them in time.

One of the principles of tax law making is the principle of formulating regulations in a clear manner. This principle means that the regulations should be written in such a way that the addressee of the norms (the taxpayer) is able to understand what his or her obligations and rights are.[38] Taking into account the fact that the wording of regulations concerning the JPK file combined with a VAT return or regulations concerning the obligatory split payment mechanism resulted in a lot of ambiguities, which made it necessary for the Minister of Finance to issue additional explanations to the regulations, the principle of legal certainty was violated when issuing these regulations.

The principle of the clarity of tax law relates to the principle of legal certainty. The certainty of law may be considered in the context of two layers of the legal system – the legislative layer and the layer of law application.[39] The described examples of changes in the scope of the JPK file, i.e. frequent changes of its structures or doubts as to the scope of data reported in the file, show that the principle of legal certainty is somehow also violated when making these tax regulations.

The principle of proportionality in tax law limits the state's excessive legislative activity in the field of tax creation and imposing excessive obligations on taxpayers (Mudrecki 2020).[40] The above-mentioned examples of solutions introduced to combat the VAT gap have imposed additional obligations on taxpayers requiring additional administrative work or significant costs. The question arises as to whether imposing more and more administrative burdens on VAT taxpayers in order to close the VAT gap is proportionate to the objective pursued.

Summary

Changes in VAT introduced in recent years in Poland, associated with the fight against the VAT gap, have 'made it harder' to operate business for entrepreneurs. The examples presented in the paper show that tools implemented to combat the VAT gap by using new technologies have resulted in additional costs and time for taxpayers to adapt to the changes resulted thereto. What is more, some of the solutions introduced to combat the VAT gap may potentially block a taxpayer's business operations. In addition to the increase in the number of administrative obligations, an additional difficulty for VAT taxpayers are the frequently changing

[38] D. Mączyński, R. Sowiński, *Jasność prawa podatkowego jako warunek poprawnej legislacji podatkowej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, No. 3, pp. 35–45.

[39] B. Brzeziński, *Pewność prawa podatkowego. Zagadnienie podstawowe*, in: A. Kaźmierczyk, A. Franczak (eds.), *Zasada pewności w prawie podatkowym*, Warszawa 2018.

[40] A. Mudrecki, *Zasada proporcjonalności w prawie podatkowym*, Warszawa 2020.

regulations, the unclear content of new regulations, the need to monitor the interpretation of new regulations presented in clarifications issued by the Ministry of Finance or not infrequently in the press.

References

Adamczyk-Kaczmara S., *Zmiany w zakresie kas rejestrujących jako przejaw działań zmierzających do uszczelniania systemu podatkowego*, „Krytyka Prawa" 2019, Vol. 11, No. 2, pp. 12–26, https://doi.org/10.7206/kp.2080-1084.292

Bełdzikowski M., *Uszczelnianie systemu VAT" – próba oceny skuteczności podjętego wysiłku legislacyjnego i organizacyjnego*, „Kwartalnik Prawa Podatkowego" 2018, No. 3, pp. 111–148. https://doi.org/10.18778/1509-877X.2018.03.06.

Brzeziński B., *Pewność prawa podatkowego. Zagadnienie podstawowe*, in: A. Kaźmierczyk, A. Franczak (eds.), *Zasada pewności w prawie podatkowym*, Warszawa 2018.

Budzyński M., *Fiscal Aspects of Value Added Tax in Poland*, "Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia" 2016, No. 1(50), pp. 611–619, https://doi.org/10.17951/h.2016.50.1.611.

Deresz A., Podstawka M., *Mechanisms of tax Frauds Based on* VAT, „Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu. Finanse Publiczne" 2015, No. 403, pp. 42–53, https://doi.org/10.15611/pn.2015.403.04.

Fornalik J., Ziętek J., *Rewolucja technologiczna w podatkach*, „Krytyka Prawa" 2019, Vol. 11, No. 2, pp. 40–52, https://doi.org/10.7206/kp.2080-1084.294.

Góralska, J., *Wdrożenie jednolitego pliku kontrolnego w praktyce działalności gospodarczej małych i średnich przedsiębiorstw*, „Finanse, Rynki Finansowe, Ubezpieczenia" 2017, No. 4(88/1), pp. 263–271, https://doi.org/10.18276/frfu.2017.88/1-25.

Gryziak B., *Mechanizm podzielonej płatności (split payment) jako narzędzie przeciwdziałania oszustwom podatkowym w zakresie VAT – podsumowanie pierwszego roku funkcjonowania w Polsce na tle doświadczeń europejskich*, „Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych" 2019, No. 8, pp. 8–14, https://doi.org/10.5604/01.3001.0013.3750.

Kardas P., *Prawnokarne aspekty uchylania się od wykonania zobowiązania podatkowego w podatku VAT – oszustwo skarbowe czy oszustwo klasyczne?*, „Prokuratura i Prawo" 2006, No 5, pp. 28–49.

Kowal A., Lichota W., *Proces cyfryzacji podatku VAT w Polsce*, „Studia Prawno-Ekonomiczne" 2020, No. 115, pp. 265–282, https://doi.org/10.26485/SPE/2020/115/15.

Koszewski R., Oręziak B., Wielec M. (eds.), *Identyfikacja przyczyn przestępczości w wybranych obszarach gospodarki w Polsce i na świecie*, Warszawa 2020.

Koślicki K., *Miały być uproszczenia w VAT, będą utrudnienia*, https://www.prawo.pl/podatki/jpk-zamiast-deklaracji-vat-problemy-zamiast-uproszczen,496485.html (accessed: 9.02.2022).

Kotowski W., *Karuzele podatkowe*, in: I. Ożóg (ed.), *Przestępstwa karuzelowe i inne oszustwa w VAT*, Warszawa 2017.

Królak J., *Fiskus zablokował firmom prawie 100 mln zł*, https://www.pb.pl/fiskus-zablokowal-firmom-prawie-100-mln-zl-1107093 (accessed: 9.02.2022).

Macudziński M., *System Teleinformatyczny Izby Rozliczeniowej (STIR) – nowe narzędzie zwalczania wyłudzeń skarbowych*, „Prawo Budżetowe Państwa i Samorządu" 2018, No. 3(6), pp. 69–87, https://doi.org/10.12775/PBPS.2018.017.

Majczyna M., *Odwrotne obciążenie a oszustwa w VAT*, in: I. Ożóg (ed.), *Przestępstwa karuzelowe i inne oszustwa w VAT*, Warszawa 2017.

Mączyński D., Sowiński R., *Jasność prawa podatkowego jako warunek poprawnej legislacji podatkowej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, No. 3, pp. 35–45.

Mudrecki A., *Zasada proporcjonalności w prawie podatkowym*, Warszawa 2020.

Nowak T., *Rozwiązania prawne wprowadzone w latach 2015–2019 w Polsce w celu uszczelnienia systemu podatku od towarów i usług – analiza i ocena wpływu na dochody budżetowe, pewność obrotu gospodarczego i koszty prowadzenia działalności gospodarczej*, „Studia Biura Analiz Sejmowych" 2020, No. 4(64), pp. 51–67, https://doi.org/10.31268/StudiaBAS.2020.30.

Nowak-Piechota A., *Mechanizm podzielonej płatności – ocena nowej regulacji*, „Kwartalnik Prawa Podatkowego" 2018, No. 2, pp. 119–132, https://doi.org/10.18778/1509-877X.2018.02.06.

OECD, *Guidance Note – Guidance for Developers of Business and Accounting Software Concerning Tax Audit Requirements*, https://www.oecd.org/tax/administration/guidancenote-guidancefordevelopersofbusinessandaccountingsoftwareconcerningtaxauditrequirements.htm (accessed: 9.02.2022).

Rudowski, J., *Instrumenty uszczelniające system podatkowy w praktyce orzeczniczej sądów administracyjnych*, „Kwartalnik Prawa Podatkowego" 2020, No. 4, pp. 9–38, https://doi.org/10.18778/1509-877X.2020.04.01.

Stopiak M., *Nowe technologie a walka z oszustwami VAT*, „Przegląd Prawno-Ekonomiczny" 2018, No. 44/2, pp. 249–260.

Szulc M., *GTU_09 nie tak kłopotliwe, jak się wydawało*, https://podatki.gazetaprawna.pl/artykuly/1497272,jpk-vat-gtu_09-kod-sprzedaz-lekow-wyrobow-leczniczych-podatki.html (accessed: 9.02.2022).

The Polish Ministry of Finance (2020). *Information Sheet on JPK_VAT Structure with Tax Return*, https://www.podatki.gov.pl/media/6169/broszura-informacyjna-jpk-vat-z-deklaracja.pdf (accessed: 9.02.2022).

The Polish Ministry of Finance (2021). *Answers and Questions: JPK_VAT File with Tax Return*, https://www.podatki.gov.pl/jednolity-plik-kontrolny/jpk-vat-z-deklaracja/faq-jpk-vat-z-deklaracja (accessed: 9.02.2022).

The Polish Ministry of Finance (2019). *Tax Clarification of 23 December on the Split Payment Mechanism*, https://www.gov.pl/web/finanse/objasnienia-podatkowe-z-23-grudnia-2019-r-w-sprawie-mechanizmu-podzielonej-platnosci (accessed: 9.02.2022).

List of Legal Acts

Legal Acts (EU)

Council Implementing Decision (EU) 2019/310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (OJ L 51, 22 February 2019, pp. 19–27).

Legal Acts (Polish)

The Act of 18 March 2011 amending the Act on Goods and Services Tax and the Act – Law on Measures (Journal of Laws of 2011, No. 64, item 332).

The Act of 26 July 2013 amending the Value Added Tax Act and certain other acts (Journal of Laws of 2016, item 1027).

The Act of 13 May 2016 amending the Tax Ordinance Act and certain other acts (Journal of Laws of 2016, item 846).

The Act of 24 November 2017 on amending certain laws to prevent the use of the financial sector for fiscal fraud (Journal of Laws of 2017, item 2491).

The Act of 15 December 2017 amending the Act on Value Added Tax and certain other acts (Journal of Laws of 2018, item 62).

The Act of 15 March 2019, amending the Act on Tax on Goods and Services and the Act on Measures (Journal of Laws of 2018, item 62).

The Act of 4 July 2019, amending the Act on Value Added Tax and other acts (Journal of Laws of 2019, item 1520).

The Act of 9 August 2019 amending the Act on Value Added Tax and certain other acts (Journal of Laws of 2019, item 1751).

The Regulation of the Minister of Finance, Investment and Development of 15 October 2019 on the detailed scope of data contained in tax declarations and records with respect to tax on goods and services (Journal of Laws of 2019, item 1988).

Marek Bełdzikowski

Kozminski University, Poland

marek.beldzikowski@gmail.com

The Evolution of the Tax Exchange Information System in the European Union

Abstract

The exchange of tax information within the European Union is a very unique solution. The scope of the tax information exchange and the degree of automation of the exchange are constantly being expanded. The impetus for development in recent years is the digitisation of tax collection. Information exchange is developing not only in the area of tax on goods and services, which is traditional for information exchange, but also in direct taxes. The manifestation of this process is the expansion of the OSS system and a number of new directives, referred to as DAC directives.

Keywords: exchange of tax information, value added tax, VAT, European Union, EU, Common Communications Network/Common Systems Interface (CCN/CSI), VIES system, Eurofisc, One Stop Shop (OSS), Mini One Stop Shop (MOSS), Import One-Stop Shop (IOSS)

Introduction

The exchange of tax information seems to be the response of tax administration to the growing phenomenon of tax avoidance. Tax avoidance has an international nature and the digitalisation of the economy significantly facilitates the transfer of funds. Hiding investments in offshore is significantly easier since many countries function as tax havens that tolerate secret bank accounts and shell companies. Moreover, many countries refuse to share information with foreign governments.[1] Paradoxically, the European single market makes the tax avoidance much easier. Economic entities take advantage of the differences in tax regulations in individual Member States, and thus pay the lowest possible taxes on the profits obtained. As a consequence, it is estimated that in the EU, tax revenue foregone resulting from corporate tax avoidance is within the range of EUR 50–70 billion per year.[2] This figure could be as much as EUR 190 billion (around 1.7% of the EU's GDP in 2021) if other factors such as tax advantages and ineffective tax collection solutions are taken into account.[3]

The Evolution of the Exchange of Tax-Related Information within the EU

Huge budgetary losses are the reason why mutual assistance between EU tax administrations in the field of information exchange has a relatively long history. Information exchange in the field of direct taxation has been possible since 1977 on the legal basis of the Council Directive of the European Communities 77/799/EEC.

The directive supplemented previously concluded bilateral agreements, established independently and spontaneously between the Member States. It has been also replaced by the one currently in force: Directive on administrative cooperation in the field of taxation.

In this way, formal channels of exchanging tax information were established. Today, there are still in force, that is:

---

[1] https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/.

[2] R. Dover et al., *Bringing Transparency, Coordination and Convergence to Corporate Tax Policies in the European Union*, I – Assessment of the Magnitude of Aggressive Corporate Tax Planning, September 2015 (PE 558.773), https://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU(2015)558773_EN.pdf.

[3] Special Report 03/2021: *Exchanging Tax Information in the EU: Solid Foundation, Cracks in the Implementation*, p. 7.

– exchange of information on request, consisting in providing information on the basis of an inquiry from the requesting Member State to the requested Member State[4]
– spontaneous exchange, is to provide the partner country with information about suspected tax fraudsters, if such data are detected during national fiscal audits
– automatic exchange, consisting in providing the competent authorities of a Member State with information on the issued cross-border decisions on transaction prices or cross-border rulings (except for interpretations relating only to an individual case of a natural person). The information is to contain the identification data of the unit for which it was issued and an indication of other Member States to which a given interpretation or decision may apply.

These three ways of information exchange comply with the standards set by tax authorities at the international level, and in particular with the standards in force in OECD countries.[5]

The directive was intended to contribute to the following three specific objectives:
– Improving the capacity of Member States to prevent cross-border tax fraud, tax evasion and tax avoidance.
– Limiting the scope of the incentives and benefits leading to harmful tax competition, including countering tax avoidance and aggressive tax planning through transparency measures related to tax rulings / advance pricing agreements, and by country-by-country reporting by multinationals.
– Promoting spontaneous tax compliance by facilitation the detection of cross-border income and assets.

European common market creates new challenges not only to the tax administration, but also to the tax information exchange. That is why the original Directive on the information exchange was replaced by EU Council Directive 2011/16/EU on administrative cooperation in the field of taxation. This directive entered into force on 1 January 2013.[6]

Directive 2011/16/EU introduced a number of new developments – the most important are international tax audits and simultaneous administrative proceed-

[4] A. Bischoff, M. Wasilewski, *Współpraca w zakresie wymiany informacji podatkowej między Polską a krajami UE*, „Zeszyty Naukowe SGGW, Polityki Europejskie, Finanse i Marketing" 2018, No. 19(68), p. 289.

[5] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ L 336, 27 December 1977, pp. 15–20).

[6] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11 March 2011, pp. 1–12).

ings. Moreover, it has regulated the methods of mutual cooperation in the field of electronic notification of tax decisions made.

However, much more revolutionary changes took place in the field of VAT. The abolition of physical border controls, necessary element of the common market had a significant impact on the development of tax information on VAT. First of all, it required the establishment of a new VAT control system for intra-Community trade. On the basis of the EEC Council Regulation 218/92/EEC, a platform for the exchange of information on VAT – the VIES exchange mechanisms – was implemented in VAT area.

These mechanisms were modernised and amended by Council Regulation 1798/2003 and subsequent Council Regulation No. 904/2010. The information exchange also covered mutual assistance in the recovery of claims relating to taxes, duties and charges. In 1976, Directive 76/308/EEC entered into force. It was subject to further changes. It was extended by Directive 79/1071/EEC and Directive 92/108/EEC by excise duty, Regulation 2001/44/EC by taxes on income, capital and insurance premiums.

The Technical Infrastructure of the Information Exchange

The cooperation of tax administrations would not be possible without the technical tools. These tools were prepared by the European Commission. They are known as the integrated electronic information exchange system. The Common Communications Network/Common Systems Interface (CCN/CSI) is an electronic communications network overseen by the Directorate.

The CCN's mission is to provide common services for the exchange of information on taxation, excise and customs with high accuracy while maintaining the principles of security and continuity. The CCN was designed in 1993 and 1995 and has been operating since 1999. The CCN is the largest platform for electronic communication between tax and customs administrations worldwide. This network also provides a range of supporting services. Over 50 applications are based on the operation of the CCN network. The CCN network and the applications based on it are the basic tool for the exchange of tax information in EU countries.

The Evolution of the Information Exchange System within the European Union

All legal instruments for the exchange of information were modernised in the following years. Administrative cooperation in the field of excise duties was reformed by Council Regulation (EC) 2073/2004 and Directive 2004/106/EC. Mutual assis-

tance in the field of debt recovery was modernised and expanded by the EU Council Directive 2010/24/EU and the EU Commission Implementing Regulation No. 1189/2011.

The most impressive example of the development and evolution of the information exchange mechanism within the European Union is the modernisation of Directive 2011/16/EU (also called DAC1). At the beginning, provisions of this regulation ensured the automatic exchange of information such as employment income, remuneration of directors, pensions, life insurance products, real estate. As of 2015, national authorities must, automatically provide relevant Member States with information on the following categories of income and capital for residents in another Member State, employment income, directors' fees, life insurance schemes pensions, ownership of, and income from, immovable property.

The scope of the automatic exchange of financial data subject to exchange is constantly expanding as a result of the following amendments:

– Council Directive 2014/107/EU of 9 December 20147 (DAC2) on the automatic exchange of financial information between Member States on the basis of the common OECD standard for the exchange of information, which provides for the automatic exchange of information on financial accounts held by non-residents. Entry into force in 2016.
– Council Directive (EU) 2015/2376 of 8 December 2015 (DAC3)8 as regards the mandatory automatic exchange of information on tax rulings with a cross-border dimension. Entry into force in January 2017.
– Council Directive (EU) 2016/881 of 25 May 2016 (DAC4)9 on mandatory automatic exchange of information between tax authorities with regard to country-by-country reporting. Entry into force in June 2017.
– Council Directive (EU) 2016/2258 of 6 December 2016 (DAC5)10 as regards access by tax authorities to anti-money laundering information; Entry into force in January 2018.
– Council Directive (EU) 2018/822 of 25 May 2018 (DAC6)11 on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. Entry into force in July 2020.

---

[7] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16 December 2014, pp. 1–29).

[8] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18 December 2015, pp. 1–10).

[9] Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3 June 2016, pp. 8–21).

[10] Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L 342, 16 December 2016, pp. 1–3).

[11] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards man-

– Council Directive (EU) 2021/514 of 22 March 2021 (DAC7)12 amending Directive 2011/16/EU on administrative cooperation in the field of taxation with regard to the obligation to automatically exchange tax information has been imposed on digital platform operators. Entry into force on 1 January 2023.

A Special Role for the Exchange of Information on VAT in the Community Information Exchange System

The exchange information on the VAT tax has developed rapidly. After the creation of the VIES system, there were more and more areas where information on VAT was exchanged. The provisions of Directive 2008/9/EC of 12 February 2008 creates the rules for applying for a tax refund for taxpayers not established in a given country. The appointed tax authority in each EU Member State has become the competent authority for the refund. The tax authority directly contacts the designated tax authority in other Member States, dealing with the refund. The return application was structured across the EU, as was the procedure for applying for a refund. The whole process was also digitalised.

However, it was assumed, that this procedure will be strictly auxiliary to the general rules on deduction input VAT, with regard to supplies made to jurisdictions in which supplies were usually not made.[13] At the same time, the existing exchange of information on VAT has been deepened. In June 2010, it was agreed that there should be a decentralised structure without legal personality, capable of combating cross-border VAT fraud rapidly and in a coordinated way. That structure was called Eurofisc.[14] The general idea was that specially established central liaison offices will provide information on the assessment and application of VAT, especially in intra-Community transactions. They will also have an obligation to inform about the actions taken to prevent the areas of the informal economy in which frauds using the construction of VAT may occur. The information provided by Eurofisc central liaisons offices may take the form of reports, the results of administrative proceedings or opinions and statements. Information will be exchanged at the request of the authority of the requesting Eurofisc Member State or in cases where:

---

datory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ST/7160/2018/INIT (OJ L 139, 5 June 2018, pp. 1–13).

[12] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ST/12908/2020/INIT (OJ L 104, 25 March 2021, pp. 1–26).

[13] Articles 170–171a of Directive 112/2006.

[14] K. Raczkowski, *Eurofisc – zdecentralizowana sieć współpracy w dziedzinie podatku VAT*, „Biuro Analiz Sejmowych, INFOS. Zagadnienia Społeczno-Gospodarcze" 2011, No. 6(98).

– there is a suspicion of an infringement of VAT regulations in another Member State
– information from the other country on, for instance, the origin of a given good is necessary in the process of controlling and determining the tax in the country of destination
– it is considered that there may be or may be a risk of the loss of a government levy in another Member State.

A reply to the inquiry in the scope mentioned above should be granted as soon as possible, but not later than 3 months from the receipt of the full inquiry about the procedure for obtaining information and up to 1 month in the event of an accident having them. A responsible authority of the Member State (for instance, the central liaison office) may refuse to provide certain types of information. This is especially true for inquiries relating to, for example, the necessity of carrying out non-checking proceedings routine conduct where the law of a particular country prohibits it from collecting certain information for their own purposes or when the requesting state is unable to provide similar information. Information does not have to be granted in a situation leading to the disclosure of an industrial, commercial, professional secret production process or violation of public order, either. In any case, however, in which the inquiry is not answered by the requested state Member State, it must notify the European Commission and state the reasons justifying the refusal.[15]

The next area that became the subject of Community information exchange was telecommunications, broadcasting and electronic services provided to non-taxable entities. The *ratio legis* of this solution has been clearly defined in recital 23 of Directive 112/2006 EEC – '(23) In order to avoid distortions of competition, also radio and television broadcasting services and services provided electronically from third territories or third countries to persons established in the territory of Communities or supplied from the territory of the Community to customers established in third territories or third countries are to be taxed at the place where the customer is established.' For the purposes of this group of entities and transactions, autonomous rules have been created for recognising the place of supply of services, which means that in the case of electronic services provided by a taxpayer established in the territory of one Member State to both a VAT taxpayer and a non-taxable person established in the territory of another Member State will be taxed there. For the latter situation, the provision of services to non-taxable customers, a special legal and organisational structure was created – 'a small (mini) one-stop shop for the taxpayer'.[16]

[15] Ibidem, p. 4.

[16] In the original (English) version, it was referred to as the Mini One Stop Shop.

It allows the supplier the telecommunication services, television and radio broadcasting services and electronically supplied services to non-taxable persons in Member States in which they do not have an establishment to account for the VAT due on those supplies via a web-portal in the Member State in which they are identified. It is optional, and allows these taxable persons to avoid registering in each Member State of consumption.

Entities are allowed to choose whether to register in individual countries separately and settle the tax in accordance with applicable local laws or to use a small one stop shop. It is a significant simplification because it is enough to register for VAT in Poland and settle the tax due from the provision of telecommunications, broadcasting or electronic services to non-taxable persons with their registered office, permanent residence or – usually – residence in the territory of other Member States by the Polish tax authority.[17] The whole one stop shop procedure, from registration to the keeping of a register of transactions made by the taxpayer, is generally conducted in electronic form. The use of this new procedure is not mandatory, but merely optional. The taxable person can therefore choose whether to account for the tax in the new system (MOSS registration) or to register for VAT in each Member State where he or she provides the services in question to non-taxable persons. If the service provider decides to settle the tax under the special procedure, then he or she submits an electronical quarterly VAT return and pays the tax amount due to all Member States.

The taxes paid in this way are transferred by the tax administration to the relevant Member States of consumption (countries where the final recipients are located). Thus, one stop shop is not only exchanging the information on taxpayers, but it also transfers taxes paid in one Member State to another Member State. Registration for this schema is made by electronic means of communication to the competent tax authorities that identify and confirm the taxpayer's application to use this VAT settlement procedure.[18] They also issue a decision on refusing the declaration, i.e. if the taxpayer does not meet the conditions necessary to use this special scheme by means of electronic communication. Changing the declaration form and deregistration of the taxpayer (for instance, resignation from the use of the MOSS scheme for settlement) is also made in electronic form. A special form has been developed for registration.[19] The reporting obligation (tax submitted in the settlement for individual quarters) is also performed by means of electronic communication to the Second Tax Office Warszawa-Śródmieście.[20] These regula-

[17] It is the Head of the Second Tax Office Warszawa-Śródmieście.

[18] In the case of Poland, it is also the Head of the Second Tax Office Warszawa-Śródmieście.

[19] VIN R – an application form that contains information about the EU special VAT settlement procedure.

[20] VIU D declaration form (declaration for VAT settlement in the scope of the EU procedure).

tions have been extended to the provision of electronic telecommunications and broadcasting services on the territory of the European Community by entities that do not have a registered office or a permanent establishment in the territory of the European Union for the benefit of non-taxable persons who have their place of residence or stay in the territory of the Community.[21] The taxpayer making such supplies has the right to choose the Member State of the Community in which he or she will register for VAT purposes.[22] Tax registration applies to all telecommunications, broadcasting and electronic services provided by this entity in the European Union. From 1 July 2021, two extensions to the MOSS procedure were introduced – One Stop Shop (OSS) and Import One Stop Shop (IOSS), both known as the eCommerce VAT package.[23] Both of them are based on mini one stop shop (MOSS), which has been simply expanded for a number of other B2C transactions. And like in MOSS, VAT-OSS procedure will be optional. New OSS allows registration for VAT purposes in one Member State and entrepreneurs will avoid the obligation to register for VAT purposes in many countries to which goods or services are sold. VAT settlement is made in one electronic quarterly tax declaration form. Cooperation with the tax administration of one's own country has also been introduced, even if the sale is of a cross-border nature.

The fundamental change in One Stop Shop (OSS) are the new regulations on distance sales to consumers of other EU countries. According to old provisions, when distance sales take place, there were applicable thresholds determining the place of taxation of this transaction, but different in different Member States (between EUR 35,000 and 100,000). If a transaction was below the threshold, the entrepreneur could choose the option of taxing the sale in the country of dispatch. In case, the limit was exceeded, the entrepreneur was obliged to register for VAT purposes in the country to which the goods are delivered and to settle VAT in that country. E-commerce introduces one single limit for distant within the EU – EUR 10 000 (net). It relates to the sale to the benefit of (B2C) sales of services and goods. Sales up to EUR 10,000 have to be declared in the seller's Member State. If the threshold is exceeded, the seller can declare and pay foreign VAT in his or her country. The requirement is the seller registration in the OSS system.

---

[21] This aim of the regulation is clearly stated in paragraph 56 of Directive 112/2006/EEC, according to which 'To facilitate compliance with tax obligations by economic operators providing electronic services, who are not established in the territory of the Community and who are not required to be identified for VAT purposes within the territory of the Community, a specific procedure should be established. Under that procedure, any economic operator supplying such services by electronic means within the territory of the Community to non-taxable persons would have the option, if not otherwise identified for VAT purposes within the territory of the Community, of tax identification in one of the Member States only.'

[22] According to the definition of the 'Member State of identification'.

[23] https://www.podatki.gov.pl/vat/abc-vat/procedury/punkt-kompleksowej-obslugi-oss-i-ioss/.

An important change is the elimination of the European Union-wide exemption from import VAT, the so-called small parcels – with value up to EUR 22. The goal of this new provisions is to stop the inflow of parcels to the EU with untaxed goods from countries such as China. Sales platforms are also charged with the obligation to collect VAT on certain transactions, which are carried out through them. When a sales platform sends goods from a non-EU country to a customer in the EU (B2C), it will be obliged to settle VAT on import. However, some simplifications have been made for shipments below EUR 150. If a seller registers with the IOSS (import one-stop shop), he or she can declare and pay foreign VAT on imports in his or her country. Conversely, non-EU sellers must appoint an EU-based broker to use IOSS. Otherwise, the import VAT has to be paid by the buyer of the goods.

The new regulations have an impact on electronic tools (webpages, applications) that support sales. In the case of sales made with its help, it is assumed that it is also responsible for the payment of VAT. This is especially important for the sale of shipments with a value below EUR 150. The interface should be registered in IOSS and settle VAT on import. In other case the VAT on the import of goods will have to be settled by the buyer of the goods. The first experience with an e-commerce package seems to be promising. The total amount of VAT collected on low value consignments for the first 3 months applying the eCommerce package is estimated at around EUR 710 million (which could result in EUR 3 billion per year). Half of this amount (EUR 333 million) relates to imports of goods with a value less than EUR 22 (exempted before). There is also a significant number of VAT registration in IOSS – 7,379 on 5 November 2021. Additionally, more than 90% of the low-value consignment declarations contain IOSS numbers.[24] The eCommerce package is an example of the increasing complexity of information exchange, the greater and greater coherence of which is demonstrated, for instance, by overlapping scopes. A good example are online platforms regulated by both Article 8(a) and (c) of Council Directive 2021/514 of 22 March 2021, and Article 242(a) of Directive 2006/112. The DAC7 regulations impose an obligation for the platform to report to the tax authorities in which the platform is established. The receiving Member State shall ensure automatic exchange with the Member State where sellers are established or where the property is situated. The purpose of reporting is to provide the tax authorities with information on the income generated by sellers, including the sellers of goods. On the other hand, Article 242(a) of Directive 2006/112 provides tax authorities with the possibility of requesting information in relation to a specific transaction and verifying whether VAT has been correctly settled. For this purpose, the platforms were required to keep records imposed on the platforms in connection with the facilitation of their deliveries (Article 109(b)

[24] Top 8 IOSS registered traders actually accounted for +/- 91% of all transactions declared for import into the EU via IOSS.

of the VAT Act). Records must be made available in electronic form at the request of the Member State concerned, so this is not an automatic exchange, but it is only available upon request. Pursuant to Directive 2021/514, automatic exchange with the Member State of the sellers' office or place where the property is located, in which that office is indicated, takes place once a year. The platform also reports to the tax authorities once a year.

Previous Experience with the Exchange of Information

The exchange of tax information in the European Union, despite the extensive technical and legal infrastructure, was the subject of criticism rather than admiration. The VAT exchange mechanism was criticised most frequently. Generally, the ineffectiveness of the VAT number verification system was pointed out. However, the reporting system on intra-Community transactions raised even greater concerns. The data on intra-Community turnover were too general and tax administration authorities received them too late to use them against the tax fraudsters. In truth, the main problem was that ICT reporting is always overdue. Taxpayers are obliged to report when the transaction is completed. Eurofisc seems to be a partial solution to that problem. However, the scope of this system is limited. The one stop shop mechanism is also rarely used. In view of the some commentators, the costs of creating IT systems for such minimal use make no economic sense. The overall assessment of exchange tax information without the EU Member States was made by the Court of Auditors. Based on audits in five Member States, the Court concluded that the quality of the information exchanged was limited and, moreover, information was not used sufficiently. The Court concluded that the legislation provided a clear and transparent legislative framework for the tax information exchange system. Nevertheless, some forms of income received by non-resident taxpayers may still be untaxed in their Member States of tax residence. This concerns categories of income which are not covered by the mandatory reporting under Directive on administrative cooperation in the field of taxation. The Court was of the opinion that the tax information exchange is that the system has been set up correctly, but that further efforts are needed in monitoring, ensuring data quality and using the information obtained. Regarding the work of the Commission, the Court found that while it had established an appropriate framework for the exchange of tax information, it did not actively monitor the implementation of the legislation, it did not provide sufficient guidance and it did not measure the performance and impact of the system. The monitoring of the effectiveness of the system was also carried out on a minimal scale. The functioning of the VAT information exchange system in Poland was assessed by the Supreme Audit Office.[25] The Supreme Audit

[25] KBF-410-17-00/2009 No. 16/2010/P09023/KBF Information on the results of audit of the VAT

Office concludes that the capabilities of the VIES system in Poland were not properly used. Despite these doubts, tax information exchange within the EU continues to develop.

What is more, the last tools – especially those introduced in the eCommerce VAT package – seem to indicate that the expectations related to the introduction of the regulations have been met. There is a significant increase in entities registering in the new system and the amount of taxes paid. The information exchange network within the EU is becoming more and more extensive. The information exchange is becoming more and more comprehensive and it extends the substantive scope. Of all the solutions introduced for the administration, especially the exchange dedicated to VAT begins to clearly become mechanisms supporting B2B, or even B2C turnover, in the case of the eCommerce package.

References

Bischoff A., Wasilewski M., *Współpraca w zakresie wymiany informacji podatkowej między Polską a krajami UE*, „Zeszyty Naukowe SGGW, Polityki Europejskie, Finanse i Marketing" 2018, No. 19(68).

Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ L 336, 27 December 1977, pp. 15–20).

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11 March 2011, pp. 1–12).

Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16 December 2014, pp. 1–29).

Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18 December 2015, pp. 1–10).

Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3 June 2016, pp. 8–21).

Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L 342, 16 December 2016, pp. 1–3).

Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxa-

taxation of intra-Community transactions with tax on goods and services, Warsaw, April 2010.

tion in relation to reportable cross-border arrangements ST/7160/2018/INIT (OJ L 139, 5 June 2018, pp. 1–13).

Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ST/12908/2020/INIT (OJ L 104, 25 March 2021, pp. 1–26).

Dover R. et al., *Bringing transparency, coordination and convergence to corporate tax policies in the European Union*, I – Assessment of the Magnitude of Aggressive Corporate tax planning, September 2015 (PE 558.773). https://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU(2015)558773_EN.pdf.

Raczkowski K., *Eurofisc – zdecentralizowana sieć współpracy w dziedzinie podatku VAT, Biuro Analiz Sejmowych*, „INFOS. Zagadnienia Społeczno-Gospodarcze" 2011, No. 6(98).

KBF-410-17-00/2009 No. 16/2010/P09023/KBF Information on the results of audit of the VAT taxation of intra-Community transactions with tax on goods and services, Warsaw, April 2010.

Special Report 03/2021: *Exchanging Tax Information in the EU: Solid Foundation, Cracks in the Implementation*.

Dominik Mączyński

Adam Mickiewicz University in Poznań, European Association of Tax Law Professors, Regional Administrative Court of Justice

mdominik@amu.edu.pl

ORCID: 0000-0003-3637-7777

The Impact of the CJEU Case-Law on VAT Regulations in Poland[1]

Abstract

This article aims to answer the question of what the legislator's response is to the case-law of the Court of Justice of the European Union. It is noted that in the current legal situation, the CJEU's case-law does not directly interfere with the sphere of tax law adoption and its effects are associated primarily with the area of its application. However, due to the specific nature of the CJEU's case-law in tax matters and its importance for the national tax system, the need for legislative changes cannot be ruled out *a priori*.

The article focuses on how the tax case-law of the CJEU is directly influencing Polish tax law concerning value added tax. In the light of the conducted research, the CJEU's case-law affects not only the application of national tax law, but also its adoption. The research has shown that many judgments of the CJEU have directly affected the adoption of tax law in Poland.

Keywords: The Court of Justice of the European Union, Case-Law, VAT, tax law adoption, Poland

[1] The paper presents some of the research results published in the following monograph: D. Mączyński (ed.), *The Impact of CJEU Case-Law on Excise Duty Regulations in Selected EU Member States*, Poznań 2021, p. 186.

1. Introduction

The analysis of the impact of the CJEU case-law on the process of adoption of tax law in Poland mainly requires an examination of the legislator's response to that case-law. There is doubt as to whether the application of the CJEU's case-law on the ground of law is sufficient, i.e. whether the provisions of national law should be interpreted so as to reflect the postulates of that case-law or perhaps it is necessary to change the national law to enable its application in accordance with the EU legislation or to simplify the process of interpreting the law for the benefit of both tax authorities and taxpayers.

Before proceeding with a detailed analysis, it should be noted that in the current legal situation, the CJEU's case-law does not directly interfere with the sphere of the adoption of tax law and its effects are associated primarily with the area of its application. In addition, the interference of the legislator, which is a consequence of the CJEU's case-law, may – contrary to the legislator's intentions – contribute to complicating the legal matter by supplementing it with another element, while the reconstruction of the legal norm is already possible on the basis of previously applicable provisions of national law supplemented by the CJEU's case-law. However, due to the specific nature of the CJEU's case-law in tax matters and its importance for the national tax system, the need for legislative changes cannot be ruled out *a priori*. This should constitute an exception to the principle of the impact of CJEU's case-law at the level of application of the law.

2. Direct Impact of the CJEU's Case-Law on the National Tax System

The impact of the CJEU's case-law on national tax systems may be direct or indirect.[2]

The direct impact of the CJEU's case-law on the national tax system is caused by rulings relating to a specific provision of national law. This impact can take various forms, depending on the procedure in which the ruling is given.

Rulings given on the basis of Article 258 of the TFEU are a clear indication for the tax authorities and courts adjudicating in tax matters that the challenged provision cannot constitute the basis for decisions and should be disregarded in the process of applying the law, both in tax and judicial procedures. At the same time, CJEU rulings issued pursuant to Article 258 of the TFEU allow the legislator to make changes with respect to the challenged provision, either by repealing it or by

[2] P. Pistone, *The Impact of ECJ Case Law on National Taxation*, "Bulletin for International Taxation" 2010, August/September 2010, pp. 412–428.

amending it in a way that takes into account the requirements of the European Union's legal system.

In the case of judgments issued pursuant to Article 258 of the TFEU, some controversial issues may arise.

Firstly, it is unclear whether the repeal of a provision incompatible with the EU law is sufficient to restore the compatibility of national legislation with the EU law. In particular, the question arises as to whether national law should be brought into conformity with the European law also in the period preceding the CJEU's judgment.

Secondly, doubts exist as to whether the effects of the CJEU's case-law should be limited only to periods that are not time-barred in the light of internal tax regulations (Judgment of the Court (Grand Chamber) of 8 September 2015, Criminal proceedings against Ivo Taricco and Others, C-105/14, and Judgment of the Court (Second Chamber) of 20 December 2017, Caterpillar Financial Services Poland Sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie, C-500/16).

Thirdly, it has been debated whether the CJEU case-law also applies to similar provisions of national law.

Even more complex is the assessment of the direct effect of the CJEU's rulings delivered pursuant to Article 267 of the TFEU on the adoption of national tax law. In delivering such rulings, the CJEU interprets provisions of the EU law.

In principle, the direct effect of the CJEU's case-law does not mean a refusal to apply a provision of national law. On the contrary, tax authorities and courts are obliged to apply national legislation to ensure compliance with the EU legislation. As a result, the legislator's interference does not seem necessary. If the legislator decides to do so, then the implementation of the CJEU's case-law, as a rule, requires not repealing the provision of the national act, but changing its content to reflect the interpretation adopted in the CJEU's case-law.

In addition to the controversy that accompanies rulings delivered pursuant to Article 258 of the TFEU, there arises another problem, namely whether the CJEU's case-law referring to a specific fact may provide grounds for changing a provision of national law that is also applicable to facts other than the ones analysed by the CJEU.

3. CJEU Rulings Concerning Value Added Tax

3.1. Tax matters brought before the CJEU by the Commission

In the light of the CJEU's case-law, Poland has failed to fulfil its obligations by incorrectly applying a reduced tax rate.

In case C-49/09, the CJEU declared that by applying a reduced value added tax rate of 7% to supplies, import and intra-Community acquisition of clothing and clothing accessories for babies and of children's footwear, the Republic of Poland

had failed to fulfil its obligations under Article 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in conjunction with Annex III thereto. The judgment was given on 28 October 2010. An appropriate amendment, respecting the ruling, came into force on 1 January 2011 (Article 1(17)(c)) in conjunction with Article 3 of the Act of 29 October 2010 amending the Act on tax on goods and services (Journal of Laws of 2010, No. 226, item 1476). It must be noted that the amending legislation was adopted only one day after the ruling. Therefore, it was not possible to include the judgment in the content of the amendment.

In case C-639/13, the CJEU declared that that by applying a reduced rate of value added tax to supplies of goods designed for fire protection, set out in Annex 3 to the VAT Act of 11 March 2004, the Republic of Poland failed to fulfil its obligations under Articles 96–98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Annex III to that directive. An amendment respecting the Judgment of 18 December 2014, entered into force on 1 January 2016 (Article 1(18) in conjunction with Article 13 of the Act of 9 April 2015 amending the Act on tax on goods and services and the Public Procurement Act (Journal of Laws of 2015, item 605).

In case C-678/13, the CJEU declared that by applying a reduced rate of value added tax to supplies of the following:

– medical equipment, aids and other appliances which are not reserved for the exclusive personal use of the disabled or which are not normally intended to alleviate or treat disability
– products which are not pharmaceutical products of a kind normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes, including products used for contraception and sanitary protection,
– under headings 82, 92 and 103 of Annex 3 of the VAT Act of 11 March 2004, the Republic of Poland had failed to fulfil its obligations under Articles 96–98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Annex III of that directive.

The judgment was delivered on 4 June 2015, and the corresponding amendment entered into force on 19 January 2018 (Article 1 in conjunction with Article 2 of the Act of 14 December 2017 amending the Act on tax on goods and services (Journal of Laws of 2018, item 86).

In case C-311/09, the CJEU found that by charging value added tax in the manner set out in Chapter 13, § 35(1), (3), (4) and (5) of the Regulation of the Minister for Finance of 27 April 2004 on the implementation of certain provisions of the Act on tax on goods and services concerning international carriage of persons, the Republic of Poland had failed to fulfil its obligations under Articles 73, 168 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common sys-

tem of value added tax. It should be noted that on 6 May 2010, when the judgment was delivered, the questioned provisions were no longer in force. The Regulation of the Minister for Finance of 27 April 2004 was repealed as of 1 December 2008 (§ 46 Regulation of the Minister for Finance of 28 November 2008 on the implementation of certain provisions of the Act on tax on goods and services (Journal of Laws of 2008, No. 212, item 1336). However, the same provisions were adopted in a new Regulation of the Minister for Finance of 28 November 2008 on the implementation of certain provisions of the Act on tax on goods and services. Finally, the appropriate amendment entered into force on 1 January 2011 (§ 43 Regulation of the Minister for Finance of 22 December 2010 on the implementation of certain provisions of the Act on tax on goods and services (Journal of Laws of 2010, No. 246, item 1649).

3.2. Preliminary rulings

In case C-25/07, the CJEU found that Article 18(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2005/92/EC of 2 December 2005, and the principle of proportionality had precluded national legislation, such as that at issue in the main proceedings, which, in order to allow investigations required to prevent tax evasion and avoidance, extends from 60 to 180 days, as from the date of submission of the taxable person's VAT return, the period available to the national tax office for repayment of excess VAT to a category of taxable persons, unless those persons lodge a security deposit to a value of PLN 250,000. Moreover, the CJEU stated that provisions of national law do not constitute 'special measures for derogation' intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of the Sixth Directive 77/388/EEC, as amended by Directive 2005/92/EC. The judgment clearly shows that Poland has violated the principles of neutrality and proportionality. The ruling led to amending the provisions of national law. Article 97(5) and (7) was repealed as of 1 December 2008 (Article 1(50)(b)) in conjunction with Article 15 of the Act of 7 November 2008 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2008, No. 209, item 1320).

In case C-414/07, the CJEU examined changes in national law regarding the right to deduct input tax when purchasing fuel for cars used for the purposes of taxable activities. In the opinion of the CJEU, the second subparagraph of Article 17(6) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment precludes a Member State from repealing in their entirety, when that directive is transposed into national law,

national provisions concerning restrictions on the right to deduct input tax on purchases of fuel for vehicles used for a taxable activity, by replacing, on the date on which that directive entered into force on its territory, those provisions by provisions laying down new criteria in that regard if – which it is for the national court to determine – the latter provisions have the effect of extending the scope of those restrictions. It precludes, in any event, a Member State from subsequently amending its legislation which entered into force on that date, so as to extend the scope of those restrictions as compared with the situation existing prior to that date.

The impact of this ruling on changes in national tax law is not easy to assess. Article 86(3) of the VAT Act, in the wording that took effect on 22 August 2005, was repealed as of 1 January 2011 (Article 1(11)(b) in conjunction with Article 9 of the Act of 16 December 2008 amending the Act on tax on goods and services and the Act on road transport (Journal of Laws of 2010, No. 247, item 1652). However, the same provision was adopted in Article 86(a) of the VAT Act. The fundamental change to the provision took place only as of 1 April 2014 (Article 1(4) in conjunction with Article 17 of the Act of 7 February 2014 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2014, item 312).

In case C-395/09, the CJEU questioned Article 88(1)(1) of the VAT Act. The CJEU declared that Article 17(6) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, the provisions of which have, in essence, been reproduced in Article 176 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be construed as not authorising the retention of national legislation, applicable when the Sixth Directive 77/388 entered into force in the Member State concerned, which excludes in general the right to deduct input value added tax paid at the time of the purchase of imported services, the price of which is directly or indirectly paid to a person established in a state or territory classified as a 'tax haven' by that national legislation. The judgment was delivered on 30 September 2010. The questioned provision of national law was repealed on 1 April 2011 (Article 1(18)(a) in conjunction with Article 11 of the Act of 18 March 2011 amending the Act on tax on goods and services and the Act on measures (Journal of Laws of 2011, No. 64, item 332).

In case C-438/09, the CJEU concluded that Articles 18(1)(a) and 22(3)(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2006/18/EC of 14 February 2006, must be interpreted as meaning that a taxable person has the right to deduct value added tax paid in respect of services supplied by another taxable person who is not registered for that tax, where the relevant invoices con-

tain all the information required by Article 22(3)(b), in particular the information needed to identify the person who drew up those invoices and to ascertain the nature of the services provided. Moreover, the CJEU stated that Article 17(6) of the Sixth Directive 77/388 as amended by Directive 2006/18 must be interpreted as precluding national legislation which excludes the right to deduct value added tax paid by a taxable person to another taxable person, who has provided services, where the latter has not registered for the purposes of that tax.

The judgment was delivered on 22 December 2010. The questioned provision was effectively amended on 1 July 2011 (Article 1(18) in conjunction with Article 5 of the Act of 9 June 2011 amending the Act on tax on goods and services, the Act on the principles of recording and identifying taxpayers and payers and the Act on road transport (Journal of Laws of 2011, No. 134, item 780).

The judgment in case C-280/10 is particularly interesting. On one hand, the CJEU found that Articles 168 and 178(a) of Directive 2006/112/EC must be interpreted as precluding national legislation under which, in circumstances such as those at issue in the main proceedings, the input VAT paid could not be deducted by a partnership when the invoice, drawn up before the registration and identification of the partnership for the purposes of value added tax, had been issued in the name of the partners of that partnership. However, in the ruling the CJEU did not indicate any provision of Polish legislation. Hence, it is impossible to point out any amendment respecting the ruling.

In case C-169/12, the CJEU stated that Article 66 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/117/EC of 16 December 2008, is to be interpreted as precluding national legislation which provides that, in respect of transport and shipping services, value added tax is to become chargeable on the date on which payment is received in full or in part, but no later than 30 days from the date on which those services are supplied, even where the invoice has been issued earlier and specifies a later deadline for payment. The principles governing the existence of tax liability in the scope examined by the CJEU were changed as of 1 January 2014 (Article 1(16) in conjunction with Article 15 of the Act of 7 December 2012 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2013, item 35).

Case C-319/12 concerned VAT exemption for educational services. In the Judgment of 28 November 2013, the CJEU found that point (i) of Article 132(1)(i), points (a) to (d) of 133(1) and Article 134 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that they do not preclude educational services provided for commercial purposes by bodies not governed by public law from being exempt from value added tax. However, point (i) of Article 132(1) of that directive precludes a general exemption of all supplies of educational services, without consideration of the

objects pursued by non-public organisations providing those services. On the date of the ruling, the national provisions were no longer in force. The appropriate amendment entered into force as of 1 January 2011 (Article 1(8) and (18) in conjunction with Article 3 of the Act of 29 October 2010 on the Act on tax on goods and services (Journal of Laws of 2010, No. 226, item 1476).

In case C-277/14, the CJEU analysed national provisions denying taxpayers the right to deduct input value added tax when the underlying invoice was issued by an entity which, in the light of the criteria provided for by national provisions, should be considered as non-existent and it is not possible to identify the actual supplier. The ruling referred to § 14(2)(1)(a) of the Regulation of Minister for Finance of 27 April 2004 on the implementation of certain provisions of the VAT Act – the Regulation of the Minister for Finance of 27 April 2004 on the implementation of certain provisions of the Act (Journal of Laws of 2004, No. 97, item 970). In the judgment of 22 October 2015, the CJEU declared that the provisions of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2002/38/EC of 7 May 2002, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, by which a taxable person is not allowed to deduct the value added tax due or paid in respect of goods that were delivered to him or her on the grounds that the invoice was issued by a trader that is to be regarded, in the light of the criteria provided by that legislation, as a non-existent trader, and that it is impossible to determine the identity of the actual supplier of the goods, except where it is established, on the basis of objective factors and without the taxable person being required to carry out checks which are not his responsibility, that that taxable person knew, or should have known, that that transaction was connected with value-added-tax fraud, this being a matter for the referring court to determine.

However, the examined provisions were no longer in force on the date of the ruling and the same provisions entered into force by virtue of Article 88(3a)(1)(a) of the VAT Act. According to that Article, invoices do not constitute grounds for deducting input value added tax, if they are issued by a non-existent entity. At the same time, it should be noted that provisions of the VAT Act do not specify the conditions for applying this provision.

In case C-307/16, the CJEU questioned the provisions of the Act on tax on goods and services to the extent that they required that as part of supply of goods for export to be carried in travellers' personal luggage, the taxable vendor must have achieved a minimum level of turnover for the previous tax year or must have entered into a contract with an entity entitled to a refund VAT to travellers if non-compliance with these conditions results in the definitive loss of the exemption in relation to this supply. The CJEU analysed Article 127(6) of the VAT Act that states

that vendors may refund the tax provided that their turnover in the previous tax year exceeded PLN 400,000 and that they refund only VAT paid on goods purchased by the traveller from that vendor. In its Judgment of 28 February 2018, the CJEU found that Article 131, Article 146(1)(b) and Articles 147 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation under which, in the context of a supply of goods for export to be carried in the personal luggage of travellers, the vendor, a taxable person, must have attained a minimum level of turnover in the preceding tax year, or have concluded an agreement with a person authorised to refund VAT to travellers, where the mere failure to meet those conditions results in the definitive loss for the vendor of the exemption in relation to that supply. The ruling has not influenced the national legislation yet.

In case C-308/16, the CJEU examined a definition of 'first occupation'. In the Judgment of 16 November 2017, the CJEU declared that Articles 12(1)(a) and 135(1)(j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national law, such as that at issue in the main proceedings, which makes the VAT exemption on the supply of buildings subject to the condition that the first occupation thereof arises in the context of a taxable transaction. In the ruling the CJEU pointed out the lack of compliance of the definition contained in national law with the provisions of the Directive 2006/112/EC. The appropriate amendment entered into force as of 1 September 2019 (Article 1(1) in conjunction with Article 28 of the Act of 4 July 2019 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2019, item 1520).

In case C-491/18, the CJEU stated that Article 168(a), Article 178(a) and Article 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, must be interpreted as precluding national tax authorities from refusing taxable persons the right to deduct value added tax due or paid upstream on the sole ground that the invoices issued contain an error relating to the identification of the goods to which the transactions concerned relate, even where the taxable person has provided those authorities, before the latter took a decision in its regard, with the documents and clarifications necessary to determine the actual subject of those transactions and attesting thereto.

In the Judgment of 13 December 2018, the CJEU referred to a whole group of provisions of national law, e.g. Article 88(3a)(4)(a) and (b), Article 106(1) of the Act on tax on goods and services. The questioned provisions have not been amended until today.

In case C-225/18, the CJEU found, among other things, that Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation, such as that

at issue in the main proceedings, which provides for the scope of an exclusion from the right to deduct VAT to be extended, after the accession of the Member State concerned to the European Union, and which means that a taxable person, providing tourism services, is deprived, since the entry into force of that extension, of the right to deduct VAT paid on the purchase of overnight accommodation and catering services which that taxable person re-invoices to other taxable persons in the context of the provision of tourism services. So far, the national legislation has not changed after the ruling.

In case C-566/17, the CJEU concluded that Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national practice which permits a taxable person to deduct in full the input VAT charged in respect of acquisition of goods and services for the purposes of both economic activities subject to VAT and non-economic activities not falling within the scope of VAT, owing to the lack of specific rules in the applicable tax legislation regarding the criteria and methods of apportionment which would enable that taxable person to determine the share of that input VAT which must be regarded as being connected to his economic and non-economic activities respectively.

Importantly, the CJEU ruling did not refer to a specific provision of the VAT Law, but to a general practice, largely influenced by the case-law of the Polish Supreme Administrative Court (Resolution of the Supreme Administrative Court of 24 October 2011, I FPS 9/10 – the resolution available at orzeczenia.nsa.gov.pl). However, the judgment referred to a legal situation that no longer existed. Provisions on the method of determining the proportion of deduction of input VAT charged in respect of his acquisition of goods and services for the purposes of both economic activities subject to VAT and non-economic activities not falling within the scope of VAT were introduced to the VAT Act on 1 January 2016 (Article 86(2a–2h) of the Act on tax on goods and services in conjunction with Article 1(4)(a) in conjunction with Article 13 of the Act of 9 April 2015 amending the Act on tax on goods and services and the Public Procurement Act (Journal of Laws of 2015, item 605).

In case C-653/18, the CJEU found that Article 146(1)(a) and (b) and Article 131 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principles of fiscal neutrality and proportionality must be interpreted as precluding a national practice, such as that at issue in the main proceedings, which consists in considering in all cases that there is no supply of goods, within the meaning of that former provision, and in refusing as a result the VAT exemption, where the goods concerned were exported to a destination outside the European Union and where, following their exportation, the tax authorities found that the person acquiring those goods was not the person stated on the invoice issued by the taxable person but another entity which

has not been identified. In such circumstances, the VAT exemption provided for in Article 146(1)(a) and (b) of that directive must be refused if the failure to identify the person actually acquiring the goods prevents it from being proved that the transaction at issue constitutes a supply of goods within the meaning of that provision or if it is established that that taxable person knew or ought to have known that that transaction was part of a fraud committed to the detriment of the common system of VAT. Moreover the CJEU stated that Directive 2006/112 must be interpreted as meaning that where, in those circumstances, there is a refusal to grant the VAT exemption provided for in Article 146(1)(a) and (b) of Directive 2006/112, the transaction in question should be considered not to constitute a taxable transaction and, accordingly, not to confer entitlement to the deduction of input VAT.

Similarly to the previous judgment, the CJEU did not criticise any particular provision of the Law, but the practice formed by applying the provisions regulating export, i.e. in particular Article 2(8), Article 7(1) and Article 41(4), (6) and (11) of the VAT Law. These provisions have not changed in response to this judgment.

4. Conclusions

In the light of the presented analysis, it should be stated that the CJEU's case-law affects not only the application of national tax law, but also its adoption. Among the rulings given pursuant to Article 258 of the TFEU, in four cases the CJEU stated that Poland had failed to fulfil its obligations to ensure consistency of national law with the EU law in the field of VAT taxation. In fourteen cases concerning value added tax, the CJEU declared that the European legislation must be interpreted as precluding provisions of Polish tax taw. In such situations the legislator's response should be expected to ensure compatibility between the national and European legal systems.

Furthermore, the research has shown that the CJEU's case-law has a differentiated impact on adoption of national tax law. The CJEU's case-law potentially resulting in the need to make legislative changes can be divided into three groups. The first group consists of rulings that were a prerequisite to change Polish tax legislation. In three cases the amendments occurred under the influence of rulings delivered in matters brought before the CJEU by the Commission. In six cases there were preliminary rulings. The second group consist of rulings that on the date of their delivery referred to provisions that were no longer in force. These rulings concerned VAT (C-49/09, C-319/12 and C-566/17). It should be noted that the initiation of proceedings before the CJEU could have been a prerequisite for the legislator to change the law, because the amendments corresponded to the subsequent CJEU's case-law. The third group consists of rulings indicating the need for legislative changes which have not impacted the adoption of tax law in Poland.

These include rulings regarding VAT (C-280/10, C-277/14, C-307/16, C-491/18, C-255/18 and C-653/18).

The responses of the Polish tax legislator to rulings belonging to the first two groups have generally been positive. The CJEU's case-law directly contributed to adoption of Polish tax law. This means that the rulings were a prerequisite to adopt legislation corresponding to the CJEU's case-law.

On the other hand, the situation in which the tax legislator has not responded in any way to the CJEU's rulings declaring that the provisions of the European law should be interpreted as precluding Polish legislation must be assessed negatively. However, the final criticism of the legislator in this area requires further in-depth research. In particular it should be considered whether it is possible to adopt legal provisions directly corresponding to the CJEU's case-law.

References

Mączyński D. (ed.), *The Impact of CJEU Case-Law on Excise Duty Regulations in Selected EU Member States*, Adam Mickiewicz University Press, Poznań 2021.

Pistone P., The Impact of ECJ Case Law on National Taxation, *Bulletin for International Taxation*, August/September 2010, pp. 412–428.

Judgements and Orders of the CJEU

Judgment of the Court (First Chamber) of 10 July 2008, Alicja Sosnowska v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu, C-25/07.

Judgment of the Court (Fourth Chamber) of 22 December 2008, Magoora Sp. z o.o. v Dyrektor Izby Skarbowej w Krakowie, C-414/07.

Judgment of the Court (Seventh Chamber) of 30 September 2010, Oasis East Sp. z o.o. v Minister Finansów, C-395/09.

Judgment of the Court (Third Chamber) of 28 October 2010, European Commission v Republic of Poland, C-49/09.

Judgment of the Court (Third Chamber) of 22 December 2010, Bogusław Juliusz Dankowski v Dyrektor Izby Skarbowej w Łodzi, C-438/09.

Judgment of the Court (First Chamber) of 1 March 2012, Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz Sp. j. v Dyrektor Izby Skarbowej w Poznaniu, C-280/10.

Judgment of the Court (Sixth Chamber) of 16 May 2013, TNT Express Worldwide (Poland) Sp. z o.o. v Minister Finansów, C-169/12.

Judgment of the Court (Third Chamber) of 28 November 2013, Minister Finansów v MDDP sp. z o.o. Akademia Biznesu, Sp. komandytowa, C-319/12.

Judgment of the Court (Seventh Chamber) of 18 December 2014, European Commission v Republic of Poland, C-639/13.

Judgment of the Court (Seventh Chamber) of 4 June 2015, European Commission v Republic of Poland, C-678/13.

Judgment of the Court (Grand Chamber) of 8 September 2015, Criminal proceedings against Ivo Taricco and Others, C-105/14.

Judgment of the Court (Fifth Chamber) of 22 October 2015, PPUH Stehcemp Sp. J. Florian Stefanek, Janina Stefanek, Jaroslaw Stefanek v Dyrektor Izby Skarbowej w Łodzi, C-277/14.

Judgment of the Court (Second Chamber) of 20 December 2017, Caterpillar Financial Services Poland Sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie, C-500/16.

Judgment of the Court (Second Chamber) of 16 November 2017, Kozuba Premium Selection Sp. z o.o. z siedzibą w Warszawie v Dyrektor Izby Skarbowej w Warszawie, C-308/16.

Judgment of the Court (Fifth Chamber) of 28 February 2018, Stanisław Pieńkowski v Dyrektor Izby Skarbowej w Lublinie, C-307/16.

Judgment of the Court (Eighth Chamber) of 2 May 2019, Grupa Lotos S.A. v Minister Finansów, C-255/18.

Judgment of the Court (Second Chamber) of 8 May 2019, Związek Gmin Zagłębia Miedziowego w Polkowicach v Szef Krajowej Administracji Skarbowej, C-566/17.

Judgment of the Court (Tenth Chamber) of 17 October 2019, Unitel Sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie, C-653/18.

Judgment of the Court (Tenth Chamber) of 13 December 2018, Mennica Wrocławska Sp. z o.o. v Dyrektor Izby Administracji Skarbowej we Wrocławiu, C-491/18.

Decision of the Polish Supreme Administrative Court

Resolution of the Supreme Administrative Court of 24 October 2011, I FPS 9/10 – the resolution available at https://orzeczenia.nsa.gov.pl.

Legal acts

Act of 7 November 2008 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2008, No. 209, item 1320).

Act of 16 December 2008 amending the Act on tax on goods and services and the Act on road transport (Journal of Laws of 2010, No. 247, item 1652).

Act of 29 October 2010 amending the Act on tax on goods and services (Journal of Laws of 2010, No. 226, item 1476).

Act of 18 March 2011 amending the Act on tax on goods and services and the Act on measures (Journal of Laws of 2011, No. 64, item 332).

Act of 9 June 2011 amending the Act on tax on goods and services, the Act on the principles of recording and identifying taxpayers and payers and the Act on road transport (Journal of Laws of 2011, No. 134, item 780).

Act of 7 December 2012 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2013, item 35).

Act of 7 February 2014 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2014, item 312).

Act of 9 April 2015 amending the Act on tax on goods and services and the Public Procurement Act (Journal of Laws of 2015, item 605).

Act of 14 December 2017 amending the Act on tax on goods and services (Journal of Laws of 2018, item 86).

Act of 4 July 2019 amending the Act on tax on goods and services and certain other acts (Journal of Laws of 2019, item 1520).

Regulation of the Minister for Finance of 27 April 2004 on the implementation of certain provisions of the Act (Journal of Laws of 2004, No. 97, item 970).

Regulation of the Minister for Finance of 28 November 2008 on the implementation of certain provisions of the Act on tax on goods and services (Journal of Laws of 2008, No. 212, item 1336).

Regulation of the Minister for Finance of 22 December 2010 on the implementation of certain provisions of the Act on tax on goods and services (Journal of Laws of 2010, No. 246, item 1649).

Marek Zirk-Sadowski

ORCID: 0000-0003-1740-0863

Marta Sarnowiec-Cisłak

msarnowiec@nsa.gov.pl

ORCID: 0000-0001-9870-9111

The Role of the Supreme Administrative Court in the Harmonisation of Value-Added Tax. Dialogue in Different Forms: Building Mutual Trust and Confidence

Abstract

This article presents four approaches to VAT harmonisation that are present in the jurisprudence of the Polish Supreme Administrative Court. The first approach relates to questions referred to the CJUE for a preliminary ruling. The second one includes situation when the Supreme Administrative Court decides VAT disputes on its own, as an EU court, on the basis of the existing CJEU jurisprudence. The third approach is to build a line of cases to achieve the most pro-EU interpretation of the Polish law. Finally, the fourth approach concerns specific circumstances in which the Court, from the perspective of the harmonisation of VAT, noticing the lack of the proper implementation of EU law into the Polish legal order, refers to the direct effect of the directive. In conclusion, the authors point out that one of the necessary elements for the operation of the common market is a harmonised VAT system. The process of VAT harmonisation in the European Union has not been completed yet and is still ongoing.

Keywords: The Court of Justice of the European Union, Case-Law, VAT harmonisation, Poland

1. Professor Koen Lenaerts, the President of the Court of Justice of the European Union (CJEU), during a lecture on the premises of the Supreme Administrative Court in 2018, stressed that dialogue based on mutual trust remains fundamental to the relationship between national courts and the CJEU. The framework of cooperation outlined in this way becomes crucial for the process of the harmonisation of law in the European space, and thus for the implementation of the EU's common goals and values, including compliance with the principle of the equality of Member States and the effectiveness of European law. Undoubtedly, in this dialogue – regardless of the form that it takes – a special place is occupied by the Supreme Administrative Court and taxes.

Within the framework of such massive judicial case-law, it is natural that there are several forms of VAT harmonisation that apply to our court.

2. In this study, we want to discuss four of these approaches that are present in the court jurisdiction.

The first approach are questions referred to the CJUE for a preliminary ruling.

The report prepared by the Editors of Electronic Publications of the Legal Information System (LEX) shows that in the years 2004–2020, as many as 40% of all CJEU preliminary rulings issued in the so-called Polish cases (answering questions from Polish courts) were tax rulings. The vast majority of these cases are obviously related to VAT – subject to harmonisation. The Supreme Administrative Court remains the Polish court which most frequently refers tax questions to Luxembourg for a preliminary ruling. For instance, out of 25 questions referred to the CJEU in the field of VAT in the last 5 years (2016–2020), the Supreme Administrative Court initiated as many as 19 of them.

The Polish administrative court of last instance thus contributes to the clarification of interpretative doubts concerning EU law, i.e. the regulations of the successively applicable VAT Directives, which are a tool of the harmonisation in the field of VAT.

This was, for instance, in cases in which requests for preliminary rulings were made concerning the taxation of travel services provided by travel agents subject to a special VAT scheme provided for in Articles 306–310 of Directive 112. Thanks to the Supreme Administrative Court, in the *Kozak* judgment, the principles of the taxation of transport services provided by a travel agent were resolved. In turn, in the ruling that was important for the tourism industry, in the *Skarpa Travel* case, in response to doubts presented by the SAC, the Court of Justice considered the issue of the taxation of payment on account made by customers of travel agencies. The question was when – in the case of a travel agency subject to the margin scheme – the VAT becomes chargeable, i.e. at the time of that payment (when all actual

costs incurred by the travel agency, necessary to establish the margin as the taxable base, are not yet known) or later, when it is already possible to finally establish the costs actually incurred by the taxpayer (travel agency). The Luxembourg court explained that in cases where the travel services are precisely designated at the time of the payment on account made by the traveller, the VAT becomes chargeable when the travel agent receives this payment. When the amount of the payment on account corresponds to the total price of the tourist service or to a significant part thereof and no or only a limited part of the costs has yet been incurred by the travel agent (or the actual costs cannot be established at the time of making the payment on account), the profit margin can be determined on the basis of an estimate of the total actual cost.

The dialogue on the taxation for the travel industry continues. Recently the Supreme Administrative Court referred another question to the CJEU, this time concerning the possibility of subjecting to a special VAT procedure a consolidator of hotel services that purchases and resells accommodation services to other entities engaging in an economic activity.

In this context, it becomes evident that the Supreme Administrative Court, as the court of last instance, fulfilling the obligation resulting from Article 267 TFEU and addressing the CJEU, aims at obtaining an interpretation pattern, which allows for the uniform application of VAT regulations both by tax authorities and administrative courts. CJEU rulings are binding not only in the case against which the question was made, but they are also respected in other cases with a similar factual and legal situation. Thus, the preliminary ruling procedure is a key instrument in the process of harmonising VAT in the sphere of applying the law, but it is not the only one.

3. The second approach is due to the fact that the Supreme Administrative Court not only plays the role of a questioning court initiating a direct dialogue with the CJEU, but it also decides VAT disputes on its own, as an EU court, on the basis of the existing CJEU jurisprudence.

An interesting example (primarily due to the factual circumstances) may be one of the cases concerning the purchase of a machine park. Within two days, six entities successively sold and purchased machinery and equipment, with the last buyer (the taxpayer) purchasing it for a price almost 100 times higher than the original price (paid the day before). In the course of the proceedings, it was established that the machines were in poor technical condition, inoperative, incomplete and unused, while there was no evidence to justify such a significant increase in the value of the object of sale (no evidence of repairs or purchase of spare parts). What is more, at the time of the transaction, the machines in question were still on the premises leased by the taxpayer (the ultimate buyer) from the original sell-

er. The SAC stated that the series of transactions described above was aimed at obtaining an excessive refund of VAT and was oriented at obtaining an undue tax benefit. Referring to the rulings in cases *Halifax* (C-255/02) and *Kittel and Recolta Recycling* (Joined Cases C-439/04 and C-440/04), the SAC confirmed that in the case of an abusive tax supply, the refusal of the right to deduct VAT is justified. Moreover, the Court, following the case-law of the CJEU (in the *Mahagében kft* case (C-80/11) and the *Péter Dávid* case (C-142/11)), in the light of the cited facts, ruled out the possibility for the taxpayer to rely on the concept of good faith. The cited judgment is not an isolated example. Referring to the judgments of the CJEU has become a permanent fixture in the VAT rulings.

4. The third approach is to build a line of cases to achieve the most pro-EU interpretation of the Polish law. It means that sometimes the SAC, on the basis of the rulings of the Luxembourg court and the basic principles of VAT, draws a line of jurisprudence, which allows for stabilising the jurisprudence (sphere of law application) in a certain area in the spirit of pro-EU interpretation. A good illustration may be the case of VAT settlements made by Polish municipalities (local self-government units). Here, the essence of the dispute boiled down to the establishment of principles of accounting for this tax in the case of expenditures incurred by a municipality related to water and sewage activities. This activity is of mixed nature. It is mainly an economic activity consisting in water supply and sewage disposal for the benefit of residents and companies located in the municipality and it is a non-taxable activity only to a small extent – outside the VAT system (e.g. in the case of water supply/sewage disposal for the municipality office, schools). This structure of activity affects the scope of permissible VAT deductions. The tax authorities took the position that in order to determine the proportion of the deduction, the municipality should apply the official formula established by the Minister of Finance for local self-government units. The municipality (taxpayer), on the other hand, argued that in accordance with the provisions of the VAT Act, it may use an individually determined pre-deduction ratio calculated on the basis of the ratio of the amount of water/wastewater supplied and discharged as part of business activities to the total amount of water/wastewater supplied to and discharged from all recipients. The difference in the application of the pushed methods was substantial. While the use of the official formula allowed deductions of 11%, the individually calculated precipitant allowed deductions of up to 99%. In making its ruling in favour of the municipality, the SAC stressed that the current regulations of the Polish VAT Act clarify the methods for calculating the pre-deductible ratio, responding to the CJEU rulings in the *BLC Baumarkt* case (C-511/10) and the *Securenta* case (C-437/06). Pointing to the need for respecting the principle of neutrality as the basis for a common VAT system, the SAC emphasised the need

to ensure that this principle is implemented when determining the pre-deductible ratio to the fullest possible extent in given circumstances. As a result, the Polish court assumed that the interpretation of national provisions must take into account the right of deduction as an element of tax construction which implements the principle of VAT neutrality. Thus, the Court allowed for the possibility of determining an individually calculated proportion of deduction in relation to a specific type of activity performed by a municipality. The described judgment, passed in 2018, not only initiated a specific direction of decisions in cases concerning water and sewerage activities, but it also found a translation into VAT settlements in other spheres of activity of municipalities (e.g. sport and recreation activities), where individual calculation of the proportion of input tax deduction is considered permissible, provided that the proposed method is more representative than the official formula. The principle of tax neutrality, fundamental to the VAT system, is therefore also implemented in other areas of municipal activity.

5. Finally, the fourth type of approach. It is worth mentioning situations in which the Court, from the perspective of the harmonisation of VAT, noticing the lack of the proper implementation of EU law into the Polish legal order, refers to the direct effect of the directive. This was done, for instance, in the Judgment of the Supreme Administrative Court of 30 June 2021 (I FSK 2240/19), in which it was assumed that the narrow approach to the legal succession of the acquirer of an enterprise under the Polish VAT Act is contrary to Article 19 of Directive 112 and, therefore, the taxpayer may directly invoke, as the acquirer of an enterprise (legal successor to the transferor), the regulation of the EU law.

6. Taking into consideration not only the current perspective, but also the future of the VAT harmonisation process, we would like to call attention to the need for cooperation between Member States. The possibility of enjoying the experience and benefitting from the case-law of other EU Member States may sometimes prove to be a certain alternative and supplement to the preliminary ruling procedure or to an independent resolution of cases based on statements of the CJEU. The positions of national courts may provide helpful interpretative guidance in the process of resolving VAT issues common to EU countries. The beginnings of such cooperation are already visible. The Supreme Administrative Court is an active participant of the ACA-Europe discussion forum (Association of Councils of State and Supreme Administrative Jurisdictions of the EU), which is becoming a place for the exchange of information on issues of administrative law, including VAT case-law. Similar objectives are also pursued through the Judicial Network of the EU, under the auspices of the CJEU, where the highest courts of the Member States make available decisions of national

courts outside preliminary rulings which are of particular importance for the Union law.

The signalled cooperation between Member States, although it undoubtedly requires involvement, additional work and knowledge of particular tax systems which constitute the legal environment for particular VAT solutions seems to be an area of great potential which may contribute to the approximation of VAT taxation rules within the EU.

Therefore, when talking about the role of the Supreme Administrative Court in the process of VAT harmonisation, we have in mind the activity of the Court in various fields, both at the level of jurisprudence and in the sphere of inter-judicial information exchange. Currently, however, it is of key importance that the Court engages in and continues the dialogue with the European Court of Justice, as mentioned above, either directly – when the Supreme Administrative Court acts as a questioning court – or indirectly – when the Supreme Administrative Court, as an EU court, resolves VAT disputes by providing a pro-EU interpretation of national regulations and respecting interpretation guidelines stemming from the CJEU jurisprudence. An active attitude of the Supreme Administrative Court in this respect contributes to building, maintaining and implementing the principle of mutual trust and its sister principle of mutual confidence, without which the process of harmonisation in the sphere of the application of law would be at least difficult if not impossible.

7. In conclusion, one of the necessary elements for the operation of the common market is a harmonised VAT system. The process of VAT harmonisation in the European Union has not been completed yet and is still ongoing. Over the years, we have succeeded in harmonising the structure of VAT and the principles of this form of taxation. Problems leading to tax competition between the countries of the European Union are all noticeable primarily in large tax rate discrepancies. The bodies of the European Union are aware of the numerous shortcomings of the current tax system and they are working intensively on improving it. However, it is to be expected that, in the absence of a fiscal union, which requires political agreement, the coming changes will not have a revolutionary character. They will rather move towards a moderate correction of the current tax system. The basic task of the courts in the current situation is to harmonise VAT. Until the EU's fiscal union is established, this is a very difficult task and must be based on a close dialogue between the courts of the individual Member States and the CJEU.

Roman Wiatrowski

Judge of the Supreme Administrative Court, Poland

romanwiatrowski2008@gmail.com

ORCID: 0000-0003-0051-6712

The Consensus Model of Interpretation of National Law in Accordance with the EU Law in the Field of Provisions on Tax on Goods and Services in the Case-Law of the Supreme Administrative Court

Abstract

This article presents how the preliminary ruling procedure applied by the Supreme Administrative Court shapes the jurisprudential model of pro-EU interpretation of value added tax regulations. In particular, it is examined how the preliminary ruling procedure contributes to the principle of neutrality and effective collection.

Keywords: preliminary ruling procedure, pro-EU interpretation, VAT

Introduction

This article aims to present the jurisprudence practice of the Supreme Administrative Court in making a pro-EU interpretation of the provisions on tax on goods and services. The purpose of this article is to answer the question of the importance of the preliminary ruling procedure in the implementation of this interpretation. For this purpose, a model of the pro-EU interpretation of VAT regulations, already examined in the literature, was chosen. The article presents some of the content of this model in terms of the principles of neutrality and effective collection. Subsequently, it was examined how this model was changed as a result of the application of the preliminary ruling procedure by the Supreme Administrative Court. For this purpose, the most recent preliminary rulings of the CJEU were selected, answering questions of the Supreme Administrative Court and referring to the principles of neutrality and effective collection. It was examined how the jurisprudence of the Supreme Administrative Court and, consequently, also the jurisprudential model of the pro-EU interpretation, changed after these judgments were issued. This allowed us to take the position that the preliminary ruling procedure continues to shape the pro-EU interpretation model, introducing new elements into its content, which increase the effectiveness of the EU law.

A General Model of the Pro-EU Interpretation of the Provisions on Tax on Goods and Services

There can be no doubt that the Supreme Administrative Court, as a court competent to rule on matters with an EU element, e.g. in the area of VAT, has developed a rich line of rulings on the interpretation of national regulations resulting from the implementation of EU directives. The question arises in this connection as to whether, on the basis of the case-law of the Supreme Administrative Court to date, it is possible to present a model of the pro-EU interpretation in the process of applying provisions on VAT, the content of which will not only consist in the choice and order of application of methods of interpreting both the EU law and the national law, but it will also contain specific indications as to the interpretation of provisions of national law on the basis of the EU law? The question thus posed has already been answered positively in the literature.[1] This article aims to test whether such a model can have practical application in the case-law of the Supreme Administrative Court.

[1] R. Wiatrowski, *Wykładnia prounijna Naczelnego Sądu Administracyjnego w zakresie przepisów dotyczących podatku od towarów i usług*, Warszawa 2021.

In particular, it will need to be analysed how such a model can be supplemented by the use of the preliminary ruling procedure by the Supreme Administrative Court.

Before examining this issue, it is first necessary to set out the characteristics of such a model.

It is necessary, first of all, to point out the features which would distinguish such a model from the interpretation of legal provisions other than VAT provisions resulting from the implementation of the EU law. Such a model should be normative in nature, as it provides normative guidance for the implementation of the obligation of the pro-EU interpretation. Such a model of the pro-EU interpretation should serve to strengthen the effectiveness of the duty to interpret as a means of ensuring the effectiveness of the EU law in the Polish VAT jurisprudence.[2]

The Jurisprudential Model of Interpretation of Provisions on Tax on Goods and Services

A distinction should be made between a theoretical model of pro-EU interpretation, a model which will present the most desirable, i.e. the best way to ensure the effectiveness of the EU law, the manner of conforming interpretation by the Supreme Administrative Court, and a practical jurisprudential model. The practical model is built, in the first place, on the case-law of the Supreme Administrative Court. Such a model should have certain content and fulfil certain functions.

The content of a pro-EU interpretation should be understood not only as a selection and chronology of interpretation rules, but also as specific interpretation rules, which will be specific to the VAT due to the fact that these regulations are the result of the implementation of VAT directives. Therefore, it is necessary to present the interpretation rules that the Supreme Administrative Court applies in making pro-EU interpretations. In addition to the type and chronology of application of the interpretative rules, it is also important whether the principle of the pro-EU interpretation of VAT rules forms an autonomous and coherent rule or whether it is a principle of interpretative priority and must be observed within the framework of national rules and methods of interpretation.[3] In view of the fact that general principles of VAT can be distinguished in VAT,[4] it is necessary to consider whether, in interpreting VAT rules resulting from the implementation of EU di-

---

[2] Ibidem.

[3] M. Kamiński, *Internal and External Limits of the Principle of Consistent Interpretation of Domestic Law with the Directives of the European Union and Their Relevance for the Adjudication of the Administrative Courts*, "Białystok Legal Studies" 2018, Vol. 23, No. 2, p. 12.

[4] M. Militz, D. Dominik-Ogińska, M. Bącal and T. Siennicki, *Zasady prawa unijnego w VAT*, Warszawa 2013.

rectives, a reference should be made to specific interpretative principles appropriate to the nature of those rules.

Two competing models of pro-EU interpretation have been distinguished in the literature. Apart from the dominant model of an interpretation pattern,[5] M. Koszowski also distinguished the 'one-bag model' alias 'harmonisation of contexts'.[6] In the 'harmonisation of contexts' model proposed by M. Koszowski, the authorised body does not construct an interpretative pattern at all, but interprets national law in accordance with the EU law, interpreting the EU law and national law simultaneously, taking into account the linguistic, teleological-axiological context and the systemic context.[7]

In the model of the interpretative benchmark, in order to ensure a pro-EU interpretation, it is first necessary to reconstruct the interpretative benchmark. Building the model of the pro-EU interpretation on such a benchmark entails interpreting a provision of the EU law not only on its letter, but also on the basis of its context, system, function and purpose. An objective interpretation of a provision of the EU law, on the other hand, requires taking account, to the fullest extent possible, of the case-law associated with the benchmark and its normative environment.[8] Therefore, in the literature on the subject, the EU model is given the character of a specific directive norm with the content given to it under the influence of linguistic, systemic, functional, purposive or decisional factors (i.e. the CJEU case-law).[9]

In this article the model of an interpretation model has been adopted. Such a conception makes it possible to distinguish, based on the case-law of the Supreme Administrative Court, the jurisprudential model from the theoretical model, which is a benchmark for the jurisprudential model. The conception of the interpretative model enables a better presentation of the jurisprudence practice of the Supreme Administrative Court, and in particular the application of the preliminary ruling procedure for the elimination of doubts concerning the interpretation of the EU law.

The jurisprudential model of pro-EU interpretation, based on the concept of the model of an interpretative benchmark, is characterised by an adequate justification of the interpretative decision of the Supreme Administrative Court. In the justification of this judgements, a parallel interpretation of domestic and EU law

---

[5] C. Mik, *Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej*, in: S. Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej* (pp. 115–165), Kraków 2004; A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego*, Warszawa 2005.

[6] M. Koszowski, *Dwa modele wykładni prounijnej*. „Studia Europejskie" 2012, Vol. 3, pp. 93–110.

[7] Ibidem.

[8] C. Mik, op. cit.

[9] K. Łuczak, *Metody wykładni prawa krajowego a wykładnia zgodna z prawem unijnym (w orzecznictwie sądów administracyjnych)*, „Państwo i Prawo" 2011, No. 1, pp. 59–72.

is made. Therefore, the literature on the subject considers as exemplary those judgments in which the Supreme Administrative Court referred both to the content of the national and the EU law, referred to the CJEU jurisprudence and to previous national jurisprudence, presented its own position on the case, which was supported by the position taken in the literature on the subject, and referred to the applied jurisprudential principle.[10]

The concept of the interpretative model allows the question to be formulated as to how the interpretative rules applied by the Supreme Administrative Court differ at both of these stages, i.e. at the stage of interpreting EU law and national law in accordance with the EU law (pro-EU interpretation in the strict sense)? It has already been demonstrated in the literature on the subject that in interpreting EU law the Supreme Administrative Court makes use of the body of work and experience of the CJEU, both in terms of interpretative directives and the finished results of the interpretation of EU law.[11]

In order to determine the interpretative standard, the Supreme Administrative Court uses the course and result of the interpretation conducted by the CJEU. The need to apply such an interpretative rule in the case-law of the Supreme Administrative Court is justified by the need to apply the principle of loyalty and the principle of effectiveness.[12] Therefore, it may be assumed that the jurisprudential model of pro-EU interpretation takes into account the interpretative rules applied by the CJEU in the interpretation of the provisions on VAT. This process precedes pro-EU interpretation in the strict sense, i.e. the interpretation of national law in accordance with EU law. The latter takes place according to national interpretative rules.

At both stages of interpretation, i.e. when interpreting the EU law and the domestic law, the Supreme Administrative Court uses similar types of interpretation directives: grammatical, systemic and goal-oriented (functional) interpretation. When interpreting the EU law, one would expect the Supreme Administrative Court to examine different language versions of the EU tax law provisions. However, when interpreting the provisions of domestic law regulating the taxation of goods and services, the Supreme Administrative Court should attribute to the terms used in these provisions an autonomous meaning, specific for this tax and, therefore, detached from the understanding given to these terms by domestic civil law.[13]

In the jurisprudential model of interpreting EU law, linguistic interpretation is relevant only at the beginning of the process of consensual interpretation, when it

---

[10] R. Wiatrowski, *Wykładnia prounijna Naczelnego Sądu Administracyjnego w zakresie przepisów dotyczących podatku od towarów i usług*, Warszawa 2021.

[11] Ibidem.

[12] Judgment of the Supreme Administrative Court of 18 March 2015, I FSK 240/14.

[13] Judgment of the Supreme Administrative Court of 26 March 2015, I FSK 2174/13.

is necessary to decode the content of a rule of national law and a rule of EU law, but already at this stage its scope in relation to rules of the EU law is very limited, due to linguistic diversity and conceptual autonomy. At this stage of the interpretation process, the objective-functional interpretation has a clear advantage over the linguistic interpretation, as the linguistic interpretation is unreliable due to the different meaning of the text in different language versions. The Supreme Administrative Court clearly recognises the superiority of the goal-oriented and functional interpretation over linguistic interpretation in interpreting provisions of EU law, noting the unreliability of linguistic interpretation, which is justified by the different meaning of the text in different language versions.[14]

The Importance of the Case-Law Principles of the Court of Justice in the Jurisprudential Model of the Pro-EU Interpretation of VAT Legislation

The fact that in interpreting EU law the Supreme Administrative Court makes use of the acquis and experience of the CJEU, both in terms of interpretative directives and the finished results of the interpretation of EU law, makes it possible to assign a special role in the discussed model of interpretation to the case-law principles of the CJEU in the field of VAT. The case-law principles are referred to by the CJEU. Among them one may distinguish the principle of universality of taxation, the principle of neutrality, the principle of the taxation of consumption and the principle of the prohibition of abuse of rights in VAT.

In the jurisprudential practice of the Supreme Administrative Court, judgments of the CJEU are given the nature of binding precedents and the jurisprudential principles developed by the CJEU are treated as systemic and axiological arguments.[15] Such a strong significance ascribed to the case-law principles by the Supreme Administrative Court may be justified by their specific functions. The following functions of the principles of EU law may be distinguished: filling in legal gaps, as well as such functions as interpretative, corrective, regulative, creative, protective and that regarding a behavioural pattern.[16] A reference to principles of law should be justified by the fact that the scope of national law used to develop an interpretative decision includes not only those provisions that imple-

[14] R. Wiatrowski, op. cit.

[15] Ibidem.

[16] W. Jedlecka, *Zasady prawa Unii Europejskiej w ogólności*, in: J. Helios, W. Jedlecka, *Zasady stosowania prawa Unii Europejskiej*, Toruń 2013, pp. 47–56.

ment EU law, but also the entire scope of national and EU law necessary to take an interpretative decision.[17]

When making a pro-EU interpretation of the provisions on VAT, the Supreme Administrative Court, referring to the case-law principles, creates various models of arguments referring to the EU law. When analysing such arguments using the example of the principle of neutrality, it should be noted that the Supreme Administrative Court refers in particular to the principle of neutrality when presenting the position of the CJEU, which in its judgment referred to the case-law principle.[18]

In other cases, the Supreme Administrative Court refers to the principle of neutrality, citing it as one of the arguments that support the interpretative result obtained with other arguments, including the CJEU case-law.[19]

However, the Supreme Administrative Court usually refers to the principle of neutrality by indicating the CJEU judgments in which it was interpreted. It is also possible to indicate rulings of the Supreme Administrative Court in which the necessity to verify the ruling principle in a specific case resulted directly from a CJEU ruling.

In particular, the obligation to examine whether the principle of neutrality was infringed was imposed by the CJEU on the Supreme Administrative Court in the Judgment of 22 April 2021, in case C-703/19, J.K.[20] In view of the CJEU judgment, the Supreme Administrative Court held that in a situation where a different reduced tax rate was stipulated for the supply of prepared meals and a different one for services related to catering, which consequently, due to the different interpretation practice of the tax authorities in relation to the settlement periods referred to in the judgment, led to a breach of the principle of neutrality, it is essential:

– firstly, to determine the nature of the transactions effected by the taxpayer
– secondly, to classify them as supplies of goods or services and to determine the appropriate tax rate applicable.[21]

In the light of the distinguished principles of jurisprudence, it is possible to construct an interpretative benchmark, which is used to determine the compliance of the case-law of the Supreme Administrative Court with EU law. The interpretative benchmark in the case-law model of pro-EU interpretation provides impor-

[17] K. Łuczak, op. cit.

[18] E.g. judgments of the Supreme Administrative Court of: 2 July 2019, I FSK 119/17;11 September 2019, I FSK 1007/17; 21 November 2019, I FSK 2047/15; 17 December 2019, I FSK 1750/16.

[19] E.g. judgments of the Supreme Administrative Court of: 28 June 2019, I FSK 1844/15; 10 March 2016, I FSK 1472/14.

[20] Judgment of the Court of Justice of 22 April 2021, C-703/19, J.K., ECLI:EU:C:2021:314.

[21] Judgment of the Supreme Administrative Court of 30 July 2021, I FSK 1749/18.

tant interpretative clues, which the Supreme Administrative Court takes into account in the construction of the interpretative decision in the field of VAT.[22]

The Supreme Administrative Court refers to the case-law principles not only in the justifications for judgments, but also in the wording of the preliminary questions. The case-law principles in the area of VAT, and in particular the principle of neutrality, were also an element of the construction of the questions for a preliminary ruling as well as their justifications.[23]

The jurisprudential model of conforming interpretation is shaped by rulings of the CJEU concerning the interpretation of EU law and by rulings of the Supreme Administrative Court concerning the interpretation of both the EU law and national law. The jurisprudential model of pro-EU interpretation consists of the theses of only those judgments of the Supreme Administrative Court which are consistent with the model of pro-EU interpretation or whose departure from the model of conforming interpretation is justified by the need to take into account the boundaries of pro-EU interpretation.

Assuming a high degree of the effectiveness of EU law in the case-law of the Supreme Administrative Court, which is at least in part consistent with the model of interpretation, it may be assumed that it was possible to determine the content of the jurisprudential model in this part on the basis of the case-law of the Supreme Administrative Court. In the case-law practice of the Supreme Administrative Court such an assumption has a limited scope. As far as the interpretation of EU law is concerned, the judgments are not as important as the judgments of the CJEU, which, as indicated above, are given the nature of a precedent. The CJEU, as regards the interpretation of EU law, enjoys great authority of the judges of the Supreme Administrative Court. As far as the interpretation of VAT regulations is concerned, the ordinary formations of the Supreme Administrative Court tend to submit preliminary questions to the CJEU rather than refer legal questions for a resolution of the Supreme Administrative Court.

This practice contributes more to ensuring the effectiveness of EU law. This is evidenced not only by the fact that the Supreme Administrative Court, in its ordinary composition, has often verified the position taken in the resolution by referring a question for a preliminary ruling, but also by the fact that the question for a preliminary ruling has also been referred by the composition competent to adopt the resolution. The special authority of the CJEU is also confirmed by the fact that in the cases in which it issued a preliminary ruling inconsistent with the earlier wording of the resolution, the Supreme Administrative Court did not apply the procedure provided for in Article 269 of the Administrative Court Proce-

[22] R. Wiatrowski, *Wykładnia prounijna Naczelnego Sądu Administracyjnego w zakresie przepisów dotyczących podatku od towarów i usług*, Warszawa 2021.

[23] Decision of the Supreme Administrative Court of 30 June 2020, I FSK 1785/17.

dure and did not apply for re-taking the resolution, but directly applied the preliminary ruling.[24]

The constructed jurisprudential model of pro-EU interpretation, based on the jurisprudential principles of VAT, may provide judges of the Supreme Administrative Court with many important interpretative guidelines in the interpretation of VAT regulations. However, this model does not have a permanent character. The evaluation of this model is connected with the dynamics of economic processes and their influence on the interpretation of legal provisions. Therefore, the Supreme Administrative Court should bear in mind that it is necessary to expand the model with new interpretative results, especially in respect of the interpretation of EU law.

The content of the jurisprudential model of pro-EU interpretation is the part based on the principle of neutrality and the principle of effective collection. A characteristic feature of the jurisprudential model of pro-EU interpretation is the interpretative decision, which has a specific substantive content. The substantive content of the interpretative decision takes into account the content of the interpretative model and thus also the objectives of the directives governing VAT and therefore also the jurisprudential principles of this tax. By analysing the case-law of the Supreme Administrative Court in the part where it refers to the principles of jurisprudence, one can create the content of the model of jurisprudence, which, already at this point, should be noted that it will not be definitive.

In particular, the content of the model of pro-EU interpretation, in the part based on the principle of neutrality, characterises the taxpayer's right to deduct input tax. That right depends on the existence of a direct and close link between the goods or services purchased and the taxable activities of the taxable person.[25] The implementation of the principle of neutrality precludes depriving taxable persons of the right to deduct VAT on the basis of formal conditions which are too restrictive, which means that proportionality must be observed in the sense that, where transactions effected by a taxable person for VAT purposes do not constitute an abuse of rights and result, for example, from a misinterpretation of the rules, there are no grounds for depriving that person of the right to deduct input tax.[26]

In line with the pro-EU interpretation, in the part based on the principle of neutrality, it is therefore characteristic to refer to the good faith of the taxpayer as a state of awareness on the part of the taxpayer and the related duty and possibility to foresee certain events that he is participating in actions leading to the undue refund of tax. Therefore, the right to deduct input VAT may be deprived only by omissions on the part of the taxpayer, the absence of which would result in the tax-

[24] R. Wiatrowski, op. cit., p. 454.

[25] E.g. judgment of the Supreme Administrative Court of 6 July 2017, I FSK 2191/15.

[26] E.g. the judgment of the Supreme Administrative Court of 13 March 2012, I FSK 690/11.

payer knowing, or at least should have known, that the transaction on which the right to deduct is based was connected to a VAT offence or fraud.[27]

The principle of the neutrality of VAT guarantees the taxpayer the right to deduct input VAT to the extent to which the expenditure was connected with the performance of his economic activity, which means that if the evidence gathered in the case makes it possible to determine the value of the actual transaction overstated on the invoice, the court should guarantee the right to deduct tax in the part corresponding to the actual value of the transaction.[28] The neutrality principle may also be infringed by applying different tax rates to similar products.[29] It follows from the judgment of the CJEU in case C-499/16 AZ[30] that Article 98 of the VAT Directive must be interpreted as not precluding – provided that the principle of fiscal neutrality is observed, which it is for the referring court to examine – national legislation, such as that at issue in the main proceedings, which makes the application of a reduced rate of VAT to fresh pastry products and cakes subject only to the criterion of their 'date of minimum durability' or 'best-before date'.[31] In that judgment, the Court, in principle, accepted the criterion of the 'best-before date' as being appropriate for differentiating the rate of VAT on pastry and cakes. This criterion for a reduced VAT rate is derived from 'the average Polish consumer's point of view when choosing to buy cakes and pastry products'.

The Court reserves the conditional nature of its interpretation of Article 98 of Directive 112 by stating that it is for the national court to undertake a specific examination to ascertain whether the fact that the expiry date has been stated in such a way that the shelf-life does not exceed 45 days is decisive from the point of view of the average Polish consumer. The Court instructs the national court to examine whether, on the Polish market, there are pastries and cakes whose shelf-life does not exceed 45 days but which, in the eyes of the consumer, are similar to pastries and cakes with a minimum durability date exceeding 45 days, such as those produced by AZ, and which are mutually substitutable. If the existence of such goods can be established, a shelf life of less than 45 days would not prove decisive for the average Polish consumer and his choice could be influenced by the application of different VAT rates. In such a case, in the opinion of the CJEU, the principle of fiscal neutrality would preclude the national legislation at issue in the main proceed-

---

[27] E.g. judgment of the Supreme Administrative Court of 11 February 2014, I FSK 390/13; judgment of the Supreme Administrative Court of 6 March 2014, I FSK 509/13; judgment of the Supreme Administrative Court of 6 March 2014, I FSK 517/13.

[28] Judgments of the Supreme Administrative Court: of 18 May 2017, I FSK 1916/15; of 23 September 2017, I FSK 16/16; of 15 November 2019, I FSK 1312/19.

[29] E.g. judgment of the Supreme Administrative Court of 7 December 2018, I FSK 733/15.

[30] Judgment of the Court of Justice of 9 November 2017, in case C-499/16, AZ, ECLI:EU:C:2017:846.

[31] Judgment of the Court of Justice of 9 November 2017, in case C-499/16, AZ, ECLI:EU:C:2017:846.

ings.[32] The Supreme Administrative Court, applying the interpretation of EU law resulting from the CJEU ruling, held that the answer to the question whether the criterion of differentiation of VAT rates adopted by the Polish legislator should take into account the assessment of consumer preferences with respect to the category of products in question is therefore in the affirmative.[33]

Turning to the content of the model of the pro-EU interpretation, in the part based on the principle of effective collection, one can present the interpretation results of the Supreme Administrative Court that are consistent with the model of the pro-EU interpretation, from which it follows, *inter alia*, that the event triggering the obligation to pay a given amount of tax is also the very fact of issuing an invoice in which the amount of tax is indicated.

The content of the jurisprudence model indicates the purpose of application of the provision, i.e. Article 108 of the VAT Act, which links the obligation to pay tax with the very issuance of an invoice. It is to eliminate the risk of depletion of tax receivables.[34] In the content of this part of the model, we will find an enumerative list of what can be the reason for the obligation arising in connection with the very issuance of an invoice. This may be, for instance, an unconscious error, uncertainty as to the existence of a tax obligation, or even the conscious issuance of an invoice confirming fictitious trading in goods or the alleged performance of services.[35] According to the jurisprudential model, Article 108 of the VAT Act should be interpreted in such a way that it is intended to prevent abuse of the VAT system and should be applied taking into account whether the issuance of an invoice entails any risk of a reduction in tax revenue.

For the model of pro-EU interpretation, constructed on the basis of the realisation of effective collection, it is important that application of Article 108 of the VAT Act is possible only in the case of risk of depletion of tax dues. The Supreme Administrative Court has pointed out, *inter alia*, that there is no risk of depletion of tax and, consequently, Article 108(1) of the VAT Act does not apply to an internal invoice disclosing output VAT on an acquisition of goods incorrectly classified as intra-Community acquisition if the taxpayer has accounted for output VAT on this transaction and at the same time made a deduction of this tax, and the tax authority, ascertaining the defectiveness of such settlement, eliminated the tax deducted from it, as a consequence of which the authority must also correct the output VAT on this transaction as disclosed in the internal invoice.[36]

---

[32] Judgment of the Court of Justice of 9 November 2017, in case C-499/16, pp. 32–24 AZ. ECLI:EU:C:2017:846.

[33] Judgment of the Supreme Administrative Court of 7 December 2018, I FSK 733/15.

[34] Judgment of the Supreme Administrative Court of 27 April 2017, I FSK 1857/15.

[35] Judgment of the Supreme Administrative Court of 6 February 2013, I FSK 610/12.

[36] Judgment of the Supreme Administrative Court of 2 July 2010, I FSK 1203/09.

The content of the jurisprudential model, in the part based on the principle of effective collection, also refers to the legal nature of sanctions in the area of VAT. In the jurisprudence of the Supreme Administrative Court, the position has been developed that the directive does not preclude a Member State from providing in its legislation for an administrative sanction which may be imposed on VAT payers, such as the 'additional tax liability' provided for in Article 109(5) and (6) of the VAT Act.[37] This position is supported by the jurisprudence of the CJEU in, *inter alia*, the K-1 case,[38] in which the Court of Justice confirmed that an administrative sanction may be imposed where it is established that a taxable person has declared an amount of the VAT difference to be repaid or the input tax to be repaid that is higher than the amount due.

The above examples of the jurisprudence lines, developed on the basis of the principles of neutrality and effective collection, confirm that in the process of applying the provisions on VAT, on the basis of the jurisprudence of the Supreme Administrative Court, it is possible to construct a jurisprudence model of pro-EU interpretation, which will also contain specific interpretative guidelines as to the interpretation of the provisions of national law on the basis of EU law.

The Preliminary Ruling Procedure as a Tool for Supplementing the Jurisprudential Model of Pro-EU Interpretation

The content of the jurisprudential model of interpretation, constructed on the basis of the jurisprudence of the Supreme Administrative Court in line with the judgments of the CJEU, is not complete, as has already been noted. Due to changing economic processes, gaps in the model of pro-EU interpretation arise, the filling of which requires interpretation of EU law. In filling these gaps, as already indicated above, the preliminary ruling procedure plays an important role. The use of this procedure not only makes it possible to fill in the gaps in the pattern of the pro-EU interpretation, but also to eliminate doubts concerning the interpretation of the EU law. This is reflected in the judicial practice of the Supreme Administrative Court, where the institution of questions for a preliminary ruling is quite commonly used in VAT cases.[39] The use of the preliminary ruling procedure has a significant impact on shaping the line of rulings by the Supreme Administrative Court, as it not only confirms, but also unifies the existing line of rulings, and most

[37] Judgment of the Supreme Administrative Court of 14 January 2010, I FSK 1788/08.

[38] Judgment of the Court of Justice of 15 January 2009, C-502/07, K-1. ECLI:EU:C:2009:11.

[39] By 1 September 2021, Polish administrative courts had referred 92 questions for a preliminary ruling, 62 of which related to VAT, 52 of which were referred by the Supreme Administrative Court.

importantly, contributes to its significant change in the case where it remains inconsistent with the pro-EU interpretation pattern.[40] The Supreme Administrative Court applies the procedure of preliminary questions both when there was a divergence in jurisprudence and when the position of the Supreme Administrative Court was uniform.

The Impact of the Preliminary Ruling Procedure on the Development of a Case-Law Model of the Pro-EU Interpretation of the Principle of Neutrality and Effective Collection

In presenting the impact of the preliminary ruling procedure on the model of pro-EU interpretation, it is worth noting the principles of jurisprudence against which the Supreme Administrative Court has most often referred questions for a preliminary ruling, i.e. the principle of neutrality and ensuring effective collection.

In particular, it is worth verifying how the Supreme Administrative Court uses the preliminary ruling procedure to fill in legal gaps concerning the principle of neutrality. It should be considered what was the extent of the Supreme Administrative Court's freedom in establishing the premises for the application of this principle.

These issues can be analysed, *inter alia*, on the basis of case-law concerning the application of reduced VAT rates of 5% or 8%, depending on whether the meals sold in the 'drive-in', 'walk through', 'food court' and inside the premises are considered as a supply of goods or a supply of services. This dispute was preceded by the judgment of the CJEU in case C-703/19, J.K.[41]

In that judgment, the Court first of all answered the General Court's doubts concerning the way in which the Polish legislature transposed into national law Article 98 of Directive 112 in conjunction with Annex III thereto. The CJEU held that where the transactions to which the reduced rate applies belong to one of the categories of Annex III to Directive 112 and the principle of fiscal neutrality is respected, the national legislature may classify in the same category different taxable transactions falling within separate categories of that Annex III, without making a formal distinction between the supply of goods and the supply of services. Moreover, according to the CJEU, the VAT Directive does not preclude the supply of goods or services falling within the same category of Annex III to that Directive from being subject to two different reduced rates of VAT.

---

[40] R. Wiatrowski, op. cit., p. 438.

[41] Judgment of the Court of Justice of 22 April 2021, C-703/19, J.K., ECLI:EU:C:2021:314.

Consequently, the CJEU held that it is for the national court not only to examine whether the choice made by the national legislature to apply one or two reduced rates of VAT relates to transactions falling within one or more of the categories listed in Annex III to Directive 112, but also whether the different VAT treatment of supplies of goods or services falling within the same category of that annex complies with the principle of fiscal neutrality.

Taking into consideration the above position of the CJEU, the Supreme Administrative Court concluded that the Polish legislator did not infringe the EU law by applying two different reduced tax rates – one applicable to the supply of prepared meals and non-alcoholic beverages (5%) and another applicable to services connected with catering (8%), it is important to correctly classify transactions performed by a taxpayer of goods and services tax as the supply of prepared food and beverages or services connected with catering.

The Supreme Administrative Court stated that although there are no obstacles to the same rate being applied to both services and supplies of goods, this cannot result in a breach of the principle of neutrality and competitiveness. When recognising that the neutrality principle was infringed, the Supreme Administrative Court took into account that the interpretation practice of the authorities which issued individual interpretations was favourable to taxpayers who requested them. These interpretations entitled these taxpayers to apply a reduced rate. Only the issuance of the general interpretation of the Minister of Finance on 24 June 2016[42] ended this practice.

The Supreme Administrative Court pointed out that until the general interpretation of the Minister of Finance of 24 June 2016 was issued, the interpretation applied by the tax authorities with respect to tax rates violated the principle of neutrality to the extent that it considered products intended for direct consumption as a supply of goods at one time and as a service at another time, which resulted in taxing these activities at different tax rates. The finding of a violation of the neutrality principle changes, in the opinion of the Supreme Administrative Court, the legal assessment of the very transactions performed by the taxpayer.

The Supreme Administrative Court held that a legal assessment of transactions performed by a taxpayer requires, first, that the nature of the transactions performed by the taxpayer be determined and, second, that they be classified as a supply of goods or provision of services and that the applicable tax rate be determined, taking into account the indications in this judgment.[43]

---

[42] General interpretation of the Minister of Finance of 24 June 2016 No. PT1.050.3.2016.156, Dz.Urz. MF.2016.51.

[43] Judgment of the Supreme Administrative Court of 30 July 2021, I FSK 1290/18; similarly, judgments: NSA judgment of 2 September 2021, I FSK 745/18, NSA judgment of 2 September 2021, I FSK 789/19, NSA judgment of 10 September 2021, I FSK 2146/18; NSA judgment of 30 September 2021, I FSK 788/18; NSA judgment of 6 October 2021, I FSK 1780/18; NSA judgment of 7 December

It follows from the above that the CJEU ruling allowed for the completion of the model of pro-EU interpretation regarding the possibility of applying reduced tax rates. In the ruling, the CJEU left it to the Supreme Administrative Court to assess whether the principle of neutrality and competitiveness had been violated.

The Supreme Administrative Court found that a breach of the neutrality and competitiveness principles was caused by the different interpretation practice of the tax authorities, in relation to settlement periods before 24 June 2016, i.e. before the general interpretation was issued, which led to a breach of the neutrality principles to the extent that the supply of the same foodstuffs was considered once as a supply (in relation to entities that requested the interpretation) and at another time as a service, resulting in taxation at different tax rates.

It follows from the above that the gap in the case-law model was only partially filled by the preliminary ruling in case C-703/19, J.K., as the rest of the gap was filled by the Supreme Administrative Court, which took the final position as to whether the neutrality principle had been infringed. The gap was filled by explicitly indicating that the violation of the neutrality principle may also be caused by the interpretation practice of the authorities, which allows different tax rates to be applied by entities that applied for an individual interpretation by those that did not apply for such an interpretation. The Supreme Administrative Court has extended the model of pro-EU interpretation. As indicated above, in its earlier rulings, the Supreme Administrative Court held that the neutrality principle is infringed, among other things, when there are products on the Polish market which in the eyes of the consumer are similar to products benefiting from lower rates and which are mutually substitutable. At the time, the Supreme Administrative Court linked this to clear consumer preferences.[44] The content of the model of jurisprudence with regard to rates in the catering industry has not yet been finally shaped, because another question has been referred on this subject.[45]

The preliminary ruling in case C-653/18, Unitel Sp. z o.o[46] certainly contributed to changing the content of the jurisprudential model of pro-EU interpretation as regards the principle of neutrality. In that judgment, the CJEU stated that: Article 146(1)(a) and (b) and Article 131 of Directive 112, as well as the principles of fiscal neutrality and proportionality, must be interpreted as precluding a national

2021, I FSK 1211/18).

[44] E.g. Judgment of the Supreme Administrative Court of 7 December 2018, I FSK 733/15.

[45] In a decision dated 28 January 2022, I SA/Wr 208/21, the Provincial Administrative Court referred questions to the CJEU for a preliminary ruling on, *inter alia*: 'Is an administrative practice resulting in the application of two different reduced VAT rates to goods having the same objective characteristics and qualities depending on the occurrence of services for the preparation and serving of such goods, thereby differentiating such goods in terms of subjects rather than objects, compatible with the principle of fiscal neutrality and the principle of legal certainty?'

[46] Judgment of the Court of Justice of 17 October 2019, C-653/18, Unitel Sp. z o.o. ECLI:EU:C:2019:876.

practice which consists in considering, in each case, that there is no supply of goods within the meaning of the former provision and, consequently, in refusing to benefit from the exemption from VAT when the goods in question have been exported outside the territory of the European Union and, after the export, the tax authorities have found that the person acquiring those goods was not the person shown on the invoice issued by the taxable person, but another undetermined entity.

According to the CJEU, in such circumstances, the exemption from VAT provided for in Article 146(1)(a) and (b) of that Directive must be refused when the lack of identification of the actual customer makes it impossible to establish that the transaction in question constitutes a supply of goods within the meaning of that provision or when it is established that that taxable person knew or should have known that the transaction was linked to a fraud committed contrary to the common system of VAT. In the same judgment, the CJEU took the view that Directive 112 must be interpreted as meaning that, where, in those circumstances, the exemption from value added tax (VAT) provided for in Article 146(1)(a) and (b) of Directive 2006/112 is refused, the transaction in question must be regarded as not constituting a taxable transaction and therefore not giving rise to a right to deduct input VAT.

In view of the above ruling of the CJEU, the Supreme Administrative Court took the view that if the goods being exported have been sold, dispatched outside the EU and have physically left the EU, the conditions for applying the 0% rate are met, even if it turns out that the actual recipient of the goods is not the buyer indicated in the invoice, but an unidentified entity. At the same time, the Supreme Administrative Court held that application of the 0% rate will not be possible if it is shown that:

– the supply, even to an unidentified entity, did not take place at all
– it is demonstrated that the taxpayer in question knew or should have known that the transaction he was carrying out could constitute fraud committed against the common system of VAT by the purchaser.

In the opinion of the Supreme Administrative Court, the finding of negative prerequisites for the application of the 0% rate does not provide grounds for the application of the domestic rate, but in the opinion of the Supreme Administrative Court, assuming that a taxable transaction with the participation of the buyer in question did not occur at all, the authority should deprive the taxpayer of the right to deduct input tax on the acquisition of the goods.[47]

Before the judgment in case C-653/18, Unitel Sp. z o.o., it followed from the content of the jurisprudential model of pro-EU interpretation that demonstrating

[47] Judgments of the Supreme Administrative Court: of 19 February 2020, I FSK 126/18; of 19 February 2020, I FSK 127/18; of 19 February 2020, I FSK 127/18; of 8 July 2020, I FSK 1936/16.

that the taxpayer knew or should have known that he was participating in an illegal transaction was a necessary prerequisite for depriving the taxpayer of the right to deduct input tax (the taxpayer did not preserve so-called good faith). Following the judgment in case C-653/18, Unitel Sp. z o.o., the demonstration that the taxpayer has not kept good faith is also necessary when trying to challenge the 0% rate, if it is not disputed that the exported goods, have been sold, shipped outside the territory of the Union and have physically left the territory of the Union.

With regard to the principle of effective collection, it was also examined how the case-law has developed in the wake of the CJEU judgment in case C-935/19, Grupa Warzywna Sp. z o.o.[48] In this judgment, the CJEU responded to the Supreme Administrative Court's doubts as to whether Article 273 of the VAT Directive and the principles of proportionality and neutrality of VAT should be interpreted as precluding national legislation which imposes on a taxpayer who has wrongly classified a transaction exempt from VAT as a transaction subject to that tax a sanction amounting to 20% of the amount of the overstatement of the VAT refund unduly claimed, regardless of the nature and gravity of the irregularities included in the tax return, the absence of circumstances indicating that the error constituted fraud, and the fact that State revenue was not depleted.

In the aforementioned judgment, the Court of Justice pointed out that although Member States are entitled to impose sanctions with reference to Article 273 of the VAT Directive, they must nevertheless exercise their powers in compliance with the principle of proportionality. According to the Court, in order to assess whether a penalty complies with the principle of proportionality, account must be taken, in particular, of the nature and seriousness of the infringement which the penalty is intended to punish and of the manner in which the penalty is determined.[49] The Court of Justice, in analysing the penalty provision in Article 112b of the VAT Act, held that the manner in which the penalty is determined does not allow the tax authorities to individualise the penalty imposed in order to ensure that it does not go beyond what is necessary to achieve the objectives of ensuring correct collection of tax and preventing tax evasion.[50]

The Supreme Administrative Court, taking into account the position taken in the judgment in case C-935/19, Grupa Warzywna Sp. z o.o., stated that Article 112c of the VAT Act does not differentiate between factual situations justifying the imposition of an additional tax liability, does not differentiate the nature and gravity of the infringement. As the Supreme Administrative Court noted, the legislator

[48] Judgment of the Court of Justice of 15 April 2021, C-935/19, Grupa Warzywna Sp. z o.o. ECLI:EU:C:2021:287.

[49] Judgment of the Court of Justice of 15 April 2021, C-935/19, Grupa Warzywna Sp. z o.o., pp. 25, 26, 27. ECLI:EU:C:2021:287.

[50] Judgment of the Court of Justice of 15 April 2021, C-935/19, Grupa Warzywna Sp. z o.o., p. 35. ECLI:EU:C:2021:287.

adopted automatism, as this sanction applies to every factual situation regardless of the taxpayer's conduct. In the view of the Supreme Administrative Court, it would be a breach of the principle of proportionality and of Article 273 of Directive 112 to apply Article 112c(2) of the VAT Act in every situation, automatically, without taking into account such factual circumstances as the fact that the taxpayer infringed tax regulations as a result of failing to act with due diligence, without deliberate and conscious participation in tax fraud, by his conduct seeking to prevent tax losses, by undertaking cooperation with the tax authorities and with the prosecuting authorities.[51]

Prior to the judgment in case C-935/19, Grupa Warzywna Sp. z o.o., it followed from the case-law model of the pro-EU interpretation only that an administrative sanction could be imposed where it was found that a taxpayer had declared an amount of the VAT difference refund or input tax refund higher than the amount due. The pro-EU interpretation model did not contain any limitation on the application of sanctions because of the need to take into account the principle of proportionality. Judgment C-935/19, Grupa Warzywna Sp. z o.o. has significantly enriched the content of the jurisprudential model by narrowing the possibility of applying sanctions. According to the current content of the model of pro-EU interpretation, it is not possible to impose sanctions in every situation, automatically, without taking into account factual circumstances, such as the fact that the taxpayer violated tax regulations as a result of failing to act with due diligence, without intentional and conscious participation in tax fraud, by his conduct seeking to prevent tax losses, by undertaking cooperation with tax authorities and law enforcement agencies. Establishing such a content of the case-law model of pro-EU interpretation restored the state of affairs in line with EU law. Already before the judgment in case C-935/19, Grupa Warzywna Sp. z o.o., the literature on the subject pointed out that the sanction should take into account the principle of proportionality.[52]

This position was also clear from the case-law of the CJEU. In accordance with the previous judgments of the CJEU, the possibility of imposing a sanction, as a measure referred to in Article 273 of Directive 112, is possible only when it complies with the principle of proportionality.[53] In order to assess whether a sanction complies with the principle of proportionality, it is necessary to examine, in par-

---

[51] Judgment of the Supreme Administrative Court of 22 October 2021, IFSK 489/21.

[52] K. Lasiński-Sulecki, Komentarz do wyroku TS z dnia 15 stycznia 2009 r. w sprawie C-502/07 K-1 sp. z o.o. v. Dyrektor Izby Skarbowej w Bydgoszczy, Zb. Orz. 2009, s. I–161, in: *Orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w sprawach podatkowych. Komentarz*, eds. W. Nykiel, A. Zalasiński, 2004, pp. 1321–1331.

[53] Judgment of the Court of Justice of 8 May 2019, C-712/17, EN.SA. Srl, p. 39 and the following judgments. ECLI:EU:C:2019:374.

ticular, the nature and gravity of the infringement that the sanction is intended to punish and the manner in which its amount is determined.[54]

In order to examine the principle of effective collection, it is also worth examining how the case-law developed following the judgment in Case C 855/19, G. Sp. z o.o. – the CJEU held that Articles 69, 206 and 273 of Directive 112 preclude a provision of national law which establishes an obligation to pay VAT on intra-Community acquisitions of fuel before that tax becomes chargeable within the meaning of that Article 69.[55]

In the justification for its judgment, the CJEU noted that, although Member States may, under the second sentence of Article 206 of the VAT Directive, derogate from the principle of payment on submission of the periodic VAT return and collect advances, this option may be exercised only in so far as it relates to tax that has become chargeable. In the CJEU's view, the possibility of collecting advances provided for under the second sentence of Article 206 of the VAT Directive allows Member States to bring forward, not the date on which VAT becomes chargeable, but only the date on which tax which has already become chargeable is paid. Therefore, it held that that provision must be interpreted as precluding a provision of the law of a Member State which requires VAT to be paid before it becomes chargeable pursuant to Article 69 of that directive).

In view of the above, the Supreme Administrative Court held that Article 103(5a) of the VAT Act, which imposes an obligation to pay VAT on intra-Community acquisitions of fuels in advance before the tax becomes chargeable within the meaning of Article 69 of the VAT Directive, is inconsistent with the provisions of the VAT Directive. In the Supreme Administrative Court's opinion, Article 103(5a) of the VAT Act gives rise to an obligation to pay VAT in advance, in breach of Article 69 of the VAT Directive, irrespective of whether an invoice has been issued or the time limit laid down in the provision (no later than the 15th day of the month following the month in which the chargeable event occurred if the invoice was not issued before that date), after the expiry of which the tax necessarily becomes chargeable.

The Supreme Administrative Court noted that, with regard to intra-Community acquisitions, although, pursuant to Article 68 of Directive 112, the chargeable event occurs on the date on which the intra-Community acquisition of goods is made. However, the tax becomes chargeable pursuant to Article 69 of that directive, in conjunction with Article 222 thereof, only at a later date, that is, when the invoice is issued or, if the invoice is not issued before that date, no later than on

[54] Judgment of the Court of Justice of 8 May 2019, C-712/17, EN.SA. Srl, pp. 39–40 and the following judgments.

[55] Judgment of the Court of Justice of 29 September 2021, C-855/19, G. Sp. z o.o. ECLI:EU:C:2021:714.

the 15th day of the month following the month in which the chargeable event occurred.[56]

In order to examine the extent to which the preliminary ruling procedure contributes to completing the model of pro-EU interpretation of both the principle of neutrality and the principle of legitimate collection, it will also be useful to examine the judgment of the CJEU in Case C-48/20, UAB "P".[57]

In that judgment, the CJEU held that Article 203 of Directive 112 and the principles of proportionality and neutrality of VAT must be interpreted as precluding national legislation which does not allow a taxable person acting in good faith, as a result of the commencement of a tax inspection procedure, to correct invoices incorrectly invoiced with VAT, even though the recipient of those invoices would be entitled to reimbursement of that tax if the transactions indicated on those invoices had been properly accounted for.

In the justification for this judgment, the CJEU pointed out that in order to ensure the neutrality of VAT, it is for the Member States to provide in their domestic legal systems for the possibility of correcting all unjustifiably invoiced taxes, provided that the issuer of the invoice demonstrates good faith. The Court of Justice pointed out that this solution applies in particular to situations in which, by issuing an invoice unduly mentioning VAT, a taxable person has acted in good faith, inasmuch as he considered that the provision of fuel cards to individuals enabling them to obtain fuel at service stations did not constitute a financial service exempt from VAT in Poland, but a supply of goods subject to VAT in that Member State and relied on the established practice of the Polish tax authorities.

The Court of Justice noted that while Polish law in principle provides for a procedure allowing the correction of VAT incorrectly invoiced by a taxable person acting in good faith, that procedure does not apply when a tax inspection is initiated against the person concerned. In this context, the CJEU held that refusing to allow the correction of fuel invoices with improperly reported VAT, issued to transport companies, when the supplies of fuel made by the service stations to these transport companies are also subject to VAT, would amount to imposing a tax burden on the applicant in the main proceedings in breach of the principle of VAT neutrality.[58]

The Supreme Administrative Court, taking into account the discussed decision of the CJ in case C-48/20, UAB "P", found the pleas in law claiming infringement of Article 108(1) of the VAT Act in connection with Article 203 of Directive 112 as correct due to their application. In the opinion of the Supreme Administrative Court, these provisions could not be applied, since in the case under consideration

[56] Judgment of the Supreme Administrative Court of 27 January 2021, I FSK 1193/17.

[57] Judgment of the Court of Justice of 18 March 2021, C-48/20, UAB "P", ECLI:EU:C:2021:215.

[58] Judgment of the Court of Justice of 18 March 2021, C-48/20, UAB "P", pp. 31–34.

the State budget was not exposed to any loss. In the opinion of the Supreme Administrative Court opinion, application of these provisions, in such a factual state, would result in disregarding the principle of neutrality. In particular, in the opinion of the Supreme Administrative Court, a taxpayer acting in good faith may not correct the VAT incorrectly invoiced by initiating a tax inspection.[59]

The preliminary ruling in case C-48/20, UAB "P" has supplemented the jurisprudential model of interpretation, in terms of both the principle of neutrality and effective collection. In the hitherto model, there were no doubts that the application of Article 108 of the VAT Act is possible only in the case of risk of depletion of tax dues.[60] The Supreme Administrative Court has supplemented the model in such a way that the commencement of a tax inspection may not stand in the way of correcting VAT incorrectly indicated on an invoice by a taxpayer acting in good faith.

Conclusions

The analysis of the effects of the preliminary ruling procedure applied by the Supreme Administrative Court allows for the conclusion that the content of the ruling model of the pro-EU interpretation of the VAT regulations cannot always be constructed on the basis of the case-law of the Supreme Administrative Court. In some cases, the content of the pro-EU interpretation requires appropriate correction and restoration of its compliance with the model of interpretation. The correction of the case-law of the Supreme Administrative Court is necessary due to cases of inconsistency between the case-law of the Supreme Administrative Court and the standard of pro-EU interpretation. In some cases, the content obtained from the analysis of the case-law of the Supreme Administrative Court needs to be supplemented, as the case-law did not refer to all important elements of the content of the model of jurisprudence.

The examples presented above also make it possible to take the view that the preliminary ruling procedure is important in shaping a model of the pro-EU interpretation of VAT regulations. The preliminary ruling does not always make it possible to determine the ready-made substantive content of this model. In some cases, this content is finally determined by the case-law of the Supreme Administrative Court. This will be the case, in particular, when the CJEU leaves the Supreme Administrative Court a certain scope for making determinations in case C-703/19. This follows from the fact that the CJEU does not have jurisdiction to rule on the compliance of provisions of national law with EU law, but it does have jurisdiction to give the referring court all the indications as to the interpretation of

[59] Judgment of the Supreme Administrative Court of 24 June 2021, I FSK 1535/17.

[60] Judgment of the Supreme Administrative Court of 2 July 2010, I FSK 1203/09.

that law which will enable that court to assess such compliance, in order to give its ruling in the case pending before it.[61]

The Supreme Administrative Court, using the preliminary ruling procedure, supplements the model of pro-EU interpretation by interpreting the provisions of national law in an appropriate manner or refusing to apply them. The choice of one of the rules depends on the relevant flexibility of the provision of national law.

References

Jedlecka W., *Zasady prawa Unii Europejskiej w ogólności*, in: J. Helios, W. Jedlecka, *Zasady stosowania prawa Unii Europejskiej*, Toruń 2013.

Kalisz A., *Wykładnia i stosowanie prawa wspólnotowego*, Warszawa 2007.

Kamiński M., *Internal and External Limits of the Principle of Consistent Interpretation of Domestic Law with the Directives of the European Union and Their Relevance for the Adjudication of the Administrative Courts*, "Białystok Legal Studies" 2018, Vol. 23, No. 2.

Koszowski M., *Dwa modele wykładni prounijnej*, „Studia Europejskie" 2012, Vol. 3, pp. 93–110.

Lasiński-Sulecki K., *Komentarz do wyroku TS z dnia 15 stycznia 2009 r. w sprawie C-502/07* K-1 sp. z o.o. v. Dyrektor Izby Skarbowej w Bydgoszczy*, Zb. Orz. 2009, s. I-161*, in: *Orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w sprawach podatkowych. Komentarz*, eds. W. Nykiel, A. Zalasiński, Warszawa 2014, pp. 1321–1331.

Łuczak K., *Metody wykładni prawa krajowego a wykładnia zgodna z prawem unijnym (w orzecznictwie sądów administracyjnych)*, „Państwo i Prawo" 2011, No. 1, pp. 59–72.

Mik C., *Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej*, in: *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska, Kraków 2005.

Militz M., Dominik-Ogińska D., Bącal M. and Siennicki T., *Zasady prawa unijnego w VAT*, Warszawa 2013.

Wiatrowski R., *Wykładnia prounijna Naczelnego Sądu Administracyjnego w zakresie przepisów dotyczących podatku od towarów i* usług, Warszawa 2021.

[61] Judgment of the Court of Justice of 15 April 2021, C-935/19, Grupa Warzywna Sp. z o.o., p. 20. ECLI:EU:C:2021:287.

Krzysztof Lasiński-Sulecki

Nicolaus Copernicus University in Toruń, Poland

kls@umk.pl

ORCID: 0000-0002-8380-8392

Fixed Establishment under the EU VAT System: Can the Old Case-Law of the Court of Justice Stand in the New Economic and Technological Reality?

Abstract

The author of this article aims to check whether the concept of the fixed establishment has evolved since its introduction to the common system of the value added tax and whether it should be re-thought due to changes in economic surroundings that have taken place since the creation of this system.

The research was based on the analysis of legal texts, including the European Union legislation and the case-law of the Court of Justice.

Although significant changes have taken place in the global economy since the entry into force of the common value added tax system encompassing the concept of the fixed establishment, there are no clear signs of the Court of Justice changing its approach to the understanding of this concept. For the fixed establishment to exist at a given location, technical and human resources must be permanently present there. There are no legislative changes in this field – neither introduced nor envisaged.

This article is limited to the provisions on the fixed establishment used in the rules on the place of supply of services. Other provisions regarding the fixed establishment, such as these forming part of the place of supply of goods and refund rules, are not covered by this research. The provisions left out of the scope of the research have not led to significant controversies.

The research was focused on the concept crucial for the functioning of the place of supply rules. The concept was created in an entirely different economic reality and the current shape of the global economy brings about questions about the need to reshape this concept.

Keywords: place of supply, fixed establishment, jurisdiction to tax, digitalisation

1. Setting the Scene

The concept of the fixed establishment was introduced to the common value added tax (VAT) system in 1979. It was part of the place of supply rules of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ L 145, 13 June 1977, p. 1, 'the Sixth Directive') and, therefore, was of utmost significance for the functioning of the system, as it affected the jurisdiction to tax. It has been present in the VAT system ever since.

Currently, the rules on the fixed establishment are included in the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11 December 2006, p. 1, 'the VAT Directive').

Initially, the concept of the fixed establishment was not defined at all. Therefore, the Court of Justice has developed judicial definitions in its case-law. In the course of these judicial developments, legal definitions have been drafted later to be included in the Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 077 23 March 2011, p. 1, 'the Implementing Regulation'). The similarities between judicial understanding of the concept and its definition in the Implementing Regulation have been described in scholarly literature as surprising.[1] Considering the function of implementing regulations, the similarity is not that surprising. However, the view that the Implementing Regulation left specific issues – also concerning the fixed establishment – unanswered is not uncommon.[2]

It is easy to notice how crucial changes had taken place in economies worldwide since 1979, when the Sixth Directive was implemented in the Member States of the European Union (EU). Back then, brick-and-mortar businesses prevailed over any other type of economic activity. Commercial use (not to mention personal use) of the internet was nearly non-existent. There were no automated platforms serving customers. Nowadays, more and more businesses function primarily online. Many business processes are nearly fully automated. This change brings about questions about the evolution of the concept of the fixed establishment. Has the approach of the Court of Justice to this concept evolved?

The concept of the fixed establishment was also used in the provisions regarding the place of supply of goods. It does not create that many interpretative prob-

[1] S. Heydari, *International – When One Becomes Two: The Forlorn Future of the Fixed Establishment*, "Derivatives and Financial Instruments" 2014, Vol. 16, No. 3, pp. 149.

[2] I. Lejeune, E. Cortvriend and D. Accorsi, *Implementing Measures Relating to EU Place-of-Supply Rules: Are Business Issues Solved and Is Certainty Provided?*, "International VAT Monitor" 2011, Vol. 22, No. 3, pp. 147.

lems in that sphere, and its understanding does not depart from the one adopted for the purposes of the place of supply of services rules (see, for instance, *Guidelines Resulting from Meetings of the VAT Committee Up until 1 December 2021*, p. 117).

It is worth noting that the Member States of the EU may use the concept of the fixed establishment when shaping the personal scope of taxation or – more precisely – when indicating a person liable to pay the VAT. This makes the understanding of the concept even more crucial in practice.

2. Legislative Background – the Sixth Directive

Under Article 9(1) of the Sixth Directive: 'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.' The fixed establishment was, therefore, one of the jurisdictional nexuses. It was the fixed establishment of a service provider that mattered. For simplicity, one could call it an active fixed establishment.

To selected types of services that could commonly be referred to as 'intangible services', a different rule applied. Namely, Article 9(2)(e) of the Sixth Directive stated 'the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides (…)'. The jurisdiction to tax was dependent, among other nexuses, on the customer's fixed establishment. This one could be referred to as a 'passive fixed establishment'.

Another special rule was contained in Article 26(2) of the Sixth Directive applicable to travel agents. This was also an active type of the fixed establishment.

As it was mentioned earlier, the concept of the fixed establishment was defined neither in the Sixth Directive nor in any other legislation at the European level.

3. Early Case-Law

The Court of Justice dealt with the concept of the fixed establishment for the first time in case 168/84 *Gunter Berkholz v Finanzamt Hamburg-Mitte-Altstadt* closed by the Judgment of 4 July 1985 (ECLI:EU:C:1985:299). Facts of this case were as follows. The undertaking Abe-Werbung Alfred Berkholz, whose registered office was in Hamburg, Germany, included the installation and operation of gaming ma-

chines, juke boxes etc. It operated most of its machines in public houses in Schleswig-Holstein, Germany, and Hamburg, but it has also installed some gaming machines on board two ferryboats owned by the Deutsche Bundesbahn which plied between Puttgarden on the German island of Fehmarn and Rodbyhavn (Denmark). Those machines were maintained, repaired and replaced at regular intervals by employees of Abe-Werbung, who settled accounts with the Deutsche Bundesbahn *in situ*. Although those employees spent a proportion of their working hours in carrying out those operations, Abe-Werbung did not maintain a permanent staff on the ferryboats (Judgment in the *Berkholz* case, para. 2).

The dispute was focused on the assessment if – in the situation described above – the fixed establishment of Abe-Werbung existed on the ferryboats. The Court of Justice ruled that: 'An installation for carrying on a commercial activity, such as the operation of gaming machines, on board a ship sailing on the high seas outside the national territory may be regarded as a fixed establishment within the meaning of that provision only if the establishment entails the permanent presence of both the human and technical resources necessary for the provision of those services and it is not appropriate to deem those services to have been provided at the place where the supplier has established his business.' (Judgment in the *Berkholz* case, para. 19).

Therefore, the Court of Justice based the concept of fixed establishment on two prerequisites:

– the permanent presence of technical resources necessary for the provision of services
– the permanent presence of human resources necessary for the provision of services.

This approach of the Court of Justice was repeated in several later judgments. For instance, in the Judgment of 17 July 1997 in case C-190/95 *ARO Lease BV and Inspecteur van de Belastingdienst Grote Ondernemingen, Amsterdam* (ECLI:EU:C:1997:374) the Court emphasised that 'when a leasing company does not possess in a Member State either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up or management decisions taken and thus to enable the services in question to be supplied on an independent basis, it cannot be regarded as having a fixed establishment in that State.' (para. 19).

One may conclude that the *Berkholz* case shaped the judicial definition of the fixed establishment for many years to come. Especially at the beginning, one would rather consider the definition to be clear and adequate for business reality.

Interestingly, just before the judgment in the *Berkholz* case, the VAT Committee, acting by a large majority, held that the fixed establishment must be defined as settled premises, without any reference to the capacity to effect taxable transac-

tions (*Guidelines Resulting from Meetings of the VAT Committee Up until 1 December 2021*, p. 33). The VAT Committed, thus, opted for a broader understanding of the fixed establishment. Its later positions were rather entirely in line with the *Berkholz* case judgment (*Guidelines Resulting from Meetings of the VAT Committee Up until 1 December 2021*, p. 125). Also, in the academic literature the understanding of the fixed establishment presented by the Court of Justice was considered to be narrow.[3]

4. New Legislative Regime

The recast to the Sixth Directive, i.e. the VAT Directive, initially brought no changes to the place of supply regime. Later, however, the system was reshaped to include two basic rules:
– the passive fixed establishment in business-to-business services (Article 44 of the VAT Directive)
– the active fixed establishment in business-to-consumer services (Article 45 of the VAT Directive).

Similarly, as under the Sixth Directive, the concept of the fixed establishment was also used in some particular provisions. What is essential, the concept remained undefined at the level of the directive. However, such definitions are currently present in the Implementing Regulation to the VAT Directive. Under its Article 11:

1. For the application of Article 44 of Directive 2006/112/EC, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.
2. For the application of the following Articles, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies:
   (a) Article 45 of Directive 2006/112/EC;
   (b) from 1 January 2013, the second subparagraph of Article 56(2) of Directive 2006/112/EC
   (c) until 31 December 2014, Article 58 of Directive 2006/112/EC

[3] P. Pistone, *Fixed Establishment and Permanent Establishment*, "International VAT Monitor" 1999, Vol. 10, No. 3, p. 102.

(d) Article 192a of Directive 2006/112/EC.

3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.

5. New Economic Reality in the Case-Law of the Court of Justice

Currently, businesses are by far more automated than in the times of Mr Berkholz. Moreover, the existence of automated businesses is more common. The spread of such businesses was turbocharged by the COVID-19 epidemic.

Sooner or later, controversies regarding such automated businesses had to make their way to the Court of Justice. The first case dealing with problems of this type was C-605/12 *Welmory Sp. z o.o. v Dyrektor Izby Skarbowej w Gdańsku* closed by the Judgment of 16 October 2014 (ECLI:EU:C:2014:2298). The facts of the case were as follows. Welmory Sp. z o.o. established in Nicosia, Cyprus (the Cypriot company), organises sales by auction on an online sales platform. For that purpose, it sells packets of 'bids', that is, the right to make an offer to purchase goods being auctioned at a higher price than the price last offered (Judgment in the *Welmory* case, para. 13). The Cypriot company concluded a cooperation agreement with the Polish company on 2 April 2009, under which it agreed to provide the Polish company with the service of making available an internet auction site with the domain name www.za10groszy.pl, including also the supply of associated services relating to the leasing of the servers needed for the site to function and the display of the goods to be auctioned. The Polish company for its part undertook principally to sell goods on that site (Judgment in the *Welmory* case, para. 14). For the period from January to April 2010, the Polish company issued four invoices for services supplied to the Cypriot company – advertising, servicing, provision of information and data processing (Judgment in the *Welmory* case, para. 18).

The Court of Justice held: 'So, to be considered, in circumstances such as those of the main proceedings, as having a fixed establishment within the meaning of Article 44 of the VAT Directive, the Cypriot company must have in Poland at the very least a structure characterised by a sufficient degree of permanence, suitable in terms of human and technical resources to enable it to receive in Poland the services supplied to it by the Polish company and to use them for its business, namely running the electronic auction system in question and issuing and selling "bids."' (Judgment in the *Welmory* case, para. 59). It continued the fact that a business such as that carried on by the Cypriot company at issue in the main proceedings, consisting in operating a system of electronic auctions which comprises, first, making an auction website available to the Polish company and, secondly, issuing and selling 'bids' to customers in Poland, could be carried on

without requiring an effective human and material structure in Polish territory was not determinative. Despite its particular character, such a business requires at least a structure that is appropriate in terms especially of human and technical resources, such as appropriate computer equipment, servers and software (Judgment in the *Welmory* case, para. 60).

The judgment of the Court of Justice in the *Welmory* case seems to be rather inconclusive.[4] The Court notices the peculiarity of the business in question but does not change its approach presented in the *Berkholz* case *expressis verbis*. On the contrary, references are made again to the necessity of the existence of human and technical resources. Nevertheless, the Court requires an appropriate structure in terms of resources (the Implementing Regulation, which was inapplicable in this case *ratione temporis* uses the term 'suitable').

The problem with automated businesses is obviously such that they – by their very nature – do not need significant intervention or do not need it at all (apart from occasional checks done by humans that also took place in the *Berkholz* case). This brings about certain non-tax associations. One may think about appropriate clothing for various types of events. Depending on a local culture, different swimwear may be expected at outdoor pools or beaches in different corners of the world. If one thinks, for instance, about appropriate swimwear for a naturist beach, it would be no swimwear at all. Similarly, for an automated business to function, human resources are far from being necessary. Obviously, such an approach can hardly be reconciled with the case-law of the Court of Justice. Otherwise, even in the *Berkholz* case, one might conclude that the human resources present on board ferries were appropriate.

References to the adequacy of structures started to appear also in the Guidelines of the VAT Committee (*Guidelines Resulting from Meetings of the VAT Committee Up until 1 December 2021*, p. 126).

6. Latest Case-Law

The Court of Justice once again tackled the issue of the resources necessary for the existence of the fixed establishment in the case C-931/19 *Titanium Ltd v Finanzamt Österreich, formerly Finanzamt Wien* closed by the Judgment of 3 June 2021 (ECLI:EU:C:2021:446).

The facts of the case were as follows. Titanium Ltd is a company whose registered office and management are located in Jersey and whose corporate purpose is property management, asset management and the management of housing and accommodation (Judgment in the *Titanum* case, para. 20). During the tax years 2009

[4] K. Spies, *Permanent Establishment versus Fixed Establishment: The Same or Different?*, "Bulletin for International Taxation" 2017, Vol. 71, No. 12, p. 710.

and 2010, that company let, subject to tax, a property which it owned in Vienna, Austria, to two Austrian traders (Judgment in the *Titanum* case, para. 21). In order to carry out those transactions, which were Titanium's only activities in Austria, Titanium appointed an Austrian real estate management company to act as an intermediary between the service providers and suppliers, to invoice rental payments and operating costs, to maintain business records and to prepare the VAT declaration data. Those services were carried out by the agent in premises which were not the property belonging to Titanium (Judgment in the *Titanum* case, para. 22). However, Titanium retained the decision-making power to enter into and terminate leases, to determine the economic and legal conditions of the tenancy agreements, to make investments and repairs and to organise their financing, to choose third parties intended to provide other upstream services and, finally, to select, appoint and oversee the real estate management company itself (Judgment in the *Titanum* case, para. 23). Although Titanium had taken the view that it was not liable to pay VAT in respect of its activity of letting the property, on the ground that it did not have a permanent establishment in Austria, the tax authority's view was that a property which was rented out constituted such a permanent establishment and, consequently, the tax authority determined an amount of VAT chargeable to that company for the tax years 2009 and 2010 (Judgment in the *Titanum* case, para. 24).

The Court of Justice found that the concept of 'fixed establishment' implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services. It thus requires a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis. In particular, a structure without its own staff cannot fall within the scope of the concept of a 'fixed establishment' (Judgment in the *Titanum* case, para. 42). The Court of Justice stressed that Titanum did not have any staff of its own in Austria and that the persons responsible for certain management tasks had been contractually appointed by that company, which reserved for itself all important decisions concerning the letting of the property in question (Judgment in the *Titanum* case, para. 44). A property which does not have any human resource enabling it to act independently clearly does not satisfy the criteria established by the case-law to be characterised as a fixed establishment within the meaning of the Directive 2006/112 (Judgment in the *Titanum* case, para. 45). The Court of Justice concluded that a property which is let in a Member State in the circumstance where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a fixed establishment within the meaning of Article 43 of Directive 2006/112 and of Articles 44 and 45 of Directive 2006/112 (Judgment in the *Titanum* case, para. 46). Once again, the Court of Justice emphasised the need for both technical and human resources to be present.

7. Conclusions

It has been rightly pointed out in scholarly writings that despite technological developments that have enhanced the ability of businesses to carry on their business and contacts with clients primarily by digital means, without requiring the level of infrastructure that traditional businesses need, the Court of Justice has continued to repeat its phrase on 'human and technical resources' in later judgments up to the present.[5] Even if the judgment in the *Welmory* case was rather inconclusive, later case-law showed a strong attachment of the Court of Justice to the definition that this court created in the *Berkholz* case.

It is interesting to note that the VAT Committee confirmed that the fixed establishment should be regarded as determining the place of supply of taxation only when it was obvious that the service was effectively supplied from that fixed establishment (*Guidelines Resulting from Meetings of the VAT Committee Up until 1 December 2021*, p. 94). Therefore, an even broader view of the fixed establishment would not necessarily affect changes of taxing rights of the Member States. Discussions might arise whether technical resources alone effectively supply a service (or effectively receive a service in the case of a business-to-business supply).

If one looks beyond the EU law, similar problems may be noticed. Under International VAT/GST Guidelines, an establishment comprises a fixed place of business with a sufficient level of infrastructure in terms of people, systems and assets to be able to receive and/or make supplies. Registration for VAT purposes by itself does not constitute an establishment for the purposes of these Guidelines. Countries are encouraged to publicise what constitutes an 'establishment' under their domestic VAT legislation (OECD 2017: 44).

For the time being, the definition based on the judgment in the *Berkholz* case remains the core indicator of what can be perceived as the fixed establishment irrespective of the level of automation of services provided. Yet, as it has been rightly pointed out in the literature the controversies over the fixed establishment's meaning will certainly persist.[6]

References

Heydari S., *International – When One Becomes Two: The Forlorn Future of the Fixed Establishment*, "Derivatives and Financial Instruments" 2014, Vol. 16, No. 3, pp. 149–152.

[5] K. Spies, *Permanent Establishment versus Fixed Establishment: The Same or Different?*, "Bulletin for International Taxation" 2017, Vol. 71, No. 12, p. 710.

[6] A. Tsielepis, *The Devil Is in the Detail: An Analysis of the ECJ's Attributes to the Fixed Establishment Concept*, "International VAT Monitor" 2017, Vol. 28, No. 3, pp. 214–215.

Lejeune I., Cortvriend E. and Accorsi D., *Implementing Measures Relating to EU Place-of-Supply Rules: Are Business Issues Solved and Is Certainty Provided?* "International VAT Monitor" 2011, Vol. 22, No. 3, pp. 144–152.

Pistone P., *Fixed Establishment and Permanent Establishment*, "International VAT Monitor" 1999, Vol. 10, No. 3, pp. 101–106.

Spies K., *Permanent Establishment versus Fixed Establishment: The Same or Different?*, "Bulletin for International Taxation" 2017, Vol. 71, No. 12, pp. 705–718.

Tsielepis A., *The Devil Is in the Detail: An Analysis of the ECJ's Attributes to the Fixed Establishment Concept*, "International VAT Monitor" 2017, Vol. 28, No. 3, pp. 210–215.

Artur Mudrecki

Kozminski University, Poland

amudrecki@kozminski.edu.pl

ORCID: 0000-0002-3731-5271

The Proportionality Principle and VAT Sanctions

Abstract

The paper analyses the case-law of the Court of Justice of the European Union concerning VAT sanctions.

In the judgements analysed, the Court recognises that the regulation and imposition of sanctions falls within the competence of the Member States, which are free to do so, with the important proviso that the regulation and imposition of sanctions does not infringe the principle of proportionality. In a situation where only formal conditions have not been met and no tax has been lost, the imposition of sanctions may infringe the principle of proportionality. It is usually for the national court to assess whether, in a specific case, the tax authorities did not exceed the limits set by the principle of proportionality when imposing penalties.

Keywords: value added tax, VAT sanctions, case-law of the Court of Justice of the European Union

1. General Remarks

The principle of proportionality is one of the most important principles upholding the protection of human rights. It can be considered in its normative aspect, as a doctrine of jurisprudence and as a scientific doctrine. The principle of proportionality is addressed to the legislature, the executive and the judiciary. It is related to the moderation of the activities of public authorities to ensure minimum interference in the sphere of rights and freedoms of the taxpayer.[1]

The aim of this paper is to present the jurisprudence of the Court of Justice of the European Union (hereinafter: 'the CJEU') in the field of the so-called VAT sanctions in the value added tax with particular emphasis on the rulings passed in Polish cases and in other cases. The most recent CJEU rulings, which draw attention to other problems occurring in the application of sanctions, will also be analysed.

According to R. Alexy, the principle of proportionality is described as the relation of the (used) means to the (intended) end. At the same time, this relation should correspond to three sub-principles. These criteria, which can be considered as a kind of test, include:

1. the criterion of usefulness
2. the criterion of necessity
3. proportionality *sensu stricto*.[2]

In the case of VAT sanctions, the principle of proportionality is not grounded in Article 5(4) of the Treaty on European Union[3]), as the indicated normative principle is addressed to the bodies of the European Union.

There is no doubt that the principle of proportionality, which appears as a doctrine in case-law, is used by the Court of Justice of the European Union (hereinafter abbreviated as the CJEU). Due to the effectiveness of the EU law and the developed principle of the priority of applying a pro-EU interpretation, it may be important to analyse the CJEU jurisprudence with regard to the application of VAT sanctions.

---

[1] A. Mudrecki, *Zasada proporcjonalności w prawie podatkowym*, Warszawa 2020, p. 13.

[2] R. Alexy, *A Theory of Constitutional Rights*, 2002, p. 66; A. Gajda, A. Mudrecki, Glosa do wyroku Wojewódzkiego Sądu Administracyjnego we Wrocławiu z dnia 3 kwietnia 2007 r. sygn. akt I SA/Wr 152/07, *Orzecznictwo Sądów Polskich*, 2008, Iss. 6, p. 459.

[3] Consolidated version OJ L. 202 of 2016, p. 13, hereinafter abbreviated as TEU.

2. The Case-Law of the Court of Justice of the European Union on VAT sanctions in Polish Cases

Administrative courts in Poland maintain an ongoing dialogue with the Court of Justice of the European Union, referring questions for a preliminary ruling to the CJEU. Only in one CJEU case, i.e. *Ceramika Paradyż*, by its decision of 6 March 2007, C-168/06,[4] the Court refused to provide a substantive answer due to the fact that the event concerned facts prior to Poland's accession to the European Union. The case, characteristically, concerned penalties for value added tax.

In the Judgment of 29 July 2010 in case C-188/09,[5] *the Director of the Tax Chamber in Białystok v Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski Sp. j.*, formerly Profaktor Kulesza, Frankowski, Trzaska Sp. j., concerning cash registers, the CJEU took the view that the common system of value added tax, as defined in Article 2(1) and (2) of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes and in Articles 2, 10(1) and (2) and Art. 17(1) and (2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2004/7/EC of 20 January 2004 does not preclude a Member State from imposing a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to keep accounting records of their sales to deduct input tax paid, on condition that the sanction thus provided for complies with the principle of proportionality.

In the grounds for its judgment, the Court indicated that, as regards the concrete application of the principle of proportionality, it is for the national court to assess the compatibility of national measures with the European Union law; the Court has jurisdiction only to provide the national court with guidance on the interpretation of European Union law which may enable it to assess that compatibility (see, in particular, case C-55/94 *Gebhard* [1995] ECR I 4165; and *Molenheide and Others*, cited above, paragraph 49; paragraph 36 of the Judgment).

Furthermore, insofar as the purpose of that sanction is not to correct accounting errors but to prevent them, its flat-rate nature, resulting from the application of the fixed rate of 30%, and, consequently, the lack of any correspondence between the amount of that sanction and the extent of any errors which may have been made by the taxable person cannot be taken into account in the assessment of whether that sanction is proportionate. Moreover, it is precisely the absence of cash registers which prevents the amount of sales made from being accurately es-

[4] ECLI:EU:C: 2007:139.

[5] ECLI:EU:C:2010:454.

tablished and therefore precludes any assessment as to whether the sanction is commensurate with the amount of any accounting errors (thesis 37 of the Judgment).

In addition, in the event, as described by the Commission, that the failure to use cash registers resulted from circumstances outside the taxpayer's control, it would be for the national court, were such circumstances to be duly established in accordance with the national rules governing procedure and evidence, to take this into account in order to establish, in the light of all the factors in the case, whether the fiscal sanction must nevertheless be applied and, if so, to ascertain that it is not disproportionate (thesis 38 of the Judgment).

In the aforementioned case, the CJEU accepted that the application of a VAT sanction on incorrect recording of turnover in a cash register is generally permissible. However, the very assessment of whether the sanction (type of administrative sanction) does not infringe the principle of proportionality is left to the national court. The recording of turnover for VAT purposes is intended to safeguard the proper functioning of the tax. The establishment of a sanction for failure to keep records in a cash register has a preventive character. However, there may be situations where the imposition of a sanction, including its amount, in the circumstances of a particular case may prove to be inadequate, i.e. in breach of the principle of proportionality. However, the application of the VAT sanction itself, as a rule, does not infringe the principle of proportionality. It should also be borne in mind that the CJEU did not classify the sanctions in question as special measures whose introduction requires the consent of other Member States.

D. Dominik-Ogińska, in her gloss to the Judgment of the CJEU of 29 July 2010, C-188/09,[6] stated that with such a detailed assessment of the national measure in question, the Polish court is left only with the assessment whether, given the circumstances of the case, there are grounds for applying such a measure. However, the criteria for the application of the principle of proportionality contained in the grounds of the Act may be useful in assessing the application of the principle of proportionality by Polish judges.

In the critical gloss to the analysed judgment, A. Wesołowska[7] pointed out that the VAT sanction for registering cash registers was erroneously included in special funds. In addition, the above ruling is not favourable for taxpayers and may change the jurisprudence practice of administrative courts in Poland.

In another judgment of 15 January 2009, in case C-502/07 *K-1 Sp. z o.o. v the Director of the Tax Chamber in Bydgoszcz*[8] concerning VAT sanctions, the CJEU

---

[6] D. Dominik-Ogińska, in: *Glosa do wyroku TS z dnia 29 lipca 2010 r., C-188/09*, in: W. Nykiel, A. Zalasiński (eds.). *Orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w sprawach podatkowych. Komentarz*, WK 2014.

[7] A. Wesołowska, *Różnice pomiędzy sankcją a środkiem specjalnym na gruncie podatku VAT. Glosa do wyroku TS z dnia 29 lipca 2010 r., C-188/09*, LEX/el. 2010.

[8] ECLI:EU:C:2009:11.

held that the common system of VAT, as laid down in the first and second paragraphs of Article 2 of the First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes and in Articles 2 and 10(1)(a) and (2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2004/66/EC of 26 April 2004 does not preclude a Member State from providing in its legislation for an administrative penalty which may be imposed on taxable persons liable to value added tax, such as the 'additional tax liability' provided for in Article 109(5) and (6) of the Law of 11 March 2004 on the tax on goods and services.

Furthermore, it was considered that provisions such as those contained in Article 109(5) and (6) of the Law on Goods and Services Tax of 11 March 2004 did not constitute 'special measures for derogation' intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of the Sixth Directive 77/388, as amended. Article 33 of the Sixth Directive 77/388, as amended, does not preclude the maintenance in force of provisions such as those contained in Article 109(5) and (6) of the Act on Goods and Services Tax of 11 March 2004.

The grounds for the judgment emphasise that what is at issue here is not a tax but an administrative penalty imposed where it is established that a taxable person has declared an amount of the VAT difference to be repaid or the input tax to be repaid that is greater than the amount due. The principle of a common system of VAT does not preclude the introduction by the Member States of measures penalising incorrect declaration of the amounts of VAT due. On the contrary, Article 22(8) of the Sixth VAT Directive provides that Member States may impose other obligations which they consider necessary for the correct assessment and collection of the tax.

According to the ruling under review, it was permissible in Poland to apply VAT sanctions. The Court has not ruled on the principle of proportionality, as the question referred by the Supreme Administrative Court does not refer to the principle of proportionality.

3. Case-Law of the CJEU in Other Cases Concerning Sanctions in Respect of the Principle of Proportionality

Penalties in the systems of EU Member States can play an important role in ensuring that taxes function effectively, especially where the reverse charge mechanism is used. Sanctions have a preventive function and their aim is to discourage tax evasion. States have the right to choose between criminal or fiscal liability and sanctions of an administrative nature. In the first case, this requires a proper crim-

inal investigation and proof of guilt (which can be more difficult and time-consuming) and in the second case, it only requires the grounds for sanctions to be indicated in tax or administrative proceedings.[9]

A more extensive analysis of the CJEU case-law relating to the application of sanctions in terms of their compliance with the principle of proportionality is made in my monograph.[10]

In its Judgment of 26 April 2017 in case C-564/15[11] *Tibor Farkas v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó Főigazgatósága*, the CJEU held that the loss of the right of deduction in the case of the acquisition of goods subject to the reverse charge was correct and pointed out the disproportionality of the VAT sanction. In the circumstances of the case, the buyer of the goods was deprived of the right to deduct the VAT it had unduly paid to the seller on the basis of an invoice issued in accordance with the general VAT system while the relevant transaction was subject to the reverse charge mechanism and the seller had paid this tax to the state. That judgment states that the provisions of Directive 2006/112, as amended by Directive 2010/45, and the principles of fiscal neutrality, effectiveness and proportionality must be interpreted as not precluding, in a situation such as that in the main proceedings, the purchaser of goods from being deprived of the right to deduct value added tax which he unlawfully paid to the seller on the basis of an invoice issued under the general system of value added tax, even though the relevant transaction was subject to the reverse charge mechanism, when the seller has paid that tax to the state. However, those rules require that the purchaser is able to address his or her claim for reimbursement directly to the tax authority where it becomes impossible or excessively difficult to recover the value added tax unduly invoiced by the vendor to the purchaser, in particular in the event of insolvency of that vendor. The principle of proportionality must be interpreted as precluding, in a situation such as that in the main proceedings, the national tax authorities from imposing on a taxable person who has acquired goods whose supply is covered by the reverse charge procedure a tax penalty equal to 50% of the amount of value added tax that he or she is liable to pay to the tax authorities, where the latter have not suffered a loss of tax revenue and there is nothing to suggest that a tax offence has been committed, which is a matter for the referring court to determine.

It follows from the foregoing that the possibility of establishing sanctions in the tax systems of individual Member States is permissible because it is not subject to harmonisation in this area. However, its introduction into the legal order and, in particular, its imposition must comply with the principle of proportional-

[9] A. Mudrecki, *Principle of proportionality…*, p. 134.

[10] Ibidem, pp. 134–149.

[11] LEX No. 2276255.

ity. There is no doubt that the principle of proportionality has a particular impact when imposing tax sanctions in a situation where no damage has been done to the state.

In another judgment of 8 May 2019, in case C-712/17[12] *EN.SA. Srl v Agenzia delle Entrate – Direzione Regionale Lombardia Ufficio Contenzioso*, the CJEU addressed the issue of sanctions in the context of compliance with the principle of proportionality. This judgment formulated the following view:

1) In a situation, such as that at issue in the main proceedings, in which fictitious circular sales of electricity made between the same traders and for the same amounts did not cause tax losses, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in the light of the principles of neutrality and proportionality, must be interpreted as not precluding national legislation which excludes the right to deduct value added tax (VAT) relating to fictitious transactions while requiring the persons who enter VAT on an invoice to pay that tax, including for a fictitious transaction, provided that national law allows the tax liability arising from that obligation to be adjusted when the issuer of that invoice, who was not acting in good faith, has, in sufficient time, wholly eliminated the risk of any loss of tax revenue, this being a matter for the referring court to ascertain.
2) The principles of proportionality and neutrality of value added tax (VAT) must be interpreted as precluding, in a situation such as that at issue in the main proceedings, a rule of national law under which the unlawful deduction of VAT is penalised by a fine equal to the amount of the deduction made.

In its Judgment of 4 October 2018 in case C-384/18[13] *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya*, the CJEU indicated that the proportionality requirement in Article 9(a) of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, as amended by Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011, cannot be regarded as having direct effect. The national court must, in accordance with its obligation to take all appropriate measures, whether general or particular, to ensure that that provision is implemented, interpret its national law in a manner consistent with it or, if such an interpretation is not possible, disapply any provision of national law in a situation where its application in the circumstances of the case would lead to a result contrary to the European Union law.

[12] ECLI:EU:C:2019:374.

[13] ECLI:EU:C:2020:124.

In another ruling, the CJEU dealt, *inter alia*, with the VAT sanction for non-registration and the right to deduct. In its Judgment of 9 July 2015 in case C-183/14[14] *Radu Florin Salomie, Nicolae Vasile Oltean v Direcția Generală a Finanțelor Publice Cluj*, the CJEU took the position that the principles of legal certainty and of the protection of legitimate expectations do not preclude, in circumstances such as those of the dispute in the main proceedings, a national tax authority from deciding, following a tax audit, to subject transactions to VAT and to impose the payment of surcharges, provided that that decision is based on clear and precise rules and that that authority's practice has not been such as to give rise, in the mind of a prudent and well-informed trader, to a reasonable expectation that that tax would not be levied on such transactions, this being a matter for the referring court to determine. The surcharges applied in such circumstances must comply with the principle of proportionality.

Moreover, the Court holds that Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax precludes, in circumstances such as those of the main proceedings, national legislation under which the right to deduct input value added tax due or paid on goods or services used for the purposes of taxable transactions is refused to a taxable person who is none the less liable to pay the tax which he should have collected on the sole ground that he was not registered for VAT when those transactions took place, and this until he has been duly registered for VAT and made a declaration in respect of the tax due.

In the grounds for its judgment, the CJEU considered that in the absence of harmonisation of the EU legislation in the field of the penalties applicable in cases of non-compliance with the conditions laid down by arrangements established under such legislation, Member States retain the power to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with the EU law and its general principles, and, consequently, in accordance with the principle of proportionality (see judgment in *Fatorie*, C-424/12, EU:C:2014:50, paragraph 50 and the case-law cited).

In yet another ruling, the CJEU dealt with the VAT sanction for failure to register trade in timber. We are referring to the Judgment of 19 July 2012 in case C-263/11[15] *Ainārs Rēdlihs v Valsts ieņēmumu dienests*, in which the CJEU held that:

1) Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2006/138/EC of 19 December 2006, must be interpreted as meaning that supplies of timber made by a natural person for the purpose of alleviating the consequences of a case of force majeure come within the scope of the exploitation of tangible property, which must be regarded as an 'economic activity' within the mean-

[14] ECLI:EU:C:2015:454.

[15] ECLI:EU:C:2012:497.

ing of that provision, where those supplies are carried out for the purposes of obtaining income therefrom on a continuing basis. It is for the national court to carry out an assessment of all the circumstances of the case in order to determine whether the exploitation of tangible property, such as a forest, is carried out for the purposes of obtaining income therefrom on a continuing basis.

2) The European Union law must be interpreted as meaning that it is possible that a rule of national law allowing a fine to be imposed, fixed at the level of the rate of VAT normally applicable for the value of the goods transferred in the supplies made, on an individual who has failed to fulfil his or her obligation to register in the register of taxable persons for VAT purposes and who was not liable for that tax, may be contrary to the principle of proportionality. It is for the national court to determine whether the amount of the penalty does not go further than is necessary to attain the objectives of ensuring the correct levying and collection of the tax and preventing fraud, having regard to the facts of the case and, *inter alia*, the sum actually imposed and the possible existence of fraud or circumvention of the applicable legislation attributable to the taxable person whose failure to register is being penalised.

In the written reasons for this ruling, it was emphasised that in order to assess whether a particular sanction complies with the principle of proportionality, account should be taken, in particular, of the nature and gravity of the infringement which the sanction is intended to punish and of the manner in which the amount of the sanction is determined.

In its Judgment of 15 September 2016 in case C-518/14[16] *Senatex GmbH v Finanzamt Hannover-Nord*, the CJEU held that Article 167, Article 178(a), Article 179 and Article 226(3) of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which the correction of an invoice in relation to a detail which must be mentioned, namely the VAT identification number, does not have retroactive effect, so that the right to deduct VAT exercised on the basis of the corrected invoice relates not to the year in which the invoice was originally drawn up but to the year in which it was corrected.

In the reasons for the judgment, it was emphasised that during the hearing the German Government had indicated that the postponement of the deduction until the year in which the invoice was corrected served as a sanction. However, sanctions other than the denial of the right to deduct for the year in which the invoice was issued, such as the imposition of a fine or penalty commensurate with the seriousness of the infringement, could have been laid down in order to punish infringements of formal requirements (see, to this effect, Judgment of 9 July 2015,

[16] ECLI:EU:C:2016:691.

Salomie and Oltean, C-183/14, EU:C:2015:454, paragraph 63). Moreover, under the legislation at issue in the main proceedings, the postponement of that right, which gives rise to the imposition of interest for late payment, occurs in any event without taking account of the circumstances requiring a correction to be made to the original invoice, which goes beyond what is necessary in order to achieve the objectives referred to in the above-mentioned paragraph of this judgment (paragraph 42 of the reasons for the judgment).

In its Judgment of 17 May 2018 in case C-566/16[17] *Dávid Vámos v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, it was held that European Union law must be interpreted as not precluding national legislation which excludes the application of a special value added tax scheme providing for an exemption for small enterprises – adopted in accordance with the provisions of Section 2 of Chapter 1 of Title XII of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax – to a taxable person who fulfils all the material requirements, but who did not exercise the option to opt for that scheme when declaring his or her economic activity to the tax authority.

In the aforementioned rulings, the CJEU held that value added tax sanctions are not subject to direct harmonisation, but the Member States of the European Union are entitled to introduce sanctions that are not a type of VAT, but an administrative charge, provided that they respect the principle of proportionality.

4. The Latest CJEU Ruling on the Reduction of VAT Sanctions

One of the latest judgments of 15 April 2021, No. C-935/19 in the case of *Grupa Warzywna Sp. z o.o. v Dyrektor Izby Administracji Skarbowej we Wrocławiu*,[18] the CJEU held that Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of proportionality must be interpreted as precluding national legislation which imposes on a taxable person who has wrongly classified a transaction exempt from value added tax (VAT) as a transaction subject to that tax a penalty amounting to 20% of the amount of the overpayment of VAT wrongly claimed in so far as that penalty applies without distinction both where the irregularity results from an error of assessment made by the parties to the transaction as to whether the supply is taxable, which error is characterised by the absence of indications of fraud and of any loss of revenue to the Treasury, and where there are no such special circumstances.

[17] ECLI:EU:C:2018:321.

[18] ECLI:EU:C:2021:287.

In the reasons for the judgment, it was emphasised that Article 273 of the VAT Directive authorises the Member States to adopt provisions to ensure the correct collection of VAT and to prevent tax fraud. In particular, in the absence of provisions of the Union law on the matter, the Member States have the power to choose the penalties they deem appropriate for failure to comply with the conditions laid down by Union legislation for exercising the right to deduct VAT (Judgment of 8 May 2019, *EN.SA.*, C-712/17, EU:C:2019:374, paragraph 38 and the case-law cited therein – Reasons – paragraph 25).

However, the Member States are obliged to exercise their powers in compliance with the Union law and its general principles and, therefore, with the principle of proportionality (Judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 59 and the case-law cited therein – thesis 26 of the reasons). Such sanctions may therefore not go beyond what is necessary to achieve the objectives of ensuring the correct collection of tax and preventing tax evasion. In order to assess whether a sanction complies with the principle of proportionality, account must be taken, in particular, of the nature and seriousness of the infringement which the sanction is intended to punish and of the manner in which the amount of the sanction is determined (Judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 60 – thesis 27 of the reasons).

However, as regards the method of determining the amount of the penalty at issue in the main proceedings, it should be noted that, where that amount is fixed at 20% of the amount of the overstatement of VAT, it may not be reduced in accordance with the particular circumstances of the case, except in cases where the irregularity is due to minor errors (paragraph 32).

It follows that the method of determining the sanction in question, applied automatically, does not give the tax authorities the possibility to individualise the sanction imposed in order to ensure that it does not go beyond what is necessary to achieve the objectives consisting in ensuring correct tax collection and preventing tax fraud (thesis 35 of the reasons).

The pro-EU interpretation introduced in the analysed CJEU judgment was reflected in the decisions of the Supreme Administrative Court: in the Judgment of 7 October 2021, Ref. No. I FSK 904/21, in the Judgment of 22 October 2021, Ref. No. 489/21, in the Judgment of 15 December 2021, Ref. No. I FSK 10335/18, in the Judgment of 21 January 2022, Ref. No. I FSK 2324/21.[19]

Currently, legislative work is underway on the amendment within the scope of the possibility to mitigate sanctions in the tax on goods and services in accordance with the Judgment of 15 April 2021, Ref. No. C-935/19.[20]

---

[19] Judgments available in the Central Database of Administrative Court Judgments at https://orzeczenia.nsa.gov.pl/cbo/query.

[20] Ł. Zalewski, *SLIM VAT 3 nie rozwiąże problemu z sankcjami VAT*, „Dziennik Gazeta Prawna", 8 February 2022, No. 26 (5688), p. B2.

5. Summary

In the initial judgments of the CJEU in the Polish cases, it allowed for the possibility of applying sanctions in the case of filing defective tax returns and cash registers. However, in the most recent ruling concerning sanctions, the CJEU pointed to the necessity of the possibility of mitigating the additional obligation.

In the judgments analysed, the Court recognises that the regulation and imposition of sanctions falls within the competence of the Member States, which may regulate them freely, with the important proviso, however, that the regulation and imposition of sanctions may not infringe the principle of proportionality. In a situation where only formal conditions have not been met and no tax has been lost, the imposition of sanctions may infringe the principle of proportionality. It is usually for the national court to assess whether, in a specific case, the tax authorities did not exceed the limits set by the principle of proportionality when imposing penalties.

References

Alexy R., *A Theory of Constitutional Rights*, 2002.

Dominik-Ogińska D., in: *Glosa do wyroku TS z dnia 29 lipca 2010 r., C-188/09*, in: W. Nykiel, A. Zalasiński (eds.). *Orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w sprawach podatkowych. Komentarz*, WK 2014.

Gajda A., Mudrecki A., Glosa do wyroku Wojewódzkiego Sądu Administracyjnego we Wrocławiu z dnia 3 kwietnia 2007 r. sygn. akt I SA/Wr 152/07, *Orzecznictwo Sądów Polskich*, 2008, Iss. 6.

Mudrecki A., *Zasada proporcjonalności w prawie podatkowym*, Warszawa 2020.

Wesołowska A.. *Różnice pomiędzy sankcją a środkiem specjalnym na gruncie podatku VAT. Glosa do wyroku TS z dnia 29 lipca 2010 r., C-188/09*, LEX/el. 2010.

Zalewski Ł., *SLIM VAT 3 nie rozwiąże problemu z sankcjami VAT*, „Dziennik Gazeta Prawna", 8 February 2022, No. 26 (5688).

Marek Maliński

State University of Applied Sciences in Konin, Poland

marekmalinski@gmail.com

ORCID: 0000-0001-6165-2027

The Binding Force of Final Judgement Convicting the Taxpayer's Contractor in Disputes Concerning Input VAT: Beyond the Glencore Case

Abstract

One of the controversial issues is VAT disputes before Polish administrative courts is the binding force of final judgement convicting the taxpayer's contractor in disputes concerning input VAT. Under Polish law administrative courts are bound by such judgements regardless the fact that the taxpayer's contractor did not participate in the criminal proceedings. The aim of this article is to examine conformity of such Polish legislation and practice with the ECJ's jurisprudence. Article concludes with recommendations for the Polish legislator to amend administrative court's procedural rules.

Keywords: final conviction judgement, the ECJ, VAT, binding force of final judgement

1. Introduction

The *Glencore*[1] case concerned national legislation or practice according to which, when checking the right to deduct VAT exercised by a taxable person, the tax authorities are bound by the findings of fact and the legal classifications which they have made in the context of related administrative procedures to which that taxable person was not a party.

The aim of the article is to examine a slightly different situation where national procedural regulations require national courts to follow in disputes concerning input VAT final judgements convicting a taxpayer's counterparty for issuing unreliable VAT invoices to the taxpayer. In such cases, the aforementioned invoices did not confirm actual economic events.[2]

According to the settled European Court of Justice (hereinafter: 'ECJ') case-law,[3] EU law does not require a national court to disapply domestic rules of procedure conferring the authority of *res judicata* on a judgement, even if it would make it possible to remedy a domestic situation which is incompatible with the EU law. It means that national courts are not obliged to question a judicial decision that has acquired the authority of *res judicata*. However, it does not necessarily mean than judgements contrary to the EU law can be binding for other national courts and administrative bodies in tax periods following the final judicial decision incompatible with EU law.

Due to the lack of the EU's competence to harmonise national regulations concerning the binding force of final national judgements, such rules should be assessed under the procedural autonomy principle. It means that national procedural rules cannot be less favourable than those governing similar domestic situations (the principle of equivalence) nor may they be framed in such a way as to make it practically impossible or excessively difficult to exercise the rights conferred by the EU legal order (the principle of effectiveness[4]). In most cases, national legislators do not introduce procedural rules which are manifestly less favourable than those governing similar domestic situations. However, in certain circumstances, the ECJ found that national rules concerning the binding force in other proceedings of a judicial decision that has acquired the authority of *res judicata* were contrary to the principle of effectiveness.

---

[1] Glencore Agriculture Hungary, C-189/18, EU:C:2019:861.

[2] As the Court stated in para. 24 of the Glencore case judgement, 'the present case does not raise questions linked to res judicata', as no criminal judgements were delivered at the time of the proceedings at the ECJ.

[3] Judgements of 6 October 2015, Târşia, C-69/14, EU:C:2015:662, paragraph 29.

[4] Transportes Urbanos y Servicios Generales, C-118/08, EU:C:2010:39, paragraph 31; and Test Claimants in the Franked Investment Income Group Litigation, C-362/12, EU:C:2013:834, paragraph 32.

As there is no direct answer of the ECJ in judgements concerning VAT, the recent ECJ jurisprudence concerning the binding force of final judgements issued contrary to the EU law shall be analysed (Luchini,[5] Fallimento Olimpiclub,[6] CRPNPAC/Vueling Airlines[7]). Guidelines from the ECJ jurisprudence shall be used to examine the conformity with EU law of the Polish legislation stipulating the binding force of final conviction judgements in administrative court proceedings.

2. The ECJ's Jurisprudence

2.1. Lucchini

In the *Lucchini* case, the national courts of both instances (Tribunale civile e penale di Roma and Corte d'appello di Roma) ruled on the possibility of granting state aid by omitting the European Commission's decision[8] declaring such support incompatible with Community law. What is important, the European Commission's decision was not challenged by the beneficiary of the aid and, as a result, it became final. Because of the failure of the Italian authorities to bring an appeal on a point of law, the decision of the Corte d'appello di Roma became final. In order to comply with a final judgement, the administrative authority granted state aid by way of a decision. Due to the Commission's letter challenging the compatibility of the aid with Community law, that decision was set aside and the Italian authorities demanded the repayment of the aid granted. The Tribunale amministrativo regionale del Lazio upheld the company's action against that decision. In support of its judgement, the referring court stated that the possibility of revoking acts of public authorities was limited by the right to obtain state aid established by a final judgement of the Corte d'appello di Roma. That position was based on the interpretation of the national provisions of the Italian courts which make final judicial decisions binding.[9] In the light of the interpretation adopted by the Italian courts, where a final decision has been given by a court on the same subject, in other judicial proceedings it was inadmissible not only to base the claim on pleas in law which had previously been raised, but also on those which could hypothetically be used by the parties in the course of a case which had previously been concluded. In exam-

[5] Lucchini SpA, C-119/05, EU:C:2007:434.

[6] Fallimento Olimpiclub, C-2/08, EU:C:2009:506.

[7] CRPNPAC/Vueling Airlines, joined cases C-370/17 and C-37/18, EU:C:2020:260.

[8] Decision 90/555/ECSC concerning aid which the Italian authorities plan to grant to the Tirreno and Siderpotenza steelworks (No. 195/88 – No. 200/88) (OJ 1990 L 314, p. 17).

[9] According to Article 2909 of the Italian Civil Code, 'The findings made in a final judgement shall be binding on the parties, their heirs or their successors in law'.

ining the appeal on a point of law, the Consiglio di Stato found that there was a conflict between the final judgement of the Corte d'appello di Roma and the final decision of the European Commission and considered it necessary to make a reference for a preliminary ruling.

In its judgement, the ECJ pointed to the limited role of national courts in the field of state aid and the exclusive competence of the European Commission in this area. During the proceedings before the Court the European Commission held that the Italian courts did not have jurisdiction to rule on the compatibility of state aid with the Community law and that no national court could annul the European Commission's decision. However, as the ECJ has pointed out, neither the judgement of the Corte d'appello di Roma nor the judgement of the Tribunale civile e penale di Roma expressly resolved the question of the compatibility of state aid with the Community law. Referring to the principle of the primacy of EC law, the ECJ stated that the Community law precludes the application of a provision of national law determining the legal effects of final judicial decisions in a case where its application prevents the recovery of state aid granted without a final decision of the European Commission.

As a result of the *Lucchini* case, only in extreme cases, the question of division of powers arises and national courts are obliged by the primacy of the EU law to disregard final judgement which grants state aid incompatible with the common market. In standard situation when a final national judgement is contrary to the EU law, national rules implementing the principle of *res judicata* should be assessed from the point of view of the principle of procedural autonomy. Such a standard of a review of national law has been adopted in cases *Fallimento Olimpiclub* and *CRPNPAC/Vueling Airlines* discussed below.

2.2. Fallimento Olimpiclub

In the *Fallimento Olimpiclub* case, a number of VAT decisions were adopted against an Italian taxable person. In those decisions, the tax authority considered that the entity had entered into the lending agreement to circumvent the provisions of tax law. The individual's action against those decisions was upheld by the national court. In the proceedings before the court of cassation, the taxable person has relied on final decisions of the national courts in the taxpayer's case concerning a similar issue raised in earlier tax periods.

The interpretation of the procedural rules adopted in the case-law of the Italian courts precluded the tax authorities from verifying, in all subsequent tax periods, the relevant factual or legal findings relating to the same taxable person which were contained in the final judicial decision relating to an earlier tax period. In view of the doubts raised by the Corte suprema di cassazione as to the compatibility with Community law of the effects of the interpretation of the national proce-

dural rules in VAT cases, national court referred the question for a preliminary ruling to the ECJ. The ECJ stated that the national rules implementing the principle of *res judicata* should be assessed from the point of view of the principle of procedural autonomy.[10]

According to the ECJ, the interpretation of the national legislation adopted in the case-law of the Italian courts was contrary to the principle of effectiveness. It would lead to a situation in which an incorrect interpretation presented in a final judgement would prevent the correct application of Community law in the field of VAT in any new tax period following a final conviction judgement. In addition, it would not be possible to correct that incorrect interpretation.[11] According to the ECJ, in such a case, it could not be considered that the principle of legal certainty could justify the inability to apply the Community VAT rules effectively.[12] In view of the negative assessment of the national provisions in the light of the principle of effectiveness, the ECJ stated that national courts are obliged to refuse the application of such national provisions.

2.3. CRPNPAC/Vueling Airlines

Another example when national rules implementing the principle of *res judicata* when considered contrary to the principle of effectiveness is the ECJ's judgement in joined cases C-370/17 and C-37/18 *CRPNPAC/Vueling Airlines*. The cases concerned posting of workers according to the rules set out in Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (hereinafter: 'Regulation No. 1408/71') and Council Regulation (EEC) No. 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No. 1408/71 (hereinafter: 'Regulation No. 574/72'). Due to the topic of the article, case C-37/18 shall be discussed below in detail.[13] What is important about the case is fact that before the aforementioned case,[14] the ECJ did not 'rule on the situation in which the criminal court has upheld applications of the law to the facts that are incompatible with EU law.'

In case C-37/18, the facts were as follows. Mr Poignant was employed by Vueling Airlines SA as a co-pilot under a contract governed by Spanish law and has

[10] Para. 22 of the ECJ's judgement.

[11] Para. 30 of the ECJ's judgement.

[12] Para. 31 of the ECJ's judgement.

[13] For case C-370/17, see Laetitia Driguez, Posting of Workers: When the Ideal of Cooperation Between National Institutions Prevails over the Fight Against Fraud: *CRPNPAC and Vueling*, 2021, 58, *Common Market Law Review*, Iss. 3, pp. 929–950.

[14] Para. 168 of the Advocate General's (hereinafter: 'the AG') opinion in the CRPNPAC/Vueling Airlines cases.

been posted to the airport in France. Mr Poignant brought an action before the Labour Court requesting inter alia a lump-sum payment of compensation for concealed employment and damages as compensation for the loss suffered due to the failure to pay contributions to the French social security system. Subsequently, court dismissed all those claims as the employer (Vueling Airlines SA) had properly completed the applicable administrative formalities, in particular by requesting the Spanish social security bodies to issue E 101 certificates[15] for its workers.

In 2016, the Court of Appeal in Paris set aside the aforementioned judgement, basing its decision on the judgement of the Court of Cassation from 2014, according to which Vueling Airlines SA could not rely on the E 101 certificates to establish the legality of the postings concerned and to bar a national court from finding that there had been a deliberate infringement of the provisions of French law. As a result of judgements in 2014, an employer has been found guilty of concealed employment and ordered to pay a fine. What is more, the employer has been ordered to pay to Mr Poignant, *inter alia*, a lump-sum payment of compensation for concealed employment and damages due to the failure to pay contributions to the French social security system. According to the Court of Appeal in Paris,[16] although the E 101 certificates gave rise to a presumption of affiliation to the Spanish social security scheme which was binding on the competent French social security institutions, those certificates could not preclude the criminal court from finding that there had been an intentional breach of the legal provisions that determine the conditions of validity of the posting of workers in France.

Consequently, the employer brought an appeal against the judgement of the Court of Appeal in Paris before the Court of Cassation. The Social Chamber of the Court of Cassation decided to stay proceedings and to refer two questions to the ECJ for a preliminary ruling. The first question of the national court as not relevant for the purpose of this article shall not be discussed in detail.[17]

From the point from the point of view of the aim of this article, the second question of the national court is important. According to the second question, if the ECJ's answer to the first question is affirmative '(…) must the principle of the primacy of EU law be interpreted as precluding a national court or tribunal, on whom under national law the authority of res judicata in criminal proceedings is binding in civil proceedings, from taking action in accordance with a decision of a criminal court delivered in a way that is incompatible with EU law by making

[15] Certificates issued according to Regulation No. 1408/71 by the social security bodies of the state of origin, which stipulate that workers are still affiliated to their national social security scheme when regularly posted in another Member State.

[16] Para. 28 of the ECJ's judgement.

[17] The first question has been aimed to determine whether in the case of legal proceedings brought against an employer, a national court may disregard E 101 certificates if they were fraudulently obtained or used.

an order that an employer has the civil liability to pay damages to a worker on the sole basis of the criminal conviction of that employer of the offence of concealed employment?'

In the answer to the aforementioned question, the ECJ recalled its settled case-law,[18] according to which the EU law does not require a national court to disapply domestic rules of procedure conferring the authority of *res judicata* on a judgement, even if doing so would make it possible to remedy a domestic situation which is incompatible with the EU law. Afterwards, the ECJ stated that national procedural rules (including *res judicata*) should be assessed under the procedural autonomy principle.[19] The ECJ[20] raised than a question of '(…) whether it is compatible with the principle of effectiveness to adopt an interpretation, in the national law concerned, of the principle that a decision in criminal proceedings that has the authority of res judicata also has that authority in civil proceedings such that a civil court, giving a ruling on the same facts as those on which the criminal court gave a ruling, is barred from calling into question not only the criminal conviction of the employer concerned as such, but also the findings of fact and the legal classifications and interpretations adopted by the criminal court, even when those findings of fact and law were made in breach of EU law (…)'.

As the ECJ stressed in the para. 94 of the judgement in the *CRPNPAC/Vueling Airlines* cases, a result of such national interpretation would be a repetition of the incorrect application of EU law in every decision adopted by the national courts concerning the same facts, and there would be no possibility of correcting a finding and an interpretation that were in breach of EU law.

According to the ECJ, in para. 96 of the judgement – making another reference to its *Fallimento Olimpiclub* case judgement, the aforementioned '(…) obstacles to the effective application of the rules of EU law in relation to that procedure and on the binding effect of E 101 certificates cannot reasonably be justified by the principle of legal certainty and must therefore be considered to be contrary to the principle of effectiveness'.

As a result, the ECJ answered the second question of the national court stating that '(…) Article 11(1) of Regulation No 574/72, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 647/2005, and the principle of the primacy of EU law must be interpreted as precluding, in a situation where an employer has, in the host Member State, acquired a criminal conviction based on a definitive finding of fraud made in breach of EU law, a civil court or tribunal of that Member State, bound by the principle of national law that a decision which has the authority of res judicata in criminal proceedings also has

[18] Para. 89 of the judgement in the CRPNPAC/Vueling Airlines cases.

[19] Para. 91 of the judgement in the CRPNPAC/Vueling Airlines cases.

[20] Para. 92 of the judgement in the CRPNPAC/Vueling Airlines cases.

that authority in civil proceedings, from holding that employer to be liable, solely by reason of that criminal conviction, to pay damages intended to provide compensation to workers or a pension fund of that Member State who claim to be affected by that fraud." (the author's own emphasis).

The AG's standpoint in the case of the second question of the national court can be considered similar to the ECJ's answer.

It is worth noting that both the ECJ and the AG[21] considered the principle of the primacy of the EU law as an inappropriate standard of the assessment of national procedural rules in case in matter. However, I cannot agree with the AG's standpoint that procedural autonomy of the Member States and, in that context, the tests of equivalence and effectiveness are not relevant (the ECJ's view was different in that matter from the AG's).

2.4. Conclusions from the ECJ Judgements

First, let us discuss the principles used by the ECJ in the cases studied above. The principle of national procedural autonomy was of vital importance in the *CRPNPAC/ Vueling Airlines* case and the *Fallimento* case. However, in Glencore case, the search principle was not of importance due to the question of the national court which concerned the right of the taxpayer to defence in tax proceedings. However, in point 45 of the Glencore case, the ECJ stated that the finality of an administrative decision, which is acquired upon the expiry of the reasonable time limits for legal remedies or by exhaustion of those remedies, contributes to legal certainty and that EU law does not require that administrative bodies are placed under an obligation to reopen an administrative decision which has become final in that way. Therefore, the common starting problem for the ECJ is how to balance the principle of legal certainty and the principle of the effectiveness.

What conclusion can be drawn from the ECJ's jurisprudence, then? First, EU law does not require withdrawing a final national criminal conviction judgement in case it is contrary to the EU law. Second, from the perspective of the EU law, there are negative consequences of an incorrect final judgement in other subsequent proceedings.

One can distinguish negative consequences:

– the infringement of the principles governing the division of powers between the Member States and the EU in the area of state aid (Lucchini)
– the duration of the incorrect application of the EU law – permanent or limited to certain tax periods (Fallimento Ollimiclub)
– the negative impact on the effectiveness of the cooperation between Member States set out in the EU regulation (CRPNPAC/Vueling Airlines)

[21] Para. 162 of the AG's opinion.

– the lack of the possibility of defence for the taxpayer whose counterparty received the final tax decision (Glencore).

It is clear from the *Fallimento Olimpiclub* case that national regulations (or their interpretation presented in the settled case-law of the national courts) cannot exclude the possibility for tax authorities/administrative court to verify the correctness of a taxable person's VAT accounts in all tax periods following a final judicial decision incompatible with the Union law. In other words, if the final national judgement would lead to an incorrect application of EU law in one tax period, the EU law does not require to question the binding force of the final national judgement. What is unacceptable is a situation where tax authorities/national courts are forced to follow an incorrect final judgement without any temporal limitation. In such a situation, the EU law cannot be effective in national legal orders.

However, the situation is different where a criminal conviction judgement concerns the assessment of behaviour in certain periods. It is worth noting that, in the *CRPNPAC/Vueling Airlines* cases, the ECJ effectively extended *Fallimento Olimpiclub* to situations when final conviction judgement did not have permanent negative consequences in other subsequent tax proceedings.

In order to understand what impact the *CRPNPAC/Vueling Airlines* cases can have for VAT disputes it is worth to read it in combination with the *Glencore* judgement. As it was pointed out at the beginning of this article, the *Glencore* case did not concern situation in which there was delivered a final conviction judgement. However, according to M. Szydło,[22] the *Glencore* case implies that if the court finds that the earlier judicial review was insufficient or incorrect, then it may carry out a further review and rule on the legality of the subsequent decision founded on those materials accordingly.

Combining the direction of the interpretation of the EU law presented in the *CRPNPAC/Vueling Airlines* cases and in the *Glencore* case, it is clear that the aim of the ECJ is to avoid a situation where a final conviction judgement cancels the possibility of calling into question not only the criminal conviction of the issuer of a VAT invoice, but also the findings of fact and the legal classifications and interpretations adopted by the criminal court, even when those findings of fact and law were made in breach of EU law.

To conclude, the *CRPNPAC/Vueling Airlines* cases provide arguments to question national legislation which makes a criminal conviction judgement binding both for tax administration and administrative courts. It is so that tax administration and administrative courts have means of ensuring that a judgement convict-

[22] M.A. Szydło, *Court of Justice: How Far Can Previous Rulings or Evidence Determine an Individual Administrative Decision? Glencore's Implications for Decisions within the Scope of EU Law*, "Common Market Law Review" 2021, Vol. 58, Iss. 2, pp. 526–527

ing or acquitting the person concerned takes account of all the evidence which that authority has at its disposal.[23]

However, it is worth noting that in some Member States the principle that a decision adopted in criminal proceedings is binding in administrative court proceedings might currently not exist (Spain, Germany).[24] What is more, in some Member Stated the matters judged by the criminal court have only the value of rebuttable presumptions (the Netherlands, Portugal).[25] In such a scenario, administrative courts are not obliged to disapply national procedural regulations. However, national courts are still obliged to interpret national law in a manner favourable for EU law.

From the point of view of the obligations of administrative bodies and national courts, it is, however, clear that the obligation to disapply national procedural rules concerning the binding force of final conviction judgements can be only indirectly drawn from the *Glencore* or *CRPNPAC/Vueling Airlines* judgements. Therefore, in order to effectively protect a taxpayer's rights, the ECJ should clarify its standpoint regarding the binding force of final judgements convicting issuer of a VAT invoice in other tax proceedings.

After exploring the ECJ's jurisprudence, it is worth to apply the EU law principles in case of the Polish legislation stipulating binding force of criminal judgements in administrative court proceedings.

3. Polish Administrative Court's Jurisprudence and National Legislation

After describing the ECJ's standard for the assessment of national regulations, it is worth examining Polish legislation and the jurisprudence of the Polish administrative courts.

According to Article 11 of the Administrative Courts Proceedings Act of 30 August 2002 (hereinafter: 'the ACPA'), the findings of the final conviction judgement regarding the commitment of a crime are binding for the administrative court.[26] As it is accepted in the jurisprudence of the Polish administrative courts,[27] the aforementioned provision must be understood as meaning that the court is prohibited from challenging the findings of the public administration body consistent with the findings of the final conviction judgement and requires acceptance of the

[23] See para. 167 of the AG's opinion in the CRPNPAC/Vueling Airlines cases.

[24] Footnote 113 in the AG's opinion in the CRPNPAC/Vueling Airlines cases.

[25] Ibidem.

[26] In Polish: 'Ustalenia wydanego w postępowaniu karnym prawomocnego wyroku skazującego co do popełnienia przestępstwa wiążą sąd administracyjny'.

[27] See judgements of the Supreme Administrative Court of: 16 September 2015 (case No. I GSK 40/14), 14 June 2016 (case No. I FSK 1928/14), 8 May 2018 (case No. II FSK 1463/17).

findings of the administrative authority consistent with the findings of the final criminal conviction judgement.

What are the practical consequences of the Article 11 ACPA for the tax authorities and taxpayers in VAT disputes? First, in cases where it is necessary to determine the issuance of a fictitious or an unreliable VAT invoice, the tax authorities and administrative courts are obliged to take into account the findings of the final conviction judgement regarding the commitment of a crime against the credibility of documents.[28] According to the settled case-law of the Polish administrative courts[29] both the tax authorities and the courts are obliged to take into account the findings as to the commission of a crime contained in final criminal convictions concerning persons who are not parties to tax (court-administrative) proceedings if it is necessary and justified in the circumstances of a given tax or court-administrative case. This means that by such a judgement, the administrative court is also bound by the findings concerning the commission of a crime by other persons, e.g. the taxpayer's contractors.

Secondly, in the jurisprudence of the Polish administrative courts,[30] cases can be frequently found where the taxpayer's contractor was finally convicted of the offence of issuing unreliable invoices to the taxpayer that did not confirm actual economic events. In such cases, the administrative court is bound by the final conviction judgement, and the effects of this judgement apply to the taxpayer's case concerning the right to deduct input VAT.

Considering both the wording of Article 11 of the Administrative Courts Proceedings Act of 30 August 2002 and its interpretation by the Polish administrative courts it cannot be said that Polish law is in conformity with EU law. It is nearly impossible for a taxpayer to defend his or her rights in the case of the final conviction of his or her contractor for the offence of issuing unreliable invoices. It is worth noting that Polish law does not provide any room for assessing factual statements in final conviction order. Therefore, courts have no possibility of verifying all of the evidence, regardless of whether it supports the taxpayer's claims. In such case as taxpayer is deprived of his or her right to defend himself or herself and has no possibility of presenting evidence contrary to the contractor's final conviction judgement effectively.

It is clear that Article 11 of the Administrative Courts Proceedings Act of 30 August 2002 is contrary to principle of effectiveness. Currently, a final conviction judgement cancels the possibility of calling into question not only the criminal conviction of the issuer of a VAT invoice, but also the findings of fact and the le-

[28] Judgement of the Supreme Administrative Court of 22 February 2011 (case No. II FSK 1337/09).

[29] See Judgement of the Supreme Administrative Court of 25 February 2014 (case No. I FSK 480/13 and the Provincial Administrative Court in Gliwice of 11 January 2019 (case No. II SA/Gl 804/18).

[30] See Judgement of the Supreme Administrative Court of 10 November 2020 (case No. II FSK 1947/18) and the Provincial Administrative Court in Łódź of 4 August 2020 (case No. I SA/Łd 77/20).

gal classifications and interpretations adopted by the criminal court, even when those findings of fact and law were made in breach of EU law. In such situation it is clear than both tax authorities and administrative courts are obliged to disapply provisions of national contrary to the EU law.

Therefore, what obligations do administrative courts have after refusing to apply such national procedural regulation? First, administrative court does not have duty to completely disregard final conviction judgement. Both the *CRPNPAC/Vueling Airlines* and *Glencore* cases give national courts possibility to review all evidence and do not oblige them to rule always on the benefit of taxpayer. Is to therefore completely plausible for court to follow findings of final conviction judgement in case other evidence confirm factual circumstances stated in the aforementioned ruling. The ECJ's jurisprudence should not be understood as an obligation to grant right to deduct VAT regardless of the assessment of evidence gathered in taxpayer's case. However, an administrative court (a tax authority) is obliged to disregard factual or legal findings contained in final conviction order if another type of evidence led to other findings than those presented in final conviction judgement

4. Conclusion

Protection of fundamental rights (especially principle of equality of arms in tax proceedings) justifies disregarding national rules introducing binding force of final criminal judgements in administrative court proceedings. From the point of view of EU law, it is unacceptable that final conviction judgement excludes the possibility for administrative court (tax authority) of verifying the correctness of the application of the EU law.

National rules introducing the binding force of criminal judgements in administrative court proceedings are not only contrary to the EU law, but they are also difficult to apply in the case of final conviction judgements in a transborder situation. Usually, an administrative court from Member State A will not have any possibility of verifying evidence used by the court in Member State B to deliver final conviction judgement. However, in the author's view, it is highly unlikely that the current practice of tax authorities and administrative courts shall change without the ECJ's clear statement of the obligation do disapply national procedural provisions.

What are solutions for countries such as Poland should Article 11 of the Administrative Courts Proceedings Act of 30 August 2002 be deleted? In the author's opinion, in order to be compliant with EU law, it is sufficient to introduce reputable presumption. However, such an amendment would be only possible after declaring by the ECJ that Polish procedural regulations are contrary to the principle of effectiveness.

Emilia Sroka

Kozminski University, Poland

emilia.sroka@gmail.com

ORCID: 0000-0003-4171-2023

A Gradual Approach to Shaping VAT Policy in the Digital Age as Exemplified by OSS

Abstract

Digital innovations have changed the way the entire economy works. For this reason, some legislative intervention is required to ensure the positive development and integration of the emerging digital ecosystem into the existing legal and tax environment. Developing new solutions, also in the field of VAT, is not an easy task; features of the digital economy, such as adaptability and flexibility, cause problems from the point of view of the traditional legislative process, which is rather static and slow to respond to change. To address this problem, a differentiated approach and legislative strategies in designing new solutions may be considered appropriate. In this article, the author comments on the gradual policy approach, based on the example of the evolution of the VAT One Stop Shop procedure.

Keywords: digitalisation, VAT, tax policy, OSS, MOSS, BOSS

Introduction

The birth of the modern digital economy is closely related to the popularisation of the internet in the 1990s.[1] It has enabled unprecedentedly rapid, real-time cross-border interactions between users and the dynamic development of new technologies.

As a result, the value of global e-commerce (understood as online supply of goods and services) has grown significantly. According to UNCTAD data,[2] it has reached USD 29 trillion in 2017 (13% growth from the previous year). Global B2B e-commerce was USD 25.5 trillion in 2017, representing 87% of all e-commerce, while B2C e-commerce was USD 3.9 trillion in 2017, an increase of 22% over the previous year.

It should be noted that the economic crisis triggered by the COVID-19 pandemic has further highlighted the importance of the digital economy. The pandemic has accelerated the digitalisation of consumer and business activities. New technologies are enabling many services to be performed virtually – or to coordinate the sale and delivery of goods in ways that limit in-person interactions.[3] According to the OECD report,[4] new habits have developed in response to the COVID-19 pandemic that are likely to have a positive impact on certain types of e-sectors, such as online teaching, delivery of food and other items sold online, provision of non-traditional types of short-term accommodation (as people are not comfortable staying in traditional hotels), short-term rental of online working spaces.[5]

In summary, digital innovations undoubtedly have a large impact on the entire economy. For this reason, new business models have received considerable attention, particularly in the regulatory context. The development of digital economy

---

[1] 'The seeds and the ingredients for feeding and scaling up the new economy as itis today were sown almost twenty years ago.' – Seppo Poutanen and Anne Kovalainen, *New Economy, Platform Economy and Gender*, in: S. Poutanen, A. Kovalainen (eds.), *Gender and Innovation in the New Economy: Women, Identity, and Creative Work*, New York 2017, pp. 47–96, https://doi.org/10.1057/978-1-137-52702-8_3.

[2] United Nations Conference on Trade and Development, *Digital Economy 2019: Value Creation and Capture: Implications for Developing Countries*, 2019, p. 15, https://unctad.org/system/files/official-document/der2019_en.pdf.

[3] M. Hallward-Driemeier et al., *Europe 4.0: Addressing the Digital Dilemma* (World Bank Group and the Austrian Ministry of Finance, 2020), p. 15, www.worldbank.org.

[4] OECD, *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration* (OECD 2021), pp. 95–96, https://doi.org/10.1787/51825505-en.

[5] It can be also noted that: 'Platforms mediating accommodation services have been observed to change from longer rental periods to hourly rentals, not at least taking into account the need for very short-time premises to accommodate the needs of those forced to telework during the pandemic.' *Platform Economy: Developments in the COVID-19 Crisis*, Eurofound, https://www.eurofound.europa.eu/data/platform-economy/dossiers/developments-in-the-covid-19-crisis (accessed: 7.08.2021).

also made it necessary to answer the question whether traditional legal and VAT measures are sufficient for new business models.

Digitalisation: Legal and VAT Regulatory Challenge

As was already underlined in a European agenda for the collaborative economy[6] ('the Agenda'), the proper taxation of new business models raises doubts, especially in the context of platform economy[7]: 'Like all economic operators, those in the collaborative economy are also subject to taxation rules. These include personal income, corporate income and value added tax rules. However, issues have emerged in relation to tax compliance and enforcement: difficulties in identifying the taxpayers and the taxable income, lack of information on service providers, aggressive corporate tax planning exacerbated in the digital sector, differences in tax practices across the EU and insufficient exchange of information.'

The OECD has also highlighted the regulatory pressure of VAT on new business models, particularly in the accommodation and transport sectors (which collectively represent around 90% of the total market value of the global platform economy and are expected to grow in the coming years).[8]

Therefore, it seems clear that the digitalisation of the economy has approached a critical stage where some policy intervention is required to ensure positive development and integration of emerging ecosystem within the existing legal and VAT environment. This is also the conclusion of the communication *Shaping Europe's Digital Future*.[9] This document states that extension and diversity of new digital business models and services have significantly changed over time and some services have raised new challenges which the existing regulatory framework does not always address.

In this context, three main strategies can be distinguished: inaction, prohibiting or restricting the activities of new business models, and changing the regulatory environment. The first of these approaches may arise from a deliberate decision not to interfere with legislation, or from involuntary inactivity, for in-

---

[6] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A European Agenda for the Collaborative Economy', 2 June 2016.

[7] The Agenda uses the notion 'collaborative economy'. For the purposes of this article, I use the more neutral and modern concept of 'platform economy'. I also treat the platform economy as that part of the digital economy, where platforms facilitating the supply of goods or services play a dominant role.

[8] OECD, *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration*, p. 17.

[9] Council of the European Union, *Shaping Europe's Digital Future – Council Conclusions*, 9 June 2020, https://www.consilium.europa.eu/.

stance, due to political inertia.[10] This strategy has been criticized in the literature[11] because it can lead to unequal treatment of traditional suppliers and new players (whose unclear status often entails that they are not subject to the existing regulations and therefore may constitute unfair competition).

The second of these approaches is to prohibit or restrict activities under new business models. Some of the groups involved in or affected by the digital economy are able to exert disproportionate pressure upon the relevant regulatory authorities to get these authorities to advance their special interests instead of the welfare of society as a whole.[12] For instance, the initial response of traditional hotel companies to the challenges associated with the emergence of short-term rental platforms (such as Airbnb) on the market focused on a legal battle against them[13] and the typical reaction of regulators was to impose restrictions on activities of such platforms.[14]

The strategy of limiting or prohibiting a new type of business activities is not considered as a very successful one; the legal battles are unable to suppress consumer trends and even if the authorities were persuaded to impose stricter rules, difficulties in controlling online activities often resulted in problems with their enforcement.[15]

Therefore, it is proposed to adopt a more moderate approach, allowing communities to benefit from the innovative business models.[16] In my opinion, this strategy should consist in changing the legal and tax ecosystem by: (i) indicating whether and how the existing law applies to transactions concluded in the digital economy, (ii) amending the existing regulations and/or (iii) introducing completely new, dedicated solutions.

It is clear that the law currently in force (also in the field of VAT) does not cease to be binding only because new technologies have not been provided for by the legislator. However, there are many doubts as to how to properly apply these provisions.[17] For instance, new business models in the platform economy often fall

[10] J.A. Oskam, *The Future of Airbnb and the 'Sharing Economy': The Collaborative Consumption of Our Cities*, The Future of Tourism 1, Bristol, UK; Blue Ridge Summit, PA 2019, pp. 96–99.

[11] A. Pawlicz, *Ekonomia współdzielenia na rynku usług hotelarskich. Niedoskonałości – Pośrednicy – Regulacje*, Szczecin 2019, p. 118.

[12] G. Doménech-Pascual, *Sharing Economy and Regulatory Strategies towards Legal Change*, "European Journal of Risk Regulation" 2016, Vol. 7, No. 4, pp. 720–721, https://doi.org/10.1017/S1867299X0001014X.

[13] J.A. Oskam, *The Future of Airbnb and the 'Sharing Economy'*, pp. 70–71.

[14] K. Frenken, J. Schor, *Putting the Sharing Economy into Perspective*, "Environmental Innovation and Societal Transitions" 2017, Vol. 23 (June 2017), pp. 8–9, https://doi.org/10.1016/j.eist.2017.01.003.

[15] J.A. Oskam, op. cit.

[16] S. Inara, E. Brown, *Redefining and Regulating the New Sharing Economy*, "University of Pennsylvania Journal of Business Law" 2017, Vol. 19, No. 3, pp. 594–595.

[17] This view was also presented in the Agenda with regard to VAT taxation of the platform economy:

outside any of the traditional legal categories; in the context of VAT, the discussion concerns mainly the nature of the transactions and the tax status of platform users.[18] Therefore, it is necessary to adjust the regulatory VAT environment to the digital economy.

At the same time, the development of completely new solutions to answer unmet needs may be as important as explaining how the existing law applies to the digital economy and amending the current regulations. An example of such action is the implementing of the deemed supplier regime[19] into Directive 2006/112/EC[20] as a part of the VAT e-commerce package.[21]

Developing new solutions, also in the field of VAT, is not an easy task; features of the digital economy, such as adaptability and flexibility, cause problems from the point of view of the traditional legislative process[22] because it is difficult to formulate rules that can predict the future shape of this rapidly evolving market.

'Supplies of goods and services provided by collaborative platforms and through the platforms by their users are in principle VAT taxable transactions. Problems may arise in respect of the qualification of participants as taxable persons, particularly regarding the assessment of economic activities carried on, or the existence of a direct link between the supplies and the remuneration in kind (…)'. Although the Agenda is not a binding document, it nevertheless makes a fairly clear conclusion that the current legal and tax system is not adapted to new business models.

[18] These problems are highlighted, for instance, by F. Matesanz, *International – VAT Treatment of the Sharing Economy*, "International VAT Monitor" 2021, Vol. 32, No. 2.

[19] A solution, according to which electronic interfaces such as marketplaces or platforms will, in certain situations, be deemed for VAT purposes to be the supplier of goods sold to customers in the EU by entities using the marketplace or platform (underlying suppliers). Consequently, they will have to collect and pay the VAT on these sales.

[20] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11 December 2006, pp. 1–118.

[21] The e-commerce VAT package is the name of the regulations adopted by the EU Council aimed at modernising the VAT taxation of e-commerce. Initially, the package was to apply from 1 January 2021, but due to the COVID-19 pandemic, its application was postponed until 1 July 2021. *Modernising VAT for Cross-Border e-Commerce*, https://ec.europa.eu/taxation_customs/modernising-vat-cross-border-e-commerce_en (accessed: 28.12.2021).

[22] As it was aptly described: 'First and foremost, by their nature, traditional forms of regulation are both static and slow to respond to change. Using traditional methods for developing oversight and regulatory regimes, elected officials must deliberate and pass laws and administrative agencies must go through deliberative processes for the issuance of regulations. These legislative and regulatory processes are often cumbersome, take time to complete, and are subject to capture by incumbents. They are also often "frozen in time" in the sense that, once passed or adopted, a law or regulation fixes a regulatory course and that course can only be changed through the commencement of the same process from the beginning. As a static form of regulation, they are often designed to address the present state of affairs and are less capable of adapting to changes to that state of affairs, again, short of recommencing the process of making new laws or issuing new regulations all over again.' – R. Brescia, *Finding the Right 'Fit': Matching Regulations to the Shape of the Sharing Economy*, in: *The Cambridge Handbook of the Law of the Sharing Economy*, eds. J.J. Infranca, M. Finck and N.M. Davidson, Cambridge Law Handbooks, Cambridge 2018, p. 159, https://doi.org/10.1017/9781108255882.012.

However, it should be emphasised that the digitalisation of the economy also offers new opportunities for tax authorities and taxpayers. Firstly, new business models should be viewed as an opportunity to unpack and rethink traditional regulatory categories[23]; some of the problems associated with traditional transactions will also arise in digital business models. Secondly, nowadays, a number of market failures that used to justify some of existing regulations might well be corrected or mitigated in a more efficient way by means of the technological innovations.[24]

The Gradual Policy Approach

To address the re0gulatory problems related to the digitalisation of the economy, a differentiated approach and legislative strategies may be considered as appropriate.

For instance, in the context of VAT taxation of platform economy, countries may adopt a more general or sectoral approach.[25] The general approach is not easy to achieve because the variety of business models existing in the platform economy makes it difficult to find a one-size-fits-all solution for addressing the all VAT implications.[26] For this reason, the introduction of specific regimes targeting specific sectors seems to be a better option. However, this solution also has disadvantages. A sectoral approach may be less future-proof in the light of the continuous changes to business models and create additional complexity with the consequence of increasing compliance burdens, risks of competitive distortion and non-compliance.[27]

For this reason, it is recognised that a jurisdiction may decide to adopt gradual policy action. According to the OCED,[28] this approach is to first target dominant platform economy sectors that create the most pressing risks and/or concerns of competitive distortion. Then a jurisdiction may consider running a pilot programme. Obviously, the policy response has to be consistent with the general rules and principles of the jurisdiction's VAT system (as neutrality and proportionality). The acquired know-how and experience will serve as a good basis for further pol-

---

[23] O. Lobel, *Coase and the Platform Economy*, in: *The Cambridge Handbook of the Law of the Sharing Economy*..., https://doi.org/10.1017/9781108255882.006.

[24] G. Doménech-Pascual, *Sharing Economy and Regulatory Strategies towards Legal Change*, pp. 726–727.

[25] OECD, *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration*, pp. 37–38.

[26] Ibidem.

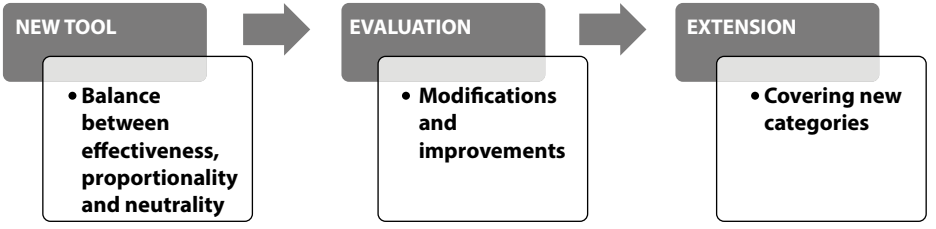
[27] Ibidem.

[28] Ibidem.

icy actions, as broadening the scope of existing policies to cover other types of platform economy activities.

It is worth noting that this type of 'evolutionary' approach to solving complex problems is often considered the most effective. As indicated in the literature,[29] due to the fact that many factors cannot be comprehended in advance, and also due to the complexity, endless variables and rapidly changing world it is difficult to formulate an effective strategy from on high. For this reason, it is better to shift from the traditional 'top-down' approach of identifying a target and create really perfect strategy designed to hit all the objectives at once, in favour of the evolutionary 'bottom-up' approach. Therefore, instead of designing a product (in this case, a new VAT solution) from scratch, it is better to create a prototype with sufficient features (e.g. a VAT solution covering a small number of selected transactions) to be tested on early users (in this case, taxable persons). The prototype is then evaluated by the users and, if the evaluation is successful, it can be improved and extended further.

Figure 1. The gradual policy approach step-by-step



Source: own elaboration.

In my opinion, the gradual policy approach may be efficient when introducing new regulatory tools in the field of VAT. The more information the success (or failure) of a new policy provides, the easier it is to decide in which direction to develop legislation (or not). This approach allows for a kind of legislative 'experiment', the results of which can be refined and then extended to further sectors, transactions and/or entities (depending on how narrowed the new regulation was). The gradual policy approach may also lead to the optimal regulation of subsequent segments of the economy, as long as they pose similar problems.

[29] M. Syed, *Black Box Thinking: Marginal Gains and the Secrets of High Performance*, London 2016.

One Stop Shop as an Example of the Gradual Policy Approach

In my opinion, a good example of a gradual approach in the field of VAT is the development of the one-stop shop ("OSS"). This special procedure was implemented as part of the Digital Single Market strategy, which contained a series of actions designed to break down the barriers for the growth of e-commerce in the EU[30]. Therefore, it is a relatively new institution in the VAT system. It entered into force in 2015 with the change in the provisions on the place of supply for telecommunications, broadcasting and electronic ('TBE') services.

Until the end of 2014, VAT on TBE services provided to EU non-taxable persons ('consumers') was collected in the Member State where their suppliers were established. This situation changed on 1 January 2015. Pursuant to the new regulations,[31] VAT on TBE services in B2C transactions is collected in the Member State where the consumer is located. The consequence of this amendment was the obligation on taxable persons supplying TBE services to register and account for VAT in all Member States where their consumers were located. This could be a significant administrative burden for these TBE service suppliers and, consequently, had a negative impact on the development of the TBE service sector. Therefore, in parallel with this amendment, in order to simplify the obligations related to the settlement of VAT, the optional possibility of using the special Mini One Stop Shop ('MOSS') procedure was introduced.[32] The MOSS allowed taxable persons supplying TBE services to consumers in Member States in which they did not have an establishment (Member States of consumption, 'MSCON') to account for the VAT due on those supplies via a web-portal in the Member State in which they were identified (member state of identification, 'MSID'). Instead of registering in each MSCON, the taxable persons could fulfil their VAT duties via only one MSID. Then, the MSID was obliged to provide MSCON with VAT returns and payments made by the taxable person. Under MOSS, two schemes were distinguished – the Union scheme and the non-Union scheme. The Union scheme was intended for taxable persons who were established or had their fixed establishment

[30] European Commission, *Impact Assessment. Accompanying the Document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernising VAT for Cross-Border B2C e-Commerce*, 1 December 2016, http://eur-lex.europa.eu.

[31] Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services, OJ L 44, 20 February 2008, pp. 11–22.

[32] Paragraph 8 of the Preamble to Directive 2008/8/EC: 'To simplify the obligations on businesses engaging in activities in Member States where they are not established, a scheme should be set up enabling them to have a single point of electronic contact for VAT identification and declaration. Until such a scheme is established, use should be made of the scheme introduced to facilitate compliance with fiscal obligations by taxable persons not established within the Community.'

in the territory of the EU (established taxable person, 'ETP'). Taxable persons who were not established or had not their fixed establishment in the territory of the EU (non-established taxable person, 'NETP') had the possibility of registering for the non-Union scheme.

Thus, the development of e-commerce in the EU resulted in the need to adapt the regulatory framework in the field of VAT. In response to the problem of proper taxation of TBE services, the existing regulations in this area were first amended and also a new, modern tool (MOSS) was introduced to simplifying the burden on business who are required to account for VAT in other Member States. The new tool covered a relatively small number of transactions – only TBE services could be settled via MOSS.

Already in 2016, the effects of the new tool were thoroughly analysed. The main conclusion from the assessment of the impact on both Member States and EU entrepreneurs was that the launch of the MOSS has been successful.[33] The EU entrepreneurs found MOSS effective and meeting the objectives for which it was introduced, i.e. simplifying their VAT obligations. Particularly important for them was the possibility of submitting only one VAT return and making one payment for each reporting period, regardless of the number of Member States where cross-border TBE services were provided. This facilitation was not only convenient, but also contributed to reducing the costs of conducting a business activity. According to the data[34]: 'The overall cost for businesses using the MOSS is about 95% lower than of those not using the MOSS, resulting in a total saving for businesses using it of about EUR 500 million. (…) The marginal cost for submitting the VAT return and paying the VAT thus decreases for each additional Member State TBE services are supplied to. Such economies of scale translate into a reduction of the costs per company per Member State from 92% when the VAT return is filed for three Member States, up to 95% when it is filed for 27 Member States'.

Probably for this reason, according to the data,[35] the total number of taxable persons using the MOSS (both the Union scheme and the non-Union one) was increasing from 2015 to 2017 (from 12,440 to 14,099). In the Union scheme a slight decrease was registered in 2018 and 2019 (to 11,163 taxable persons) and this is due to the introduction of the EUR 10,000 threshold as of 1 January 2019.[36] In the

[33] European Commission. Directorate General for Taxation and Customs Union and Deloitte, *VAT Aspects of Cross-Border e-Commerce: Options for Modernisation: Final Report. Lot 3, Assessment of the Implementation of the 2015 Place of Supply Rules and the Mini-One Stop Shop.* (LU: Publications Office, 2016), pp. 11–12, https://data.europa.eu/doi/10.2778/59123.

[34] Ibidem, p. 15.

[35] The latest MOSS statistic data, available on the website: *Modernising VAT for Cross-Border e-Commerce*, https://ec.europa.eu/taxation_customs/modernising-vat-cross-border-e-commerce_pl.

[36] According to the EC: 'In the Union scheme a slight decrease was registered in 2018 and 2019 and this is due to the introduction of the €10,000 threshold as of 1 January 2019. Small businesses may

non-Union scheme, the number of taxable persons increased compared to 2015 from 996 to 1,183 in 2019.

It is worth noting that the slight decrease in the number of taxable persons using MOSS did not have an impact on the constant growth in VAT revenues collected via this procedure; the data indicates[37] that the VAT revenues collected under MOSS (both the Union scheme and the non-Union one) increased by EUR 3 billion of VAT collected in 2015 to EUR 5.60 billion of VAT collected in 2019. In 2019, the VAT collected increased by more than 22% compared to 2018.

The MOSS assessment also showed that this tool was not without disadvantages. The main problems identified in relation to this special procedure were related to both technical and legal issues, such as no threshold for TBE services (the need to settle even transactions for insignificant amounts in MOSS), the requirement of issuing invoices according to the legislation of the MSCON, the need to correct past VAT MOSS returns rather than adjust them in current returns and then seek refunds, the requirement of keeping records for 10 years (even if the period for domestic transactions is shorter[38] in certain Member States).

Despite these shortcomings, the MOSS system functioned well and brought significant benefits to taxable persons and tax administrations. Therefore, it was decided to extend it to further transactions. The changes introduced in July 2021 by the VAT e-commerce package resulted in the disappearance of the word 'mini' from the name MOSS and now this special procedure simply functions as OSS (for the purposes of this article, I refer to the post-revised MOSS procedure as 'OSS 1.0'). It is worth noting that after the amendment, the general MOSS rules have not been significantly modified. In general, the principles of operation of the procedure remained unchanged, but the number of transactions that can be settled through it has increased.

The ETP and NETP, under the EU and non-EU schemes, respectively, can still account for and pay the VAT on supplies of TBE supplied services to consumers – however now, this possibility is not limited to TBE services only. Since 1 July 2021, the OSS 1.0 has covered all B2C services taking place in EU Member States where the supplier is not established. What is more, the OSS 1.0 has also applied to all distance sales of goods within the EU and to certain domestic supplies of goods fa-

---

choose to have the place of supply in the Member State where they are established, if their cross-border supplies of TBE services do not exceed €10,000 and thus not use the MOSS. Also, it should be noted that businesses (especially smaller ones) that are trading through a platform or marketplace are not directly eligible for the MOSS but instead the platform and the marketplace register in MOSS and assumes most of the fiscal obligations.' Ibidem.

[37] Ibidem.

[38] European Commission, *Impact Assessment: Accompanying the Document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernising VAT for Cross-Border B2C e-Commerce*. Obviously, this is not an exhaustive description of all the problems reported by taxable persons related to the functioning of MOSS.

cilitated by electronic interfaces under certain conditions (these transactions can be settled only in the Union-scheme). Moreover, another new scheme was created for the declaration and payment of VAT on distance sales of low-value goods (dispatched or transported in consignments with a value not exceeding a total of EUR 150) imported from outside of the EU, called the Import One Stop Shop ('IOSS').

Notably, some of the problems reported by taxable persons related to the functioning of MOSS were addressed in the solutions provided in the VAT e-commerce package. Firstly, from 1 January 2019, a threshold of EUR 10,000 was in force for the value of TBE services provided to consumers, up to which taxable persons could settle VAT in accordance with the rules applicable to domestic transactions in the Member States of their establishment. From 1 July 2021, this threshold already applies to the total value of TBE services and distance sales of goods within the EU. Moreover, also since 1 January 2019, if the special procedure is used, invoicing is governed by the rules applicable in the MSID, not by the MSCON as previously. From 1 July 2021, there is also a rule that if a VAT return has already been submitted, corrections to VAT returns must be made in a subsequent VAT return (corrections are always entered in the current return). It is worth noting that, however, not all taxable persons' demands have been taken into account. For instance, the requirement of keeping records for 10 years under the OSS 1.0 procedure has not been shortened.

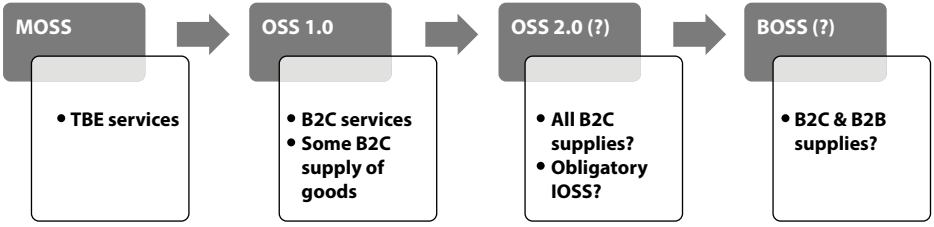
Thus, the MOSS evaluation had a double effect: firstly, the functioning of this tool was slightly changed, and secondly, it was extended to other types of transactions. This seems beneficial both for taxable persons and tax administrations. Due to the quick evaluation of the MOSS, some of the problems reported by taxable persons were eliminated relatively early. Moreover, it was only after the collected data showed that the new tool was effective that it was extended to further types of transactions. This allowed the market to gradually become accustomed to the new instrument and further extending of this procedure was not opposed.

It is worth mentioning that the evolution of the One Stop Shop does not have to stop at this point. It is possible to repeat this evaluation & extension scheme in the future. In this context, it is worth noting that the EC has announced that in the years 2022–2023 it will propose an amendment to Directive 2006/112/EC so that the remaining B2C transactions, not yet covered by OSS 1.0, could be also settled in this special procedure.[39] It is possible that in the next version of OSS (OSS 2.0), the use of IOSS will be obligatory and the threshold set for its use (currently EUR 150) will also be changed. Although the potential extension of OSS to other B2C transactions would be a significant modification of this procedure, it seems that a real revolution would await it if OSS also covered B2B transactions. In my opin-

[39] European Commission, Communication from the Commission to the European Parliament and the Council: An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, 15 July 2020, https://eur-lex.europa.eu.

ion, this extension could even change the name of the special procedure to the Big One Stop Shop – BOSS.

Figure 2. The OSS as an example of the gradual policy approach step-by-step



Source: own elaboration.

Conclusion

Summing up, the OSS procedure seems to be a good example of the advantages of the gradual policy approach. With this in mind, it is worth noting that this policy is not about introducing the tool itself gradually. To be effective, the tool should be introduced immediately in its final shape and it should only cover a narrow group of transactions or taxable persons in order to test it. The development of the OSS procedure did not consist of such stages that first taxpayers were given the possibility of submitting declarations by the OSS, then making payments and finally submitting the records. This tool would not be very effective then and, consequently, it would not fulfil its purpose. Obviously, OSS has undergone slight modifications, but the very principles of its operation have not changed much. This special procedure, meeting the expectations of taxable persons providing TBE services, simply covered a larger number of transactions.

Finally, it should be pointed out that the gradual policy approach is not without disadvantages. This approach requires relatively frequent evaluation of new tools and introduction of subsequent legislative changes. It is not a desirable situation from the point of view of the stability and predictability of rules for conducting business activity. However, given the rapid and numerous changes in the modern economy related to its digitalisation, it seems that it is the best in this situation.

References

Brescia R., *Finding the Right 'Fit': Matching Regulations to the Shape of the Sharing Economy*, in: *The Cambridge Handbook of the Law of the Sharing Economy*, eds. J.J. Infranca, M. Finck and N.M. Davidson, Cambridge Law Handbooks, Cambridge 2018, pp. 156–167, https://doi.org/10.1017/9781108255882.012.

Council of the European Union. *Shaping Europe's Digital Future – Council Conclusions*, 9 June 2020, https://www.consilium.europa.eu/.

Doménech-Pascual G., *Sharing Economy and Regulatory Strategies towards Legal Change*, "European Journal of Risk Regulation" 2016, Vol. 7, No. 4, pp. 720–721, https://doi.org/10.1017/ S1867299X0001014X.

Eurofound, *Platform Economy: Developments in the COVID-19 Crisis*, https://www.eurofound.europa.eu/data/platform-economy/dossiers/developments-in-the-covid-19-crisis (accessed: 7.08.2021).

European Commission. Communication from the Commission to the European Parliament and the Council: An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, 15 July 2020, https://eur-lex.europa.eu.

European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A European Agenda for the Collaborative Economy,' 2 June 2016.

European Commission. *Impact Assessment. Accompanying the Document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernising VAT for Cross-Border B2C e-Commerce*, 1 December 2016, http://eur-lex.europa.eu.

European Commission. Directorate General for Taxation and Customs Union. and Deloitte. *VAT Aspects of Cross-Border e-Commerce: Options for Modernisation: Final Report. Lot 3, Assessment of the Implementation of the 2015 Place of Supply Rules and the Mini-One Stop Shop.* LU: Publications Office, 2016, https://data.europa.eu/doi/10.2778/59123.

Frenken K., Schor J., *Putting the Sharing Economy into Perspective*, "Environmental Innovation and Societal Transitions" 2017, Vol. 23, pp. 3–10, https://doi.org/10.1016/j.eist.2017.01.003.

Hallward-Driemeier M., Gaurav Nayyar W.F., Anwar A., and Indermit G., *Europe 4.0: Addressing the Digital Dilemma*. World Bank Group and the Austrian Ministry of Finance, 2020. www.worldbank.org.

Inara S., and Brown E., *Redefining and Regulating the New Sharing Economy*, "University of Pennsylvania Journal of Business Law" 2017, Vol. 19, No. 3, pp. 6553–6600.

Lobel O., *Coase and the Platform Economy*, in: *The Cambridge Handbook of the Law of the Sharing Economy*, eds. J.J. Infranca, M. Finck, and N.M. Davidson, pp. 67–77, Cambridge Law Handbooks, Cambridge 2018, https://doi.org/10.1017/9781108255882.006.

Matesanz F., *International – VAT Treatment of the Sharing Economy*, "International VAT Monitor" 2021, Vol. 32, No. 2.

Modernising VAT for Cross-Border e-Commerce, https://ec.europa.eu/taxation_customs/modernising-vat-cross-border-e-commerce_en (accessed: 28.12.2021).

OECD, *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration*, 2021, https://doi.org/10.1787/51825505-en.

Oskam J.A., *The Future of Airbnb and the 'Sharing Economy': The Collaborative Consumption of Our Cities*, The Future of Tourism 1. Bristol, UK; Blue Ridge Summit, PA 2019.

Pawlicz A., *Ekonomia współdzielenia na rynku usług hotelarskich. Niedoskonałości, – Pośrednicy – Regulacje*, Szczecin 2019.

Poutanen S., Kovalainen A., *New Economy, Platform Economy and Gender*, in: *Gender and Innovation in the New Economy: Women, Identity, and Creative Work*, eds. S. Poutanen, A. Kovalainen, pp. 47–96, New York 2017, https://doi.org/10.1057/978-1-137-52702-8_3.

Syed M., *Black Box Thinking: Marginal Gains and the Secrets of High Performance*, London 2016.

United Nations Conference on Trade and Development, *Digital Economy 2019: Value Creation and Capture: Implications for Developing Countries*, 2019, https://unctad.org/system/files/official-document/der2019_en.pdf.

Bartłomiej Kołodziej

Kozminski University, Poland

bartlomiej.kolodziej@gmail.com

The VAT Liability of Online Platforms in the EU (Harmonised) System

Abstract

E-commerce is developing dynamically, constantly changing our economic reality. The challenges that are caused by this dynamic development concern many aspects of economic and social life, including significantly affecting tax systems, the important assumptions of which were created in the era before the emergence of e-commerce, not to mention digital platforms, which now dominate and play a key role in this segment of the economy. Actions to develop common international taxation rules for e-commerce have been undertaken within the OECD. In 2019, a report was agreed on the possible roles of digital platforms in the collection of VAT/GST.

The European Union is a pioneer in implementing and applying the OECD guidelines for VAT and e-commerce. As of July 2021, new harmonised e-commerce regulations have been in force in the EU. The existing solutions have been changed, and also completely new solutions have appeared. These changes have significant consequences for entities operating in this market segment. The most important changes are probably the new regulations recognising digital platforms as suppliers liable to pay VAT (the so-called deem supplier regime). At the same time, EU Member States have the option of imposing joint and several liability on digital platforms for the payment of VAT on the supply of goods and services made through these platforms. In this respect, the Member States have a lot of freedom in determining specific national solutions. However, would more harmonisation with this area not be a better solution? The need for the further harmonisation of VAT solutions for e-commerce in the European Union is indicated, for instance, by the recent rapid agreement on the approach to avoid double taxation with regard to distance sales of imported goods with respect to which VAT due is declared in IOSS. The EU VAT rules on e-commerce seem to require further evolution despite recent significant changes.

Keywords: e-commerce, digital platforms, on-line sales, VAT, VAT Directive

Introduction

Starting from the end of the 20th century, we have experienced a series of almost continuous innovations in information technology, which not only changed the image of the global economy and boosted economic growth, but also created new challenges. Not long ago, terms such as 'website', 'internet', 'e-commerce', 'online shopping' and 'digital platform' were largely unknown to the general public. Today, these words are the daily linguistic resource of many people around the world. In particular, the internet has revolutionised the way that people work, communicate, share information and … shop. Buying and selling via digital networks has grown rapidly and there is no indication that this trend will be stopped or even slowed down. This trend will certainly not bypass the European single market in particular.

Electronic commerce, better known as e-commerce, refers to trade in goods and services conducted over a network that uses remote devices and telecommunication. E-commerce offers many benefits and new opportunities. It strengthens the existing trade and creates greater competition, both within and between countries and even across continents. The internet has evolved from a communication tool to a global trading platform. It also allows for greater inclusiveness in economic activity and stimulates trade. It has increased the ease with which businesses can be formed and trade conducted. It covers business-to-business (B2B) transactions, business-to-consumer (B2C) trade as well as various types of relationships between private consumers (C2C). The objects of electronic commerce transactions may be both tangible goods and intangible products (digital goods). However, e-commerce has to face many challenges that go beyond traditional commerce. The challenges include building a more efficient information and communication technology (ICT) infrastructure, enhancing digital skills, enforcing cybersecurity, making and applying new law, various forms of legal protection (e.g. consumer protection law) and even completely new tax solutions. In this changing environment and challenges, the tax policy development and implementation must be designed to allow for the changing environment, while being sufficiently clear to provide the certainty and clarity that facilitates sustainable, long-term economic growth[1].

Electronic platforms play a completely unique, key and also constantly growing role in e-commerce. Over the past decades, the number of online shops has increased significantly. However, not everyone has the appropriate technical knowledge and resources to run an online store. One way to overcome this barrier is to sell goods and services through an 'e-commerce platform', i.e. a company that helps other businesses as well as private individuals sell goods and services by

[1] OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*. OECD, 2018, p. 17, https://doi.org/10.1787/9789264293083-en.

placing them on their website. In this way, they act as a platform, as they provide sellers and buyers with a common solutions and tools to exchange money for goods and services. Here, the sale transaction is an exchange facilitated by the platform. Nowadays, we can see an increasing number of platform-based businesses in many different sectors such as, for example, accommodation rental, transportation or peer-to-peer e-commerce.

The European Commission describes an online platform as an 'undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.'[2] This definition of online platforms is roughly similar to one used by the EOCD, which describes an online platform as a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the internet[3].

The advent of e-commerce carried out through digital platforms has a significant impact on the taxation of consumption. Tax concepts and assumptions designed for the pre-digital world require constant and significant modifications, and even the introduction of completely new ideas of taxation. E-commerce also limits governments' ability to administer taxes and often forces them to rethink, find new solutions and redefine tax policies. This is all the more important, as e-commerce based on electronic platforms is easily carried out internationally and concerns a very large number of shipments of relatively small value, which additionally causes difficulties in the enforcement of VAT obligations.

As a result, the question arises how to design the VAT system and the method of collecting VAT that would not hinder the cross-border movement of goods and at the same time strengthen the principles of equal competition. Developing tax policy to this 'digital platform-based e-commerce' remains perhaps one of the most important challenges faced by tax policymakers worldwide.

OECD

In the absence of globally coordinated rules or a harmonised approach, the different national rules can cause significant disturbances in the taxation of international transactions, in particular can result in either double taxation or involuntary

[2] European Commission (2015–2016), Consultation on Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy, https://ec.europa.eu/information_society/newsroom/image/document/2016-7/efads_13917.pdf

[3] OECD, *An Introduction to Online Platforms and Their Role in the Digital Transformation*, Paris 2019, p. 21, https://doi.org/10.1787/53e5f593-en.

non-taxation.[4] The challenge – one of the most important in the author's opinion – is to bring all e-commerce into VAT without putting domestic companies at a disadvantage compared to foreign competitors.[5]

The commencement of the OECD's work in the field of the cross-border application of consumption taxes dates back to the late 1990s.The first tangible result of international work in this field was the OECD 1998 Ottawa Conference on electronic commerce which endorsed the Ottawa Taxation Framework Conditions.[6] The Ottawa Taxation Framework Conditions provide the principles which should guide governments in their approach to e-commerce. They state that e-commerce should be treated in a similar way to traditional commerce and emphasises the need to avoid any discriminatory treatment. There was a general understanding among the participants of the Ottawa conference that cross-border trade in e-commerce sector should be taxed in the jurisdiction of consumption.[7]

Building on this work, the OECD's Committee on Fiscal Affairs ('the CFA') adopted the Guidelines on Consumption Taxation of Cross Border Services and Intangible Property in the Context of E-commerce (2003), which were complemented by the Consumption Tax Guidance Series (2003). The Ottawa Framework and subsequent implementing guidelines became an international standard for VAT/GST taxation on online supplies trying to reach a consensus on some crucial elements.[8]

The CFA draw the following conclusions, reflected in the Taxation Framework Conditions:

– The taxation principles that guide governments in relation to conventional commerce should also guide them in relation to e-commerce (namely, neutrality – taxation should seek to be neutral and equitable between forms of e-commerce and between conventional commerce and e-commerce, thus avoiding double taxation or unintentional non-taxation; efficiency compliance costs to business and administration costs for governments should be minimised as far as possible; certainty and simplicity – tax rules should be clear and simple to understand so that taxpayers know where they stand; effectiveness and fairness – taxation should produce the right amount of tax at the right time and the potential for evasion and avoidance should be minimised; flexibility – taxation systems should

---

[4] K. James, *The Rise of the Value-Added Tax*, New York 2015, p. 142.

[5] A. Schenk, V. Thuronyi and W. Cui, *Value Added Tax: A Comparative Approach*, 2nd edition, New York 2015, p. 222.

[6] OECD, *Report on the OECD Ministerial Conference 'A Borderless World: Realising The Potential of Global Electronic Commerce'*, October 1998.

[7] M. Senyk, *The Origin and Destination Principles as Alternative Approaches towards VAT Allocation: Analysis in the WTO, the OECD and the EU Legal Frameworks*, Amsterdam 2020, p. 156.

[8] F. Majdowski, *Global E-commerce Marketplaces and Consequent Challenges to Indirect Taxation*, "Belt and Road Initiative Tax Journal" 2020, Vol. 1, No. 2, http://www.britacom.org.

be flexible and dynamic to ensure that they keep pace with technological and commercial developments).
– The existing taxation rules can implement these principles. This approach does not preclude new administrative or legislative measures, or changes to existing measures, relating to e-commerce, provided that those measures are intended to assist in the application of the existing taxation principles and are not intended to impose a discriminatory tax treatment of e-commerce transactions.
– The application of these principles to e-commerce should be structured to maintain the fiscal sovereignty of countries, to achieve a fair sharing of the tax base from e-commerce between countries and to avoid double and unintentional non-taxation.
– The process of implementing these principles should involve an intensified dialogue with business and with non-member economies.

This means that the then-existing underlying international tax rules were deemed adequate and thus CFA recommends that existing principles should quite governments also in relation to e-commerce sector.[9]

Towards Increasing the Role of the Digital Platforms in the VAT/GST Collection

In 2019, the OECD published a report on the role of digital platforms in the collection of VAT on online sales (OECD Report 2019).[10] This report provides practical guidance to tax policymakers on the design and implementation of a variety of VAT/GST solutions for involving e-commerce marketplaces and other digital platforms in the effective and efficient collection of tax on digital trade of goods, services and intangibles. Especially, it includes new measures to make digital platforms liable for the VAT/GST on sales made by online traders through these platforms, along with other measures. This OECD Report 2019 builds further on the solutions for the effective collection of VAT/GST on digital sales presented in *International VAT/GST Guidelines*[11] and *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*.[12] It also complements the report on

[9] M. Lamensch, *European Value Added Tax in the Digital Era: A Critical Analysis and Proposals for Reform*. Amsterdam: IBFD Publications, 2015, p. 60.

[10] OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*. OECD, 2019. https://doi.org/10.1787/e0e2dd2d-en

[11] OECD, *International VAT/GST Guidelines*, Paris 2017, https://www.oecd-ilibrary.org/taxation/international-vat-gst-guidelines_9789264271401-en (accessed: 27.06.2020).

[12] OECD, *Addressing the Tax Challenges of the Digital Economy: Action 1: 2015 final report*, Paris 2015.

the Mechanisms for the Effective Collection of VAT/GST[13], which was delivered in 2017.

The 2019 OECD Report analyses the possible roles of digital platforms in supporting the collection of VAT/GST on online sales of goods and services/intangibles and provides guidance on possible implementation measures. It also recalls the range of other measures beyond possible VAT/GST obligations for digital platforms that tax authorities can implement to further enhance the effectiveness of VAT/GST collection on online trade. According to the OECD, changing tax rules to make e-commerce markets subject to VAT on sales made by online traders through their platforms will allow the tax authorities to focus their compliance efforts on the relatively small number of markets, rather than on millions of small traders operating through them. The OECD suggests that for digital platforms subject to VAT, they need to hold or have access to sufficient and accurate information as required to make the appropriate VAT determination and have the means to collect the VAT on the supply.

The EU as a Pioneer in Implementing the OECD Recommendations – Electronically Supplied Services

The European Union was a forerunner by adopting specific rules for the electronically supplied services in 2003 which were in line with the OECD Ottawa Framework for e-commerce transactions of 1998. Overall, EU law in 2003 provided for (i) intra-EU business-to-business (B2B) supplies and (ii) supplies provided by a non-EU taxable person to a EU taxable (B2B) or non-taxable customer (B2C) to be taxed in the state of destination. The EU rules of 2003 provided for taxation in the state of origin only for intra-EU B2C supplies. Thus, for B2C transactions, EU businesses continued to account for VAT at the rate applicable in the Member State where the supplier was established. Non-EU suppliers have to account for the local standard rate of VAT applicable in the Member State where they make a B2C supply of electronic services. The provisions introduced in 2003 were aimed at solving the growing problems of distortion of competition between EU and non-EU suppliers.[14]

Electronically provided services were added to Article 9(2)(e) of the Sixth VAT Directive[15] in force at that time. It provided that:

---

[13] OECD, Mechanisms for the Effective Collection of VAT/GST When the Supplier Is Not Located in the Jurisdiction of Taxation, OECD, 2017.

[14] M. Joostens, I. Lejeune and J.-M. Cambien, *EU Agreement on Taxation of Electronically Supplied Services*, "International VAT Monitor" 2002, Vol. 13, No. 3.

[15] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assess-

the place where the services mentioned in this article are supplied when performed for customers established outside the EU or for taxable persons established in the EU but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides.

A new indent (f) was added to Article 9(2) of the Sixth Directive. The new indent (f) determines that

the place of electronically supplied services, performed for non-taxable persons (e.g. public bodies and private individuals, further referred to as B2C), established, having their permanent address or usually residing in a Member State, will be the place where the non-taxable person is established, has his permanent address or usually resides, if these services are performed by a taxable person who has established his business or has a fixed establishment from which the service is supplied outside the Community, or in absence of such a place of business or fixed establishment, has his permanent address or usually resides.

Non-EU businesses can register in one EU Member State (under a 'special scheme' arrangement called the One Stop Shop mechanism) for the purpose of remittance of VAT due and ensuring that each EU Member State receives its appropriate amount of VAT. After remittance of VAT due, the Member State of registration (Member State of identification) shall redistribute the VAT to the appropriate EU countries in which the buyers of the digital products were actually located (the Member States of consumption).

Through an amendment made in 2003, the European Union's tax legislation in the field of VAT began to follow the guidelines agreed in the 1998 Ottawa Taxation Framework.

New VAT Rules from 1 July 2021 Onwards

In 2016, the European Commission launched a VAT action plan[16] towards a single EU VAT area. Under the section devoted to e-commerce, it proposed extending

ment, OJ L 145, 13 June 1977, pp. 1–40 (DA, DE, EN, FR, IT, NL). It is no longer in force. Date of the end of validity: 31 December 2006.

[16] Communication from the Commission to the European Parliament and the Council and the European Economic and Social Committee on an Action Plan on VAT towards a single EU VAT area – Time to decide; Brussels, 7 April 2016, COM(2016) 148 final; https://ec.europa.eu/taxation_customs/system/files/2016-10/com_2016_148_en.pdf

the One Stop Shop mechanism to online sales of EU and non-EU tangible goods to end non-business consumers and removing the VAT exemption for non-EU suppliers' imports of low-value goods.

The VAT Digital/E-commerce Package[17] was announced by the European Commission on 1 December 2016 and it covers a wide range of e-commerce transactions in B2C settings. It was designed, among others, to amend the VAT rules applicable not only to supplies of electronic services, but also to distance sales of goods and importation of goods.

The purpose of the new rules, as announced by the Commission, has been to level the playing field between traditional commerce and e-commerce, eliminate the distortions that currently exist in favour of non-EU businesses, reduce compliance costs and the complexity of VAT obligations for business and minimise the risk of VAT fraud and non-compliance leading to VAT revenue losses.

It should be noted that there are critical views concerning the EU VAT E-commerce Package which emphasise that the EU VAT framework for e-commerce still needs to be improved and that other jurisdictions should think twice before taking the current approach of the European Union as an example.[18] In particular, it seems necessary to base the proposed VAT solutions on exploring the possibilities of modern technologies and it is indicated that what the European Commission proposes to do is to improve a system that was designed in – and for – another era.[19]

On 1 January 2021, the new VAT rules for e-commerce were supposed to be introduced in the European Union. As a result of the COVID-19 pandemic, however, the introduction of the new e-commerce rules has been postponed. On 24 June 2020, the Council of the European Union agreed[20] to postpone the entry-into-force date of the second batch of the VAT e-commerce package from 1 January

---

[17] The VAT e-commerce package as such consists of Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods [2017] OJ L 348/7, Council Implementing Regulation (EU) 2017/2459 of 5 December 2017 amending Implementing Regulation (EU) No. 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, [2017] OJ L348/32 and Council Regulation (EU) 2017/2454 of 5 December 2017 amending Regulation (EU) No. 904/2010 on administrative cooperation and combating fraud in the field of value added tax.

[18] M. Lamensch, M. Merkx, J.I.W. Lock and A. Janssen, *New EU VAT-Related Obligations for E-Commerce Platforms Worldwide: A Qualitative Impact Assessment – IBFD*, 13, "World Tax Journal" 2021, No. 3*, Journal Articles & Opinion Pieces IBFD*, https://research.ibfd.org/#/doc?url=/collections/wtj/html/wtj_2021_03_e2_1.html%23wtj_2021_03_e2_1_fn_9 (accessed: 20.09.2021).

[19] M. Lamensch, *European Union – European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*, European Union – European Commission's New Package of Proposals on E-Commerce: A Critical Assessment.

[20] https://www.consilium.europa.eu/en/press/press-releases/2020/06/24/taxation-council-agrees-on-the-postponement-of-certain-tax-rules/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Taxation%3a+Council+agrees+on+the+postponement+of+certain+tax+rules

2021 to 1 July 2021 (see European Union-2, News 11 May 2020[21]). This was done to give Member States sufficient time to adapt their information technology systems and transpose the complex new rules into national law.

Until 30 June 2021 – the place of supply of B2C distance sales of goods exceeding a particular threshold was the Member State where the goods are located at the time when the transport of the goods ends, provided that the transport is made by or on behalf of the supplier and the recipient is a non-taxable person. From 1 July 2021 onwards, the rules on distance sales applied not only to movements of goods between the EU Member States (intra-Community distance sales of goods), but also to goods imported into the European Union (distance sales of goods imported from third countries or third territories). The thresholds provided for in Article 34 of the VAT Directive[22] were removed, with the result that VAT will always be due in the Member State of destination. The only exception is for taxable persons who are established in one Member State only and have an annual turnover of no more than EUR 10,000 to end customers located in all the other Member States.

One Stop Shop

The obligation to register for VAT in a foreign country might be often burdensome for businesses that experience an increase of complexity when having to comply with all their VAT obligations. Therefore, the Mini One Stop Shop (MOSS) was extended and converted into true One Stop Shop (OSS) covering all business to customer (B2C) services taking place in Member States where the supplier is not established, intra-Community distance sales of goods and certain domestic supplies of goods.

The One Stop Shop simplifies VAT obligations for businesses selling goods and supplying services to final consumers throughout the European Union, allowing them to register for VAT electronically in a single Member State for all the eligible sales of goods and services to end customers located in all the other 26 Member States, as well as to file a single electronic VAT OSS return for all these sales of goods and services.

Import One Stop Shop

From 1 July 2021, the VAT exemption at importation of small consignments of a value up to EUR 22 was removed and VAT is due on all commercial goods im-

[21] https://research.ibfd.org/data/tns/docs/html/tns_2020-05-11_e2_2.html#tns_2020-05-11_e2_2

[22] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1.

ported into the European Union, regardless of their value. This means that all goods imported in the EU are now subject to VAT. This is one of the fundamental VAT changes in e-commerce.

With this in mind, a special scheme for distance sales of goods imported from third countries or third territories into the European Union has been created to facilitate the declaration and payment of VAT due on the sale of low-value goods.

This scheme, allows suppliers selling goods dispatched or transported from a third country or third territory to end customers in the European Union to collect VAT on distance sales of imported low-value (EUR 150) goods from the final customer and to declare and pay this VAT using the Import One Stop Shop (IOSS). If the IOSS is used, the VAT exemption is applicable at the moment of the importation (release for free circulation) into the European Union. VAT should be included and paid as part of the purchase price. The use of this special scheme (IOSS) is not mandatory. If IOSS is not used, VAT should be paid upon importation.

Upon registration for the IOSS purposes, the tax authorities in the Member State of identification issue an IOSS VAT identification number. An electronic interface will have a single IOSS VAT identification number, irrespective of the number of underlying suppliers for whom it facilitates distance sales of imported goods to customers in the European Union. The IOSS VAT identification number is used to declare distance sales of imported goods under the import scheme and not for any other supplies.

The Deeming Provision of the VAT Directive in the Digital Sector

In a number of situations, a platform is deemed to supply underlying services instead of the actual supplier. When an independent entrepreneur offers and trades goods or services via a platform in his or her own name and for his or her own account, the VAT Directive contains two provisions (legal fictions solely for VAT purposes) that ensure that the platform is deemed to perform the relevant activity.

On the one hand, there is Article 9(a) of the VAT Implementing Regulation,[23] which applies to electronic services and, on the other hand, there is Article 14(a) of the VAT Directive, which applies to certain distance sales or domestic sales of goods.

Unless the presumption of Article 9(a) of the VAT Implementing Regulation can be rebutted, the first section stipulates that: for the application of Article 28 of Directive 2006/112/EC, where electronically supplied services are supplied through

[23] Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax; OJ L 268, 12 October 2010, pp. 1–18.

a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his or her own name, but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.

The second section, i.e. the deemed supplier provision included in Article 14(a) of the VAT Directive, has been introduced because, according to the European Commission, it was necessary to further involve platforms in the VAT collection on the sales that they facilitate, as the national joint and several liability provisions could not ensure efficient and effective VAT collection.[24] Therefore, as of 1 July 2021, new obligations for platforms apply, such as the liability to collect VAT.

Article 14(a) of the VAT Directive, as amended by Council Directive 2017/2455, provides that:

1. *Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods himself.*
2. *Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, the taxable person who facilitates the supply shall be deemed to have received and supplied those goods himself.*

In other words, in the specific situation targeted above, the platform will be deemed to receive the goods and supply them onwards (a fictitious chain transaction is thus created solely for VAT purposes).

The new Article 5(b) of the VAT Implementing Regulation, as amended by Council Implementing Regulation (EU) 2019/2026, clarifies that:

> *For the application of Article 14a of Directive 2006/112/EC, the term "facilitates" means the use of an electronic interface to allow a customer and a supplier offering goods for sale through the electronic interface to enter into contact which results in a supply of goods through that electronic interface.*

However, a taxable person is not facilitating a supply of goods where all of the following conditions are met:

> *(a) that taxable person does not set, either directly or indirectly, any of the terms and conditions under which the supply of goods is made;*

[24] Council Directive 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, Preamble, para. 7, OJ L348 (2017).

(b) that taxable person is not, either directly or indirectly, involved in authorizing the charge to the customer in respect of the payment made;
(c) that taxable person is not, either directly or indirectly, involved in the ordering or delivery of the goods.
Article 14a of Directive 2006/112/EC shall not apply to a taxable person who only provides any of the following:
(a) the processing of payments in relation to the supply of goods;
(b) the listing or advertising of goods;
(c) the redirecting or transferring of customers to other electronic interfaces where goods are offered for sale, without any further intervention in the supply.

It results from the new VAT deemed supply provisions that the harmonised VAT rules have far-reaching consequences for businesses operating in the e-commerce. The harmonisation of the new regulations is undoubtedly of key importance to the full achievement of the goal of the new VAT regulations. In particular, the harmonisation of the platforms' liability for the VAT due appears to be crucial here.

Domestic Liability Regimes

Under the harmonised deeming provision, the VAT liability of platforms means that a platform is primarily liable for VAT due as a deemed supplier and the underlying supplier is no longer liable. This harmonised tax solution places the farthest liability on platforms for VAT due on deliveries made via the platform. However, in addition to harmonising many of the most important issues relating to VAT, the VAT Directive also leaves same scope for Member States to adapt their national VAT systems to their own preferences and needs. Thus, the VAT Directive provides Member States with further solutions for imposing VAT liability on platforms. Pursuant to Article 205 of the VAT Directive, Member States have been given an option to introduce the joint and several liability regime. In accordance with Article 205 of the VAT Directive:

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.

Provisions implementing joint and several liability may not go further than necessary to reach the intended aim as ruled by the Court of Justice of the European Union.[25] This means that the tax authority must prove that a taxable person knows or should have known of the fraudulent activities of the contractor (the con-

[25] BE: ECJ, 21 December 2011, Case C-499/10, *Vlaamse Oliemaatschappij v. F.O.D. Financiën*, Case-Law IBFD (accessed: 30.03.2022).

cept of the 'knowledge test'). This solution is not new in the European VAT system, it was used and brought positive effects in the fight against VAT fraud – it *has had a clear deterrent effect and seems to be effective*.[26].

It should also be pointed out that some seem to be more critical to the application of this solution, pointing out that it is a solution that is not actually effective in combating VAT fraud, but it only eliminates the revenue costs of the fraud.[27] In other words, it may allow for reducing costs caused by losses in budget revenues caused by VAT fraud.

There are many different solutions regarding the joint and several liability of the platforms. Generally, the joint and several liability measures are related to the information obligations or to the obligations to take specific actions against underling suppliers (e.g. at the request of the tax authority). In this study, we do not present all the available variants in detail, but we only indicate the current directions and the variety of solutions in this area.

- **Austria**

The Austrian Platform liability rules apply to trading achieved after 31 December 2019. The tax provisions concerning the VAT liability of e-commerce platforms were added by the Tax Act of 2020 (Article 4[28] of the parliamentary print[29]). Generally, the platforms are required to keep and maintain appropriate records of transactions with non-taxable persons, which they have facilitated through their platform, for ten years. The tax authority can use this information to determine that VAT has been properly declared and paid. The records are submitted to the tax authorities upon request or – if the value of sales for which the records are kept exceeds EUR 1,000,000 in a calendar year – it is obligatory until January 31 of the year following the following year.

The platforms are liable for the VAT due if they have not diligently established that the underling supplier complies with their VAT obligations. The platform has not complied with due diligence if it has either not kept the records or has not made them available to the tax authorities on time, or if the total remuneration due to a given entity for transactions concluded via a given platform exceeds the statutory thresholds (the platform is required to verify this at least once every quarter), and the taxpayer has not provided evidence that he or she complies with his or her tax obligations. If the platform does not receive the required information from the

[26] M. Lamensch, European Union – European Commission's New Package of Proposals on E-Commerce: A Critical Assessment, *European Union – European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*.

[27] European Commission, Report From The Commission To The Council And The European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud, Brussels, 16 April 2004, COM(2004) 260 final, p. 258.

[28] https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2019_I_91/BGBLA_2019_I_91.html

[29] https://www.parlament.gv.at/PAKT/VHG/XXVI/A/A_00983/index.shtml#

taxpayer within one month of the threshold-crossing check, the platform is liable for the VAT due on transactions taking place after the end of that month. In order to avoid this VAT liability, the platform should remove such a user from the platform.

Thus, in Austria, the joint and several liability of the platforms is linked to the record-keeping and information obligations.

There are also models (where the liability of the platform is based more on the cooperation of platforms with the tax authorities (e.g. the French model or the British model). Generally, the joint and several liability is implemented when the platform operator evades cooperation with the tax authority (i.e. exchanging information with tax authorities and taking specific actions, after being requested to do so by the competent tax authority, against dishonest underling sellers, including excluding them from the platform).

- **The United Kingdom**

The UK's joint and several liability rules were first introduced in 2016 to help tackle the problem of online VAT fraud. The UK's rules were further strengthened in 2018. These measures were aimed at providing HMRC with the necessary tools to tackle domestic and overseas businesses, selling via online marketplaces, which do not comply with UK VAT rules and which are difficult to apply normal compliance powers against.[30]

Generally, the joint and several liability rules allow HMRC to hold marketplaces liable for the VAT of sellers on their platform where, having been notified by HMRC of a seller's non-compliance, the online marketplace fails to take action to either secure compliance from the seller or remove him or her from their platform.

The platform is liable for the VAT due by a (taxable) person in respect of all taxable supplies of goods made through the online marketplace in the relevant period. That platforms are liable for:

I) Any future VAT that a UK business selling goods via the online marketplace fails to account for once they have been notified by HMRC[31]
and
II) Any VAT that an overseas business selling goods via the online marketplace fails to account for where that online marketplace knew or should have known that that business should be registered for VAT in the UK.[32]

---

[30] https://www.legislation.gov.uk/ukpga/1994/23/part/IV/crossheading/liability-for-unpaid-vat-of-another

[31] https://www.gov.uk/guidance/vat-online-marketplace-seller-checks

[32] https://www.gov.uk/guidance/vat-overseas-businesses-using-an-online-marketplace-to-sell-goods-in-the-uk

The platforms are also granted a period of delay to avoid liability.[33] The duration of this period differs, depending on whether the supplier is a UK business or a non-UK business. In the case of a UK-business, the platform normally has 30 days to avoid liability, which can be established in two ways: by contacting and securing the compliance of the business or by removing the business from its website. When the platform does not take any action during this period, it will be held jointly and severally liable for the future unpaid VAT, which will be calculated based on the unpaid VAT from the day after the date of HMRC's notice. In the case of a non-UK business, a platform must ensure, within a period of 60 days of knowing, that the unregistered non-UK business can no longer sell goods to UK consumers through the website of the platform. If the non-UK business is still allowed to sell its goods through the website of the platform after the 60-day period, the platform can be held jointly and severally liable for the unpaid VAT.

- **France**

The French provisions on the joint and several liability of digital platforms are similar to the solutions introduced in the UK. It seems, however, that the French solutions are not as far-reaching as the British ones.

Pursuant to the provisions of the General Tax Code in force from 1 January 2020,[34] there is joint and several liability for the VAT liability of the operator of the digital platform through which the taxpayer conducts his or her economic activity. The French tax administration expressed its position on the provisions governing the joint and several liability of digital platform operators in the guidance.[35]

Briefly, based on the French explanations, the French tax authority has the right to notify a platform when it is presumed that an underling supplier who supplies goods or services via this platform to non-taxable persons is liable for VAT in France, but he or she has not filed a tax return and/or has not paid the VAT due. The platform then has to ensure within one month that the provider is fulfilling his or her obligations. If the supplier still has not fulfilled his or her obligations after this month, the French tax authority has the right to issue an official notification to the platform. Then the platform must take additional steps within a month for the supplier to comply with French tax law or the platform must exclude the supplier

---

[33] https://www.gov.uk/government/publications/vat-extending-joint-and-several-liability-for-online-marketplaces-and-displaying-vat-numbers-online-guidance-note

[34] https://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_contre_fraude?etape=15-SN1-DEPOT; http://www.senat.fr/rap/l17-602/l17-6027.html#toc72

[35] Direction Générale des Finances Publiques, TVA – Régimes d'imposition et obligations déclaratives et comptables – Redevable de la taxe – Livraisons de biens et prestations de services – Solidarité de paiement de l'opérateur de plateforme en ligne, Extrait du Bulletin Officiel des Finances Publiques-Impôts, BOITVA-DECLA-10-10-30-20; the original version was published on 23 March 2020, while the current version that was released on 2 September 2020 included the results of public consultations conducted in 2020.

from using the platform in order not to be jointly and severally liable for unpaid VAT that is due in France.

Further Harmonisation Needed and Final Conclusions

On 28 February 2022, the VAT Committee[36] proposed a temporary solution to practically solve the problem of double taxation arising in the situation where VAT was paid in IOSS by the supplier, whereas VAT exemption could not be applied at the moment of importation due to the inability to communicate the supplier's IOSS number to the postal operator of the country of dispatch.

The proposed solution consists of the correction of the VAT stated in the IOSS VAT return and the reimbursement of the VAT amount collected by the supplier at the time of sale, at the request of the buyer if there is proof of payment of import VAT. The solution will apply provided that the buyer is indeed the person liable for the payment of VAT on import and the preconditions for the correction of the IOSS VAT return are met.

Considering that some Member States are still not able to validate the IOSS number and to effectively communicate that number in a full customs declaration, the VAT Committee agreed that this solution can be in place temporarily until all Universal Postal Services can electronically communicate the IOSS number in the appropriate postal format to the postal operators in the EU and when all Member States have updated their national import systems to validate the IOSS numbers.

The unanimously approved solution was included on the list of guidelines regularly published by the VAT Committee.[37]

It may be questioned whether the proposed form of solution to the problem – a guideline of the VAT Committee, even if agreed by all Member States unanimously – was the most appropriate. Would not, for instance, a legislative change, e.g. a change to the provisions of the VAT Directive, be a more appropriate solution? The author does not undertake the analysis and evaluation of this issue. Nevertheless, the actions taken and the agreed solution clearly show the great importance of harmonising VAT solutions, especially in the area of e-commerce. Meanwhile, it appears that with regard to the liability of digital platforms for VAT, there will still be two systems in force, i.e. the compulsory *deemed supplier regime* and optional solutions introduced individually by Member States in the area of the joint and several liability of digital platforms. It seems that maintaining such a state of affairs may cause serious difficulties for platforms operating on the European

[36] GUIDELINES AGREED OUTSIDE A MEETING 28 February 2022, DOCUMENT A – taxud.c.1(2022)1657365 – 1036.

[37] https://ec.europa.eu/taxation_customs/system/files/2022-02/guidelines-vat-committee-meetings_en.pdf

single market. Some raise this problem and rightly criticise the current system, pointing to specific issues. It should be acknowledged that when, in theory, all Member States introduce their own domestic joint and several liability regimes, the burden on platforms would become so great that it would seem impossible for them to be compliant.[38]

According to the author's view, it seems reasonable to create tax solutions based on a model assuming building greater awareness and social responsibility as well as cooperation between the tax administration and platforms. Behavioural aspects of tax collection can be particularly important in this respect. The author also agrees with the view.[39] that if a platform has not taken appropriate measures after it has been given time to do so and has received an official notification, it seems to be justified to hold a platform liable for unpaid VAT. In particular, when the platform knows that the supplier is not complying with his or her VAT obligations, but it does not take any action against that supplier, even after receiving an official warning from the tax authorities. In this case, the platform allows one (passively or even actively) to commit VAT fraud. Therefore, the author shares the view that it is justified to hold the platform accountable. According to the author, the implementation of platform liability for VAT in European countries should be based on fully harmonised, uniform rules in all jurisdictions.

References

European Commission (2015–2016), Consultation on Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy, https://ec.europa.eu/information_society/newsroom/image/document/2016-7/efads_13917.pdf

European Commission, Report From The Commission To The Council And The European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud, Brussels, 16 April 2004, COM(2004) 260 final.

Feria R., *Tax Fraud and Selective Law Enforcement*, "Journal of Law and Society" 2020, Vol. 47, No. 2, pp. 240–270, https://doi.org/10.1111/jols.12221.

James K., *The Rise of the Value-Added Tax*, New York 2015.

Joostens M., Lejeune I. and. Cambien J.-M, *EU Agreement on Taxation of Electronically Supplied Services*, "International VAT Monitor" 2002, Vol. 13, No. 3.

[38] R. Feria, *Tax Fraud and Selective Law Enforcement*, "Journal of Law and Society" 2020, Vol. 47, No. 2, pp. 240–270, https://doi.org/10.1111/jols.12221.

[39] Ibidem.

Lamensch M., *European Union – European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*, European Union – European Commission's New Package of Proposals on E-Commerce: A Critical Assessment.

Lamensch M., *European Value Added Tax in the Digital Era: A Critical Analysis and Proposals for Reform*, Amsterdam 2015.

Lamensch M., Merkx M., Lock J.I.W. and Janssen A., *New EU VAT-Related Obligations for E-Commerce Platforms Worldwide: A Qualitative Impact Assessment – IBFD*, 13, "World Tax Journal" 2021, No. 3, *Journal Articles & Opinion Pieces IBFD*, https://research.ibfd.org/#/doc?url=/collections/wtj/html/wtj_2021_03_e2_1.html%23wtj_2021_03_e2_1_fn_9 (accessed : 20.09.2021).

Majdowski F., *Global E-commerce Marketplaces and Consequent Challenges to Indirect Taxation*, "Belt and Road Initiative Tax Journal" 2020, Vol. 1, No. 2, http://www.britacom.org.

OECD, *Addressing the Tax Challenges of the Digital Economy: Action 1: 2015 final report*, Paris 2015.

OECD, *An Introduction to Online Platforms and Their Role in the Digital Transformation*, Paris 2019, https://doi.org/10.1787/53e5f593-en.

OECD, *International VAT/GST Guidelines*, Paris 2017, https://www.oecd-ilibrary.org/taxation/international-vat-gst-guidelines_9789264271401-en (accessed: 27.06.2020).

OECD, *Mechanisms for the Effective Collection of VAT/GST When the Supplier Is Not Located in the Jurisdiction of Taxation*, OECD, 2017.

OECD, *Report on the OECD Ministerial Conference 'A Borderless World: Realising The Potential of Global Electronic Commerce'*, October 1998.

OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD, 2018, https://doi.org/10.1787/9789264293083--en.

OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, OECD, 2019. https://doi.org/10.1787/e0e2dd2d-en

Schenk A., Thuronyi V. and Cui W., *Value Added Tax: A Comparative Approach*, 2nd edition, New York 2015.

Senyk M., *The Origin and Destination Principles as Alternative Approaches towards VAT Allocation: Analysis in the WTO, the OECD and the EU Legal Frameworks*, Amsterdam 2020.

Adam Bartosiewicz

Jan Dlugosz University in Częstochowa, Poland

a.bartosiewicz@ujd.edu.pl

ORCID: 0000-0001-8702-2672

Reduced VAT Rate in Catering from 1 November 2019: The Scope of the National Legislature's Discretion in the Context of the Dispute over the Nature of Certain Supplies in Catering (Supply of Goods or Supply of Services)

Abstract

In Poland, for may years, various reduced rates were in force for catering services and for the delivery of "prepared dishes". This caused difficulties in interpretation, whether given supply was supply of (catering) services, whether was supply of goods (prepared dishes). In July 2021, the legislator decided to introduce a single reduced rate for food-related supplies, regardless of whether these took the form of the supply of goods or the supply of services. The article concerns the admissibility of such a solution in the scope of EU law.

Keywords: reduced rates, supply of services, supply of goods, catering services

Preliminary Remarks

Value added tax (in Poland called tax on goods and services) is a neutral tax for entrepreneurs. Therefore, it does not burden business activity which is subject to this tax. This is one of the basic structural features of this tax.[1]

This tax is essentially passed on to consumers. It is an indirect tax. Therefore, in principle, value added tax also has a price-creating character.[2]

It seems that, among others, because of this nature of VAT, the principle of the directive is to allow Member States to introduce one or two reduced rates and to subject to that rate (those rates) various supplies (goods and services) whose direct recipients are mainly consumers.

The list of goods and services that can be subject to a reduced rate is set out in EU law. Member States may, but are not obliged to, introduce reduced rates for all goods and services mentioned therein. However, they cannot (or at least should not) introduce a reduced rate for goods and services for which the EU law does not provide such a possibility.

For several years now, Poland has had two reduced rates – nominally (formally) 5% and 7%, although in reality they are 5% and 8% (due to the fact that under specific legislation, the 7% rate is 'temporarily' increased by 1 percentage point[3]). This is in line with EU requirements on reduced rates, which stipulate a minimum reduced rate of 5%.

Reduced Rates for Food

One of the categories of supplies which are 'traditionally' subject to the reduced rate in Poland is food, including services consisting of the provision of food immediately ready for consumption by the consumer.

For many years, until the reform of reduced rates in 2011, when there was in principle only one reduced rate (7%, or respectively 8%), such services were classified as *catering services* ('services connected with catering') and were subject to a reduced rate (at that time, there was only one in Poland).

After the reform of tax rates in 2011, when a second reduced rate of 5% was introduced, it turned out that the above rate was extended to include, among others, the supply of goods such as 'prepared dishes' (goods included in a specific manner in the statistical classification).

---

[1] A. Bartosiewicz, R. Kubacki, *Wpływ orzecznictwa ETS na wykładnię przepisów nowej ustawy VAT*, Glosa 2004/5/9-16.

[2] A. Bernal, *Podatek od wartości dodanej. Studium przerzucalności podatku na konsumentów, pracowników i dawców kapitału*, Poznań 2019.

[3] A. Bartosiewicz, *VAT. Komentarz*, wersja elektroniczna: LEX.

Disputes over the Scope of Application of the 5% Rate for the Supply of Ready-Made Takeaways to Consumers

In practice, doubts have arisen as to when a service consisting of the supply of a ready-to-eat meal to a customer (especially off-premises) is a supply of a prepared dish (subject to the 5% VAT rate) and when it is a catering service subject to the 7% (or actually 8%) VAT rate.

Doubts related primarily to services supplied in the form of fast-food or street food. However, they also generally covered the supply of prepared dishes to eat out.

In the context of the above-mentioned problem, it can be noted that it seemed quite important – under the legal regime back then – to distinguish whether a given service (namely, the provision of a dish to a customer) would constitute a supply of services or a supply of goods.

Accordingly, it can be said that from 1 July 2011 the EU Implementing Regulation No. 282 introduced a distinction between restaurant (catering) services and the supply of prepared dishes.

Under Regulation 282, restaurant and catering services mean services consisting of the supply of prepared or unprepared food or beverages (or both) for human consumption, accompanied by sufficient support services allowing for the immediate consumption thereof. The provision of food or beverages (or both) is only one component of the whole in which services shall predominate. Catering services are the supply of such services off the premises of the supplier. The supply of prepared or unprepared food or beverages (or both), whether or not including transport, but without any other support services, shall not be considered restaurant or catering services.

Therefore, in order for a given supply to be classified as a restaurant (catering) service, it must include additional elements (supporting services allowing for the direct consumption of the meal). These will be services connected with providing tableware allowing for the consumption of meals, services of serving meals, cleaning up after the meal etc.[4]

In the Judgment of 10 March 2011 in joint cases C-497/09, C-499/09, C-501/09 and C-502/09 (*Finanzamt Burgdorf v. Manfred Bog*, *CinemaxX Entertainment GmbH & Co. KG v. Finanzamt Hamburg-Barmbek-Uhlenhorst*, *Lothar Lohmeyer v. Finanzamt Minden* and *Fleischerei Nier GmbH & Co. KG v. Finanzamt Detmold*), the Court of Justice held: '[T]he supply of food or meals freshly prepared for immediate consumption from snack stalls or mobile snack bars or in cinema foyers is a supply of goods within the meaning of Article 5 if a qualitative examination of the entire transaction shows that the elements of supply of services pre-

[4] A. Bartosiewicz, *Unijne rozporządzenie wykonawcze VAT: Komentarz*, Wrocław 2012, p. 37.

ceding and accompanying the supply of the food are not predominant; except in cases in which a party catering service does no more than deliver standard meals without any additional elements of supply of services, or in which other special circumstances show that the supply of the food represents the predominant element of a transaction, the activities of a party catering service are supplies of services within the meaning of Article 6'.

The reasoning of the judgment indicates, among others, that the characteristic elements of restaurant activity include the participation of waiters, advising customers, service (consisting of taking the order to the kitchen, arranging dishes on plates and serving them to the customers), carrying out this activity in closed and heated premises intended for the consumption of the products supplied, providing cloakrooms and toilets and using crockery, furniture and tableware. Moreover, in the reasons for the judgment, it is noted that sale from mobile snack bars or snack stalls of sausages, chips and other hot food for immediate consumption may not be considered a service. According to the Court, although the sale of such products involves cooking or heating them, which constitutes a service, it is a cursory and standardised activity which usually does not take place at the request of a specific customer, but on a regular and continuous basis. It does not, therefore, constitute the predominant element of the transaction in question and cannot, of itself, give rise to the recognition of that transaction as the provision of a service. The mere fact that basic facilities exist for such sales, i.e. simple counters for consumption without seating, allowing a limited number of customers to consume on the spot in the open air, does not cause such sales to be considered as the provision of a service. Such basic facilities require only minor human activity. These elements constitute only ancillary services to a minimum extent and do not alter the predominant character of the principal service, which is the supply of goods.

Taking the above into account, it could be argued that a lot of services involving the provision of ready-to-eat meals, including, but not limited to:
- the provision of takeaways (with or without delivery – as *drive-in*)
- the provision of meals for consumption on the spot, but with a minimum of infrastructure for the client (as *fast food*), were, in fact, a supply of goods.

In classifying these services as the supply of 'prepared meals', it would appear that the reduced rate of 5% could be applied.

However, it should be noted that on 24 June 2016, the Minister of Finance issued a general interpretation (PT1.050.3.2016.156),[5] referring to the issue of applying a VAT rate in catering. The Minister stated, among others, that the determination of the tax rate requires the appropriate assignment of the service to the relevant classification unit under the Polish Classification of Goods and Services (PKWiU).

[5] LEX No. 315809.

In the Minister's opinion, what is important for the above is whether the offered products are fully prepared and served as a meal ready for direct consumption, or whether they are not intended for direct consumption, e.g. they are frozen or vacuum-packed and labelled for sale. The fact that these products are sold separately or in sets (e.g. a meat sandwich, fries and a drink or a tortilla, or baked potatoes and a drink) does not affect their classification. Neither do such factors as whether the outlets are located in a place accessible to the public, whether there are tables and chairs, whether crockery and cutlery are available, whether the products are intended for consumption on the spot or for takeaway (e.g. packed in tissue paper or cardboard boxes) or whether the outlets have toilets, a cloakroom, air conditioning or heating have any impact on their correct classification according to the PKWiU.

Therefore, in the opinion of the Minister of Finance, catering establishments selling meals intended for direct consumption could not, at the time, benefit from the 5% VAT rate on the basis of Article 41(2a) in connection with item 28 of Annex 10 to the VAT Act because they were not classified in the PKWiU under 10.85.1.

As a rule, such products are subject to the 8% tax rate.

In the Minister's opinion, it is irrelevant whether, in accordance with the CJEU case-law, the sale of these services will be treated as provision of services or as a supply of goods. In the Minister's opinion, the services specified in the annex to the regulation on rates are *services* within the meaning of the PKWiU. This does not contradict the fact that these 'services' may be a supply of goods within the meaning of the CJEU case-law.

A Polish Case at the CJEU Concerning Benefits Consisting in the Serving of Ready-to-Eat Meals

Many taxpayers questioned the interpretation presented by the Minister of Finance. This resulted in court disputes. One of them finally ended with the Supreme Administrative Court referring to the CJEU for a preliminary ruling.

In the decision of 6 June 2019 (I FSK 1290/18, LEX No. 2706788), the Supreme Administrative Court referred to the Court of Justice, among others, the following questions:

(1) Does the concept of a 'restaurant service' to which a reduced rate of VAT applies [...], cover the sale of prepared dishes under conditions such as those in the main proceedings, that is to say, in a situation where:

- *the seller makes available to the buyer the infrastructure which enables him or her to consume the purchased meal on the premises (separate dining space, access to toilets)*

- *there is no specialised waiter service*
- *there is no service in the strict sense*
- *the ordering process is simplified and partly automated; and*
- *the customer's ability to customise the order is limited?*

(2) *Is the way in which the dishes are prepared, consisting in, in particular, the heating of certain semi-finished products and the composing of prepared dishes from semi-finished products, relevant to answering the first question?*

(3) *In order to answer the first question, is it sufficient that the customer is potentially able to use the infrastructure offered or is it also necessary to establish that, for the average customer, this element constitutes an essential part of the service provided?*

In the judgment delivered in this case on 22 April 2021 (C-703/19; J.K.), the Court of Justice stated, among others, that 'the concept of "restaurant and catering services" includes the supply of food accompanied by sufficient support services intended to enable the immediate consumption of that food by the end customer, which is a matter for the national court to determine. Where the end customer chooses not to benefit from the material and human resources made available by the taxable person to accompany the consumption of the food supplied, it must be concluded that no support services accompany the supply of that food'.

Changes in Polish Legislation Made before the Judgment

However, the above CJEU judgment, has – as it seems – only historical significance, due to the changes in the provisions of the Act of 11 March 2004 on tax on goods and services (Journal of Laws of 2021, item 685, as amended), which took place from 1 November 2019.

Indeed, according to paragraph 12f, then added to Article 41, the tax rate of 8% applies to the supply of goods and supply of services classified under the Polish Classification of Goods and Services under the heading 'services related to catering (PKWiU 56)'.

The wording of the above provision seems to imply that in order to apply the reduced rate, it will be important for a given service to be classified in the grouping 56 of the PKWiU, whereas the tax rate will not be affected by the fact as to whether a given service is a 'supply of goods' or a 'supply of services' within the meaning of the provisions of Article 5 of the Act (and the taking into account of the CJEU case-law).[6] The reduced 8% rate is to be applied to both the supply of

[6] My commentary.

goods and the provision of services which are classified as 'services related to catering (PKWiU 56)'.

However, the reduced rate of 8% does not apply to the sale (i.e. both the supply and, where applicable, the provision of services in this respect) of beverages other than those listed in Annex 3 or Annex 10 to the Act, or in the executive regulations issued on its basis, including their preparation and serving. The reduced rate of 8% cannot be applied to the sale (i.e. both the supply and, where applicable, the provision of services in this respect) of goods not processed by the taxable person, other than those listed in Annex 3 or Annex 10 to the Act, or in implementing provisions issued on its basis. Finally, the 8% rate does not apply to the sale (i.e. both the supply and, where applicable, the provision of services in this respect) of meals consisting of goods indicated as excluded from the groupings listed in items 2 (lobsters and octopus and other goods falling within CN 0306 to CN 0308) and 11 (caviar and caviar substitutes falling within CN 1604 and preparations of lobsters and octopus and other goods falling within CN 1603 00 and CN 1605) of Annex 10 to the Act.

Evaluation of the New Regulations in the Context of the Reasoning for the CJEU Judgment

In any event, the question arises as to how to assess the above amendments to the Act in the context of the wording of the reasoning of the CJEU judgment in case C-703/19.

Indeed, it should be pointed out that, on the one hand, it is possible to find in the reasoning for the judgment statements according to which: '40 […] provided that the transactions to which the reduced rate applies fall within one of the categories in Annex III to the VAT Directive and that the principle of fiscal neutrality is complied with, the national legislature is free, when defining in its domestic law the categories to which it intends to apply that reduced rate, to classify the supplies of goods and services included in the categories in Annex III to the VAT Directive in accordance with the method which it considers to be the most appropriate. 41 Subject to compliance with the conditions set out in the preceding paragraph, it is open to the national legislature to classify in the same category different taxable transactions included in separate categories of Annex III, without formally distinguishing between supplies of goods and services. Similarly, as the Advocate General pointed out in point 60 of his Opinion, it is irrelevant that the national legislature chose to use, to designate a category of its classification, terms similar to those of one of the points in Annex III to the VAT Directive, while retaining a broader scope than that of the category referred to in the point concerned, where the goods and services referred to therein are taxable at the reduced rate of VAT.'

At the same time, however, the Court notes that: '42. As the Advocate General pointed out, in substance, in point 50 of his Opinion and having regard, in particular, to the judgment of 27 February 2014, Pro Med Logistik and Pongratz (C-454/12 and C-455/12, EU:C:2014:111, paragraphs 43 and 44), the VAT Directive does not, moreover, preclude supplies of goods or services falling within the same category of Annex III to that directive from being subject to two different reduced rates of VAT. […] 44. That principle [of neutrality] precludes similar supplies of goods or services which are in competition with each other from being treated differently for VAT purposes (judgments of 9 March 2017, Oxycure Belgium, C-573/15, EU:C:2017:189, paragraph 30 and the case-law cited, and of 19 December 2019, Segler-Vereinigung Cuxhaven, C-715/18, EU:C:2019:1138, paragraph 36 and the case-law cited). 45 In those circumstances, as the Advocate General pointed out in point 59 of his Opinion, it is for the national court not only to ascertain whether the choice made by the national legislature to apply one or two reduced rates of VAT relates to transactions falling within one or more of the categories set out in Annex III to the VAT Directive, but also to ascertain whether the different treatment for VAT purposes of supplies of goods or services falling within the same category of that annex complies with the principle of fiscal neutrality.'

Thus, the judgement indicates, *inter alia*, that a Member State may classify in the same category (in the context of applying a single reduced rate of tax) different taxable transactions falling under separate categories of this Annex III without making a formal distinction between the supply of goods and services. It appears that this is what Poland did when it amended the above-mentioned act and introduced (as a rule) the 8% rate for activities classified under PKWiU ex 56, regardless of whether these activities would be treated – in the context of the subject of taxation – as the supply of goods or the supply of services.

The judgment goes on to underline that (in principle) there is no obstacle to a Member State applying two different reduced rates of tax to the supply of goods or services of the same category in Annex III to the EU directive listing the goods and services for which reduced rates may be applied. However, this must respect the principle of neutrality, i.e. ensuring that similar goods or services which are in competition with each other are not treated differently in the context of VAT.

It seems that applying the same tax rates to the supply of goods (prepared meals) and the provision of services (restaurant or catering services) does not infringe the above rules, even if we consider these supplies as not being similar. Their dissimilarity might justify the application of different reduced rates, but it does not preclude the application of a single tax rate.

In view of the above, it seems that current regulations of domestic law in Poland, concerning the taxation of services in the field of catering, do not violate the provisions of the EU law.

References

Bartosiewicz A., *VAT. Komentarz*, wersja elektroniczna: LEX.

Bartosiewicz A., *Unijne rozporządzenie wykonawcze VAT: Komentarz*, Wrocław 2012.

Bartosiewicz A., Kubacki R., *Wpływ orzecznictwa ETS na wykładnię przepisów nowej ustawy VAT*, Glosa 2004/5/9-16.

Bernal A., *Podatek od wartości dodanej. Studium przerzucalności podatku na konsumentów, pracowników i dawców kapitału*, Poznań 2019.

Wojciech Dmoch

wojtek.dmoch@gmail.com

ORCID: 0000-0002-3414-8850

Binding Rate Information as a Community Law Institution

Abstract

The legal institution of Binding Rate Information (BRI) is relatively new in the Polish tax law, as the provisions regulating it entered into force at the end of 2019. This institution originates in the previously applicable legal system, whereby the taxpayer could learn the correct VAT rate applicable to the supply of goods or services by obtaining a statistical interpretation (issued by Statistics Poland) or, potentially, a tax law interpretation (issued by National Tax Information). However, statistical interpretations, despite making a statistical classification of particular goods or services and thus enabling the taxpayer to decide on the appropriate VAT rate applicable to a given supply of goods or services, did not offer certainty as to the taxpayer's correct application of the law, since they were by no means binding. On the other hand, tax law interpretations, while protecting the taxpayer, were not issued in cases concerning classification of given goods or services to the appropriate statistical grouping and thus did not resolve the correctness of the VAT rate. These problems were solved by introducing the Binding Rate Information (BRI), the functioning of which can also be considered in a broader EU perspective.

Keywords: Binding Rate Information, VAT rates, VAT taxation, Poland

Introduction

A reference in the VAT regulations to statistical classifications as the decisive criterion for applying the appropriate VAT rate to the supply of certain goods and services, accompanied by no legal institution to make an unambiguous and binding classification of given goods or services in terms of applying the correct VAT rate, resulted in taxpayers' uncertainty as to the VAT rates applied by them. The legal institutions have not removed this uncertainty by issuing statistical interpretations under the official statistics laws nor by way of individual tax law interpretations under the tax laws.

The origins of introducing the Binding Rate Information

Statistical interpretations, i.e. interpretative opinions on the proper classification of goods or services to the appropriate item of the classification and nomenclature, are issued by Statistics Poland in Łódź, based on the positions of the President of Statistics Poland (GUS) presented in official announcements.[1] In these communications, the President of Statistics Poland has decided that the interested party independently classifies its products according to the rules set out in the classification and nomenclature, and in the event of difficulties in determining the classification, it may apply for a statistical interpretation to Statistics Poland in Łódź.[2]

This means that Statistics Poland in Łódź, which is not a tax authority, decides, by issuing statistical interpretations, about VAT taxation of the supply of given goods or services. In other words, the statistical interpretation determines VAT taxation of given goods or services.[3]

However, not only does this interpretation – due to its legal nature – offer certainty as to the applicable law, but it is also by no means binding on the tax authorities. First of all, statistical interpretations are not the source of universally binding law (this stems directly from Article 87(1) and (2) of the Polish Constitu-

---

[1] Announcement of the President of Statistics Poland of 5 November 2002 on the procedure of issuing interpretative opinions according to the applicable classification standards (Journal of Laws of Statistics Poland of 2002, No. 12, item 87), which was in effect from 1 January 2003 to 31 March 2005 and the Announcement of the President of Statistics Poland of 24 January 2005 on the procedure for providing information on classification standards (Journal of Laws of Statistics Poland of 2005, No. 1, item 11), which has been in effect since 1 April 2005.

[2] Points 1 and 2 of the Announcement of 24 January 2005 on the procedure for providing information on classification standards (Journal of Laws of Statistics Poland of 2005, No. 1, item 11) and the Announcement of 5 November 2002 on the procedure for issuing interpretative opinions in accordance with the applicable classification standards (Journal of Laws Statistics Poland of 2002, No. 12, item 87).

[3] T. Michalik, *VAT. Komentarz*, Warszawa 2019, p. 139.

tion, which stipulates that in Poland, the sources of universally binding law are the Constitution, acts of the Parliament, ratified international agreements and acts of local law). Because statistical interpretations are not the source of universally binding law, they are of no significant value in tax law terms. This is to say that only the sources of universally binding law are binding on all entities and may be the basis for an authorised body's decision or another resolution. Thus, statistical interpretations do not bind the VAT taxpayer who has applied for an interpretation to Statistics Poland in Łódź, nor do they bind the tax authorities which verify whether that taxpayer has applied the correct VAT rates.[4] In addition, statistical interpretations do not determine the rights or obligations of the VAT taxpayer who is their addressee[5] and they are not subject to administrative court control, hence they are not administrative decisions.

However, under the tax law, statistical interpretations – which undoubtedly result from actions taken by a public administration body, i.e. Statistics Poland in Łódź – are only evidence in tax proceedings involving the determination of the tax liability amount.[6]

Therefore, for the VAT taxpayer, statistical interpretations are merely evidence to be presented in tax proceedings to prove that the correct VAT rate has been applied. However, this evidence is by no means conclusive, nor is it binding on the tax authorities, and it is assessed on the same terms as all other pieces of evidence collected in tax proceedings. Hence, statistical interpretations do not protect VAT taxpayers in tax law terms, nor do they offer certainty as to the law applied by them. Therefore, statistical interpretations are not a legal institution determining whether the taxpayer has applied the correct VAT rate.

An individual tax law interpretation expresses the tax authority's interpretation of the tax law in relation to an actual state of affairs or a future event, as described by the taxpayer in the interpretation request. The doctrine even indicates

---

[4] 'It should be noted that in the case-law, it is correctly and essentially uniformly adopted that the so-called classification opinions of public statistics authorities, containing interpretations of statistical standards and nomenclatures, are not formally binding neither for tax authorities nor for taxpayers.' (Resolution of 7 judges of the Supreme Administrative Court in Warsaw of 20 November 2006, ref. No. II FPS 3/06, published in CBOSA).

[5] 'The Act does not, however, oblige to adhere to the interpretation of these standards and nomenclatures, performed by public statistics authorities. It follows that in the normative area of the public statistics law, interpretations of the standards and classification nomenclatures of the Polish Classification of Products and Services do not create any direct obligations for business entities or taxpayers. They also do not endow them with any direct rights.' (Resolution of 7 judges of the Supreme Administrative Court in Warsaw of 20 November 2006, ref. No. II FPS 3/06, published by CBOSA).

[6] For instance, the Judgment of the Supreme Administrative Court of 5 June 2003, ref. No. III SA 2214/01, CBOSA, Resolution of 7 judges of the Supreme Administrative Court of 20 November 2006, ref. No. II FPS 3/06, CBOSA, Judgment of the Supreme Administrative Court of 2 September 2008, ref. No. I FSK 620/07, CBOSA, Judgment of the Supreme Administrative Court of 27 June 2019, ref. No. I FSK 1095/17.

that an individual tax law interpretation is a model for a legal interpretation.[7] An individual tax law interpretation, which – like a statistical interpretation – is not a source of universally binding law, is not legally binding neither on the taxpayer to whom it was issued nor on the tax authorities; however, unlike a statistical interpretation, it protects the taxpayer. The individual tax law interpretation protects the taxpayer in that if the taxpayer – the interpretation's addressee – adheres to the tax authority's position presented in such an interpretation and acts accordingly, the tax authority cannot harm that taxpayer.

The scope of such protection varies, depending on whether the tax consequences of the event to which the facts described in the interpretation correspond occurs before or after the taxpayer has received such an interpretation. The taxpayer having received an individual tax law interpretation does not mean that he or she must comply with the interpretation presented therein. The taxpayer's behaviour in the field of taxation may differ from that resulting from the received interpretation. In such a case, however, the interpretation will not protect the taxpayer. That being the case, the tax authority will be fully entitled to determine a different tax liability amount from that presented by the taxpayer and to determine the tax arrears or late payment interest.

From the perspective of individual tax law interpretations' functioning as a legal institution determining the correctness of the taxpayer's VAT rates adjustments, it is interesting to establish whether classifying given goods or services into a specific item of statistical classification or nomenclature could be the subject of an individual tax law interpretation. The Tax Ordinance, which governs the functioning of individual tax law interpretations, indicates that the tax authority competent to issue and interpret, i.e. the President of National Tax Information, at the taxpayer's request, issues an interpretation of the legal provisions in the taxpayer's individual case. Therefore, only tax law provisions may be the normative subject of individual tax law interpretations,[8] i.e. the tax laws, the agreements on double taxation avoidance ratified by Poland, other international tax treaties ratified by Poland as well as the provisions implementing any acts of Parliament issued on the basis of the tax laws.

Since the VAT provisions refer to statistical groupings specified in the generally applicable regulations, which are the statistical classifications and statistical nomenclatures introduced into the Polish legal framework under the relevant Council of Ministers regulations, it is legitimate to conclude that these statistical classifications and nomenclatures co-create the tax law norms and they are even an

[7] H. Dzwonkowski, *The Legal Nature of Individual Tax Interpretations – Selected Issues*, in: W. Miemiec (ed.), *Stanowienie i stosowanie prawa podatkowego. Księga jubileuszowa profesora Ryszarda Mastalskiego*, Wrocław 2009, p. 143.

[8] C. Kosikowski, in: J. Brolik, C. Kosikowski, L. Etel, P. Pietrasz, M. Popławski, S. Presnarowicz, W. Stachurski, *Ordynacja podatkowa. Komentarz*, 5th edition, LEX, el. 2013.

integral part of the tax law.[9] In one its judgments, the Supreme Administrative Court ruled that because the tax laws are not the only ones regulating the elements on which taxation depends, the obligation for the tax authority to provide a written interpretation as to the scope and manner of applying the tax law cannot be narrowed down only to those containing the concept of tax law in the title.[10] Thus, the classification of given goods or services into a specific grouping of statistical classification or nomenclature may be the subject of an individual tax law interpretation.

However, it should be emphasised that such a position of administrative courts was a uniform jurisprudence line. The Supreme Administrative Court stated in some verdicts that the classification of given goods or services into a specific statistical grouping does not lie within the competence of the tax authority to which the taxpayer applied for an individual tax law interpretation. Due to this opinion, classifying given goods or services into a specific grouping of statistical classification or nomenclature is not the normative subject of an individual tax law interpretation and it is only an element of the facts presented by the taxpayer in the application for an individual tax law interpretation. For instance, one may refer to the Judgment of 7 March 2016 (I FSK/1031/14), in which the Supreme Administrative Court ruled that 'in the tax law interpretation proceedings, the tax authority is bound by the facts provided by the applicant and has no right to make its own decisions in this regard. Since the applicant has qualified his or her activity into a specific grouping of PKWiU,[11] the authority is not entitled to make its own decisions in these proceedings'.

A similar position in this regard was also presented by the tax authorities. For instance, in the Interpretation issued by the President of National Tax Information on 4 September 2018 (No. 0113-KDIPT1-1.4012.546.2018.1.WL), it was indicated that: 'The authority is not entitled to formally assign goods and services to a specific classification grouping. It should be emphasised that the issues regarding the classification of goods or services into the appropriate statistical grouping do not fall within the framework specified in Article 14b(1) of the Tax Ordinance, according to which the President of National Tax Information, at the request of the person concerned, issues a tax law interpretation (individual interpretation) in such a person's individual case. Thus, this interpretation has been issued based on the PKWiU groupings indicated by the Applicant in the application.' Thus, the classification of given goods or services into a specific grouping of classification or

[9] 'At this point, it should be pointed out that while statistical provisions do not constitute tax law standards, if a tax law provision refers to their content, then they co-create such a standard, becoming its integral part.' (Judgment of the Provincial Administrative Court in Wrocław of 5 August 2008, ref. No. I SA/Wr 542/08, published by CBOSA).

[10] The Judgment of the Supreme Administrative Court of 6 January 2010, ref. No. I FSK 1217/09, LEX No. 598782.

[11] Polish Classification of Products and Services.

statistical nomenclature is not, according to the tax authorities, the normative subject of an individual tax law interpretation and it is only an element of the facts presented by the taxpayer in the application for an individual tax law.

To conclude the above considerations, the only effect of obtaining a statistical interpretation is having evidence to present during the tax proceedings with the view to assess whether the taxpayer has applied the appropriate VAT rate in relation to the activity comprising the supply of goods or the provision of services covered by the statistical interpretation. Obtaining an individual tax law interpretation will not even have this value.

Tax authorities (and administrative courts, in some judgments) recognise that the statistical classification of given goods or services is only an element of the facts presented by the taxpayer in the application for a tax law interpretation. However, the subject of this interpretation cannot be the classification of given goods or services into a specific statistical grouping and, consequently, the indication of the appropriate VAT rate for an activity of which such goods or services are the subject. Since the tax law interpretation does not contain such a decision and it does not assess the actual state of affairs presented by the taxpayer in the interpretation request (which is obvious, since such assessment is not the normative subject of the tax law interpretation), the taxpayer – having received the interpretation – is not protected as he or she should be.

Therefore, if tax proceedings are initiated against the taxpayer who applied the VAT rate which the interpreting authority had considered correct in the interpretation issued (at the same time stipulating that the statistical classification of the goods or services is only an element of the facts and, therefore, it has not been assessed by the authority) and if – as a result of these proceedings – the tax authority determines a VAT liability amount different from that presented by the taxpayer in the submitted tax returns, the taxpayer will be obliged to pay the outstanding tax together with the late payment interest.

The above-mentioned circumstances regarding the functioning of statistical interpretations and tax law interpretations in terms of deciding whether the taxpayer has correctly applied the VAT rate resulting from the statistical classification of given goods or services were the point of departure for introducing a new legal institution which would not only help VAT taxpayers, but it would also guarantee that their classification of given goods or services will not be questioned and would, therefore, meet the postulate of legal certainty.

Binding Rate Information

The legal institution to perform these functions is Binding Rate Information (BRI), which entered into force in November 2019. BRI is an appealable decision subject to judicial review.

Since BRI is a legal decision, it is preceded by tax proceedings conducted by the issuing authority.

The crux of these proceedings is evidence-taking, during which the tax authority assesses the evidence presented by the entity requesting BRI. Such evidence may include plans, diagrams, photographs, instructions, certificates and samples of goods, attached to the BRI request. The catalogue of evidence that may be presented by the entity requesting BRI is wide and it depends on the type of goods or services to be subject to statistical classification and assignment to the appropriate VAT rate. The only criterion in the catalogue of evidence that may be attached to the BRI request is its suitability for the proper classification of goods or services by the tax authority issuing BRI.

Therefore, the tax authority assesses such evidence and verifies its usefulness for determining the appropriate classification of given goods or services and it may deem the evidence insufficient for such classification. In such a case, the tax authority orders research or analysis to be carried out by:

a) laboratories of organisational units of National Tax Administration or other accredited laboratories
b) the National Library
c) research institutes of the Polish Academy of Sciences
d) research institutes or international scientific institutes established on under separate regulations, operating in Poland, and having the equipment necessary for a given type of research or analysis.

At the end of the tax and evidence proceedings, the tax authority, i.e. the President of National Tax Information, issues BRI. The BRI's addressee, if he or she disagrees with the decision, may appeal it to the second-instance tax authority. Since the second-instance authority is the same one that issued BRI, i.e. the President of National Tax Information, the two-instance nature of the tax proceedings is, in this case, questionable. Therefore, the administrative court supervision of BRI plays an important role.

Among the entities that may request BRI are not only VAT taxpayers with a tax identification number, but also entities intending to supply or import goods and to engage in the intra-Community acquisition of goods or provision of services.

The subject of BRI is:

1. The description of the goods or services for which statistical classification has been made in BRI.
2. Statistical classification, made only for the purposes of the VAT taxation of activities consisting in the supply of goods, import of goods, intra-Community acquisition of goods or provision of services:
   a) goods according to the Combined Nomenclature (CN)
   b) goods according to the Polish Classification of Construction Objects

c) services according to the Polish Classification of Products and Services PKWiU).

3. The determination of the VAT rate applicable to the activities consisting in the supply of goods, import of goods, intra-Community acquisition of goods or provision of services, the subject of which are goods or services for which the statistical classification has been made.
4. The classification of goods or services for the purposes of applying the VAT Act and implementing regulations issued on its basis, other than those relating to the determination of the VAT rate if the request for such classification was included in the BRI request.

BRI protection is based on the description of the goods or services for which the statistical classification has been made in BRI. Pursuant to Article 42(c) of Section 1.1 of the Polish VAT Act, BRI binds tax authorities towards entities for which this interpretation has been issued, in relation to:

a) goods which are the subject of delivery, import or intra-Community acquisition
b) services which have been performed
c) goods and services which, together, constitute a single taxable activity.

Because the description of the goods or services to which BRI relates is one of its elements, only if the goods or services constituting the activities performed by the BRI addressee are the same goods or services to which BRI relates, does it have a binding effect on the tax authorities in relation to the BRI addressee. This effect occurs not only in relation to the tax authority that issues BRI, i.e. the President of National Tax Information, but also in relation to other tax authorities. BRI binding the issuing President of National Tax Information means that this authority may only change such BRI if it rendered unlawful as a result of:

1. changes to the Combined Nomenclature (CN)
2. European Commission's adopting measures to determine the tariff classification of goods
3. failure to comply with the interpretation of the Combined Nomenclature (CN) resulting from:
   a) the explanatory notes referred to in Article 9(1)(a) of Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff
   b) a judgment of the European Court of Justice
   c) classification decisions, classification opinions or amendments to the explanatory notes to the Nomenclature of the Harmonized Commodity Description and Coding System, adopted by an organisation established on the basis of the Convention establishing a Customs Cooperation Council, drawn up in Brussels on 15 December 1950 (Journal of Laws of 1978, item 43).

BRI binding other tax authorities means that in each proceeding for controlling the BRI addressee's compliance with the VAT provisions taking place after BRI delivery, the tax authorities cannot determine a VAT liability amount different from the one resulting from adhering to the decision made in BRI. Since the tax authorities are bound by BRI when dealing with the BRI addressee (i.e. the VAT taxpayer) and his or her activities, which took place after BRI delivery, such authorities cannot determine a VAT tax liability different from that resulting from the taxpayer's adherence to BRI.

In conclusion, the introduction of BRI, which is binding on the tax authorities, means that BRI guarantees its addressees the stability of their legal and tax situation to the extent resolved in BRI. Two years since its introduction, one may conclude that BRI has met the taxpayers' expectations. The taxpayers are now certain that they have been applying correct VAT rates. The publication of issued BRIs in the Public Information Bulletin, combined with the option of searching by statistical code, allows all interested parties to learn about the classifications made by the tax authorities in BRIs so far.

Binding Rate Interpretation: Possible Use in the EU

Therefore, it is reasonable to consider whether BRI could be applied on a larger scale, not only to Polish VAT taxpayers, but also to other taxpayers from the EU Member States, especially taking into account such aspects as the common market's functioning, the development of a definite VAT system and the right of the Member States to set VAT rates (basic and reduced rates) themselves within the confines of Directive 112, which currently results in over 250 different VAT rates existing within the EU.

The internal market (the common market, the single market) – the area without internal borders, where the free movement of goods, people, services and capital is ensured, has been recognised as the fundamental tool with which the European Union has been performing its tasks since its inception. These tasks are defined in Article 2 of the Treaty Establishing the European Economic Community (the Treaty of Rome) as the Community-wide promotion of harmonious economic development, sustained and balanced growth, increased stability, accelerated improvement in living standards and closer relations between Member States. The creation of an internal market, based on the free movement of goods, persons, capital and services, which, according to the Treaty of Rome was the treaty's main objective which – once achieved – was to be considered a condition for the proper performance of the set Community tasks.

Despite several decades having passed since these assumptions, the internal market's functioning as regards one of its key tasks, i.e. the free movement of goods, has been facing difficulties resulting not only from different VAT rates ap-

plicable to particular goods supplies among the Member States, but also from the functioning of the temporary taxation model for intra-Community transactions and the lengthy process of developing a definitive VAT model for these transactions.

It should be noted that introducing a definitive VAT model applicable to trade between individual EU Member States is an intention already expressed in Article 4 of the First Council Directive of 11 April 1967 on the harmonization of the laws of the Member States relating to turnover taxes. This provision indicates the intention to create such a VAT system for intra-Community trade, where the supply of goods between Member States would be taxed according to the same rules as the taxable supply within one EU country – the country of origin. Therefore, a taxpayer established in one EU Member State, when supplying goods to another, should charge VAT according to the rules and rates applicable in the country of its establishment, while the buyer of such goods should be able to deduct this tax in his or her country as input tax. Such a VAT system for intra-Community supplies of goods, as the definitive model, was also adopted in Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC in order to eliminate fiscal borders. It was assumed that the regulations providing for the division of the cross-border movement of goods into two different transactions: intra-Community supply exempt from VAT in the Member State of the goods' origin and intra-Community acquisition, taxed in the target Member State, entering into force on 1 January 1993, i.e. on abolition of fiscal borders between Member States, will be replaced by the definitive VAT system. Within 12 months of that date, the European Commission was to propose the definitive VAT system to the Council. It was assumed that the definitive VAT system for trade between EU Member States would be based on the principle of taxing the supplied goods in the Member State of origin. The transitional regulations were to be in effect for four years, that is, until 31 December 1996, according to the Directive. It was indicated that the transitional regulations' effective period would be automatically extended until the definitive system has come into force. The transitional system defined in this way has been functioning to this day.

However, during the validity of the transitional model, the definitive VAT system was significantly modified and transformed from the taxation model in the Member State of the supplied goods' origin into the taxation model in the target Member State. However, progress in developing the definitive VAT model for intra-Community transactions does not solve the second of the above-mentioned problems with regard to the internal market's functioning – the differentiation of VAT rates in particular Member States. More importantly, this problem is unlikely to be resolved in the foreseeable future. One can reasonably consider that VAT harmonisation has already been achieved, except, however, for the adoption of

uniform VAT rates for all Member States. While the Member States have agreed to adopt uniform VAT application rules, which is reflected in the currently effective Directive 112/2006/EC, the unification of one of the structural elements of this tax, i.e. the tax rates, has yet to be achieved. This is reflected in the Directive's provisions, which result in approximately 250 VAT rates within the European Union.

Thus, the outlined framework for the internal market's functioning, in which commercial transactions will be subject to VAT based on the definitive VAT system drawing on taxation in the target country, with the simultaneous functioning of nearly 250 VAT rates in the Member States, allows one to conclude that the internal market participants may find it significantly problematic to apply the correct VAT rates in intra-Community transactions, which will affect this market's functioning. Given the above, it is worth considering whether Binding Rate Information could be applied on a larger scale within the harmonised VAT system once the definitive internal market transactions taxation system has been introduced. Since VAT harmonisation, as mentioned above, has not included any tax rates so far, due to both economic and political reasons, no quick progress should be expected in this regard, Binding Rate Information can be considered an effective tool to ensure that taxpayers who engage in common market transactions operating under the definitive VAT system obtain a binding solution regarding the application of the correct VAT rate. At the current stage of the works on the definitive VAT model, one may discuss the assumptions for Binding Rate Information's functioning under this model, where the following aspects must be taken into account:

a) the need to introduce, in all Member States, a legal solution allowing a uniform statistical classification of given products and thus ensuring certainty as to the VAT rate applicable to its intra-Community supply
b) the use of already existing 112 Directive regarding the application of the statistical classification of goods (Combined Nomenclature) as the basis for introducing Binding Rate Information as a solution applicable in all Member States
c) the introduction of the definitive VAT system based on the taxation model in the target country combined with the introduction of a uniform legal institution for all Member States ensuring that each taxpayer engaged in the intra-Community supply of goods obtains unambiguous, binding and legally certain information on the application of the appropriate VAT rate.

Obviously, the considerations presented above do not address all issues related to the possible use of BRI as a tool applicable at the EU level and that was not the purpose of their presentation. However, it is worth considering, especially when working out the details of the definitive VAT system's functioning, whether such a legal institution would help that definite system and whether it would thus help the common market.

References

Dzwonkowski H., *The Legal Nature of Individual Tax Interpretations – Selected Issues*, in: W. Miemiec (ed.), *Stanowienie i stosowanie prawa podatkowego. Księga jubileuszowa profesora Ryszarda Mastalskiego*, Wrocław 2009.

Kosikowski C., in: J. Brolik, C. Kosikowski, L. Etel, P. Pietrasz, M. Popławski, S. Presnarowicz, W. Stachurski, *Ordynacja podatkowa. Komentarz*, 5th edition, LEX, el. 2013.

Michalik T., *VAT. Komentarz*, Warszawa 2019.

Resolution of 7 judges of the Supreme Administrative Court in Warsaw of 20 November 2006, ref. No. II FPS 3/06, published in CBOSA.

Judgment of the Supreme Administrative Court of 5 June 2003, ref. No. III SA 2214/01, published by CBOSA.

Judgment of the Provincial Administrative Court in Wrocław of 5 August 2008, ref. No. I SA/Wr 542/08, published by CBOSA.

Judgment of the Supreme Administrative Court of 2 September 2008, ref. No. I FSK 620/07, published by CBOSA.

Judgment of the Supreme Administrative Court of 6 January 2010, ref. No. I FSK 1217/09, LEX No. 598782.

Judgment of the Supreme Administrative Court of 27 June 2019, ref. No. I FSK 1095/17 published by CBOSA.

Announcement of the President of Statistics Poland of 5 November 2002 on the procedure of issuing interpretative opinions according to the applicable classification standards (Journal of Laws of Statistics Poland of 2002, No. 12, item 87).

Announcement of the President of Statistics Poland of 24 January 2005 on the procedure for providing information on classification standards (Journal of Laws of Statistics Poland of 2005, No. 1, item 11).

The monograph is intended to create a platform for discussion on the most important issues concerning the reform and future of the VAT system in the European Community. It is a place for an effective exchange of reflections and experiences, including in terms of highlighting and presenting to international audiences Poland's positive experiences with mechanisms, such as split payments, reverse charge and Binding Tariff Information. Conclusions resulting from the scientific discussion will certainly be able to be used not only in national VAT legislation, but also in the practice of tax administration facing the difficult task of maintaining the budgetary effectiveness of VAT as the main source of state tax revenue.

The publication consists of four thematic parts. The first presents an analysis of the functioning of value added tax in the European Union. The second part of the monograph is devoted to the jurisprudence of the Court of Justice of the European Union. The third part of the book is devoted to VAT in the age of digital economy – VAT in e-commerce, and in the fourth part VAT rates are being considered.

It is an important voice in the discussion on the current state and future of VAT harmonisation, which should be of interest to EU institutions, including the European Commission and the Court of Justice of the European Union. The monograph should be of no less interest to administrative judges, tax advisors and employees of the National Fiscal Administration in Poland.

ISBN 978-83-66502-09-3

www.kozminski.edu.pl