



CSU
College of Law Library

7-1-2018

Making Sense of the European Union's VAT Tax System: Does the European Court of Justice's Jurisprudence Support Harmonization?

Jarrold Tudor
University of Akron Wayne College

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/gblr>



Part of the [Taxation-Transnational Commons](#), and the [Tax Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Jarrold Tudor, *Making Sense of the European Union's VAT Tax System: Does the European Court of Justice's Jurisprudence Support Harmonization?*, 7 *Global Bus. L. Rev.* 76 (2018)
available at <https://engagedscholarship.csuohio.edu/gblr/vol7/iss1/6>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in The Global Business Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

**MAKING SENSE OF THE EUROPEAN UNION’S VAT TAX SYSTEM:
DOES THE EUROPEAN COURT OF JUSTICE’S JURISPRUDENCE SUPPORT
HARMONIZATION?**

JARROD TUDOR^{1*}

| | | |
|-------|--|-----|
| I. | INTRODUCTION..... | 77 |
| II. | TAX LAW IN THE EUROPEAN UNION..... | 79 |
| III. | ADVANTAGES AND DISADVANTAGES OF VAT TAX..... | 82 |
| IV. | PURPOSE OF THIS WORK..... | 83 |
| V. | DECISIONS BY THE EUROPEAN COURT OF JUSTICE..... | 83 |
| | A. <i>Profits</i> | 83 |
| | B. <i>Language and Uniformity</i> | 84 |
| | C. <i>Federalism</i> | 85 |
| | D. <i>Relations Between Organizations</i> | 85 |
| | E. <i>Form of Business Association and Location of Services</i> | 86 |
| | F. <i>Additional Taxes Implemented by Member-States</i> | 87 |
| | G. <i>Method of VAT Tax Refunds</i> | 90 |
| | H. <i>Additional Administrative Requirements</i> | 93 |
| | I. <i>Specific Use of Goods</i> | 97 |
| | J. <i>Member-State Discretion</i> | 101 |
| | K. <i>Financial Transactions</i> | 106 |
| | L. <i>Tax Evasion</i> | 109 |
| | M. <i>Shifting VAT Tax Liability</i> | 111 |
| VI. | DOMINANT THEMES FROM THE ECJ’S DECISIONS CONCERNING THE SIXTH COUNCIL DIRECTIVE 77/388/EEC..... | 113 |
| VII. | THE EFFECTIVENESS OF DIRECTIVE 77/388/EEC: THE POTENTIAL THREATS TO HARMONIZATION..... | 117 |
| VIII. | CONCLUSION..... | 120 |

ABSTRACT

The Sixth Council Directive 77/388/EEC was adopted by the European Union (EU) as a means toward harmonization of the value-added tax (VAT) system. The Framers of Directive 77/388/EEC believed that a disjointed VAT tax system that existed previously was harmful to the common market’s guarantee of free movement of goods and services that are subject to the VAT tax. The jurisprudence of the European Court of Justice (ECJ) on the subject of the Sixth Council Directive 77/388/EEC reflects four dominant patterns, including the limitation of member-states to dictate the parameters of the VAT tax, that additional administrative measures cannot be adopted by member-states, that variations among member-states will only be tolerated if no threat to harmonization exists, and that the ECJ will draft opinions that promote efficiency in trade and combat tax avoidance. Problematically, the ECJ’s allowing for too much discretion for member-state legislatures and national courts in conjunction with the use of a Directive to legislatively push for harmonization have left the EU with serious threats to a VAT tax system

^{1*} Dean of the University of Akron’s Wayne College.

that can be best described as fragile. If left in this fragile state, the level of harmonization that has been achieved could be in jeopardy.

I. INTRODUCTION

A U.S. firm engaged in the scope of international business must consider the implications of the world's VAT tax system.² More specific to the European continent, one of the most significant challenges to a business operating in the European Union ("EU") is the ability to comply with 28 different tax administrations – one for each EU member-state.³ Despite these challenges, the EU's common market has been so enticing that many American firms have moved their factory operations to the EU in order to make and sell their goods within the EU without restrictions that would otherwise be associated with exported goods coming into the EU.⁴ The EU constitutes a common market that requires the free movement of goods, services, capital, and labor.⁵ The EU's common market also requires the reduction of non-tariff barriers as well as the harmonization of law across the member-states.⁶

One of the purposes of EU law is to address the various problems associated with a 28-member union through a body of transnational law.⁷ One of the chief responsibilities of the European Court of Justice ("ECJ") is to ensure that the 28 member-states observe the EU Treaties, Regulations, and Directives that constitute the corpus of EU law.⁸ The ECJ, through its judgments, has engaged in high levels of judicial activism in order to further harmonize the common market's principles across the EU's member-states.⁹ Regardless of the mission of the ECJ, there exists a belief that the EU member-states are losing the ability to combat tax avoidance due to the ECJ's jurisprudence, which, according to the criticism, actually makes tax avoidance easier.¹⁰

Globalization has threatened the tax bases of national governments in such a way that the international tax community is mired in a debate on tax avoidance and the proper associated responsibilities for both multinational corporations and governments.¹¹ Tax avoidance,

² ALAN SCHENK, VICTOR THURONYI, & WEI CUI, *VALUE ADDED TAX: A COMPARATIVE APPROACH* 1 (2nd ed. 2015).

³ BEN J. M. TERRA & PETER J. WATTEL, *EUROPEAN TAX LAW* 3 (6th ed. 2012).

⁴ TONY CLEAVER, *UNDERSTANDING THE WORLD ECONOMY* 121-122 (4th ed. 2013).

⁵ *Id.* at 78.

⁶ *Id.*

⁷ DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, *EUROPEAN UNION LAW* 2 (2nd ed. 2010).

⁸ *Id.* at 143.

⁹ MICHELLE CINI & NIEVES PEREZ-SOLORZANO BORRAGAN, *EUROPEAN UNION POLITICS* 257 (4th ed. 2013).

¹⁰ Lilian V. Faulhaber, *Sovereignty, Integration, and Tax Avoidance in the European Union: Striking the Proper Balance*, 48 COLUM. J. TRANSNAT'L L. 177, at 179 (2010).

¹¹ CHRISTIANA HJI PANAYI, *EUROPEAN UNION CORPORATE TAX LAW* 4 (2013).

regardless of the form of tax being avoided, creates two negative realities, including a greater disrespect for taxing authorities and the reduction of revenue whereby the various member-state governments cannot reinvest in their populations.¹² One estimate is that the avoidance of value-added tax (“VAT tax”) alone costs the EU €100 billion each year.¹³ The EU Commission has become more aggressive as of late in clamping down on illegal tax breaks and other forms of tax avoidance especially in cases that lead to distortion of competition within the EU common market.¹⁴ The EU Commission has gone as far as to find entire member-state tax regimes to be illegal as they drain the EU of revenue.¹⁵ Some of the world’s largest multinational firms are facing the threat of paying significant amounts in back taxes.¹⁶ Just recently, the European Commission commanded that the Apple Corporation pay the Irish government €13 billion in back taxes excused as the result of a tax agreement between Apple and Ireland, which the European Commission found to be a violation of EU rules on state aid.¹⁷ More specific to the VAT tax avoidance problem in Europe, the EU Commission has attempted to gain information from the 28 member-states on the amount of VAT tax avoidance, but to date, only two member-states have responded to the information request.¹⁸ For countries that are members of the Organization for Economic Cooperation and Development (“OCED”), a group of countries for which many EU member-states belong, along with the United States, tax avoidance rates are roughly the same.¹⁹ Regardless of the international attention paid to tax avoidance, there is some debate as to whether member-states within the EU have a duty to combat those entities that seek to avoid the payment of taxes.²⁰

Across the Atlantic, the United States government is concerned that the EU Commission’s attempts at finding tax avoidance are unfairly targeting American-based firms.²¹ There exists a bit of a divide between the U.S. and its trading partners on the issue of the VAT tax. The EU, in its attempts to define the scope of the VAT tax within its jurisdiction, has deemed the virtual currency Bitcoin to be subject to its VAT tax system, which applies to the

¹² Faulhaber, *supra* note 10, at 207.

¹³ *VAT Fraud in the European Union: A Tax Net Full of Holes*, THE ECONOMIST (May 11, 2006), <http://www.economist.com/node/6923936>.

¹⁴ Tom Fairless, *EU Orders Belgium to Recover Unpaid Taxes From 35 Firms*, WALL ST. J. (Jan. 11, 2016, 12:44PM), <http://www.wsj.com/articles/eu-to-rule-on-illegal-tax-breaks-for-multinationals-1452506740>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Arthur Beasley, *Apple to Start Paying €13bn to Ireland Over Back Tax Claim*, THE FINANCIAL TIMES (April 24, 2018), <https://www.ft.com/content/9ee3943e-47d3-11e8-8ae9-4b5ddcca99b3>.

¹⁸ *VAT Fraud in the European Union: A Tax Net Full of Holes*, THE ECONOMIST (May 11, 2006), <http://www.economist.com/node/6923936>.

¹⁹ *The Pros and Cons of VAT: A Last Resort*, THE ECONOMIST (Nov. 19, 2009), <http://www.economist.com/node/14903016>.

²⁰ PANAYI, *supra* note 11, at 162.

²¹ James Willhite, *EU Corporate Tax Crackdown Expands*, WALL ST. J. (Dec. 3, 2015, 6:20AM), <http://blogs.wsj.com/cfo/2015/12/03/the-morning-ledger-eu-corporate-tax-crackdown-expands/>.

purchase of goods and services.²² Showing that national governments may disagree on the same question of law, the United States' Commodity Futures Trading Commission has held that Bitcoin should be treated not as a currency for purchasing goods and services but instead a commodity that is purchased.²³ Recently, China's VAT tax regime has been challenged by the United States as discriminatory toward American-manufactured small aircraft exports to China.²⁴ The United States government has further argued that the Chinese VAT tax system is not transparent in violation in World Trade Organization rules.²⁵

II. TAX LAW IN THE EUROPEAN UNION

Each domestic tax law enacted by a member-state of the EU must be within the scope of EU law set forth by the Treaty on the Functioning of the European Union ("TFEU").²⁶ Domestic tax regulations can be a chief barrier to further integration of the EU's common market, which requires the free movement of goods, services, capital and labor.²⁷ The scope and limitations of EU law are based in the TFEU and any powers not provided to the EU are reserved to the member-states through the concept of power through conferral.²⁸ Regardless, any tax regime constructed by an EU member-state is heavily influenced by EU law.²⁹ The scope of EU tax law applies to the entire territory of the member-states that constitute the EU, and all nationals of EU member-states, unless a specific exemption to the contrary in EU law applies.³⁰

The power to tax was a critical part of the EU's founding treaties.³¹ The EU Council is comprised of the heads of government from the 28 member-states and is charged with crafting Directives that define directions and priorities of the EU.³² A Directive is one of five acts that can be adopted by the EU government if the TFEU provides it should do so.³³ An EU Directive

²² Jacob Gershman, *For Bitcoin, EU Tax Ruling Was Right On The Money*, WALL ST. J. (Oct. 22, 2015), <http://blogs.wsj.com/law/2015/10/22/for-bitcoin-eu-tax-ruling-was-right-on-the-money/>.

²³ *Id.*

²⁴ William Mauldin, *U.S. Brings WTO Case Against China Over Smaller Planes*, WALL ST. J. (Dec. 8, 2015, 10:10AM), <http://www.wsj.com/articles/u-s-brings-wto-case-against-china-over-smaller-planes-1449587899>.

²⁵ Chun Han Wong, *China Expresses Regret Over U.S. Trade Challenge*, WALL ST. J. (Dec. 9, 2015, 7:18AM), <http://www.wsj.com/articles/china-expresses-regret-over-u-s-trade-challenge-1449663481>.

²⁶ PANAYI, *supra* note 11, at 3.

²⁷ *Id.* at 5.

²⁸ T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* 110 (7th ed. 2010).

²⁹ PANAYI, *supra* note 11, at 3.

³⁰ Dimitry Kochenov, *Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions of European Union Member States*, 17 MICH. ST. J. INT'L. L. 195, at 201 (2008).

³¹ Agustin Jose Menendez, *Taxing Europe: Two Cases For A European Power To Tax (With Some Comparative Observations)*, 10 COLUM. J. EUR. L. 297, at 298 (2004).

³² CHALMERS ET AL., *supra* note 7, at 75.

³³ HARTLEY, *supra* note 27, at 105.

is different than an EU Regulation in that the latter specifies rules that apply at the EU level and national level with no discretion for the member-state.³⁴ Directives, in contrast, are not binding on member-states but require the member-state to enact domestic legislation to achieve a particular goal.³⁵ Therefore, in the case of a Directive, the member-state is given discretion to determine which method is most suitable to achieve the goal behind the Directive.³⁶ Depending upon the construction of the Directive by the EU Council, the Directive may leave little room for the member-state to achieve that goal.³⁷ In most cases, a new Directive gives the EU's member-states 18 to 24 months to enact implementing legislation.³⁸ A Directive is also deemed to be of "indirect effect" in that it does not impose obligations on individuals.³⁹

The Sixth Council Directive 77/388/EEC was designed to further harmonize the VAT tax system within the EU – a process started by the first five Directives.⁴⁰ There were 53 Articles within the Sixth Council Directive.⁴¹ Since the Sixth Council Directive 77/388/EEC was in fact a Directive, and not a Regulation, the goal of the EU Council was to get the member-states to craft implementing legislation that would harmonize the VAT tax system on the various areas which the Sixth Council Directive touched.⁴² The Sixth Council Directive created a framework for a uniform VAT tax base in the form of upper and lower limits whereby the upper limits would be flexible but the lower limits inflexible.⁴³ Directive 77/388/EEC has been amended over time to make the EU economy more competitive.⁴⁴ Council Directive 2006/112/EC recast the Sixth Council Directive of Directive 77/388/EEC but did not affect its substantive content.⁴⁵ A Seventh Directive was later added to combat economic trade distortion.⁴⁶ There exists criticism of the Sixth Council Directive because it has not met its ultimate goal of making sure that all goods and services are taxed at the final point of consumption.⁴⁷

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ HARTLEY, *supra* note 27, at 106.

³⁸ CHALMERS ET AL., *supra* note 7, at 99.

³⁹ HARTLEY, *supra* note 27, at 234.

⁴⁰ Rachel J. Tischler, *The Power to Tax Involves the Power to Destroy: How Avant-Garde Art Outstrips the Imagination of Regulators, and Why A Judicial Rubric Can Save It*, 77 BROOKLYN L. REV. 1665, at 1673 (2012).

⁴¹ TERRA & WATTEL, *supra* note 3, at 305.

⁴² *Id.* at 172.

⁴³ MARGOT HORSPOOL & MATTHEW HUMPHREYS, EUROPEAN UNION LAW 286-287 (7th ed. 2012).

⁴⁴ Richard Thompson Ainsworth, *Biometrics: Solving The Regressivity of VATs and RSTs With Smart Card" Technology*, 7 FLA. TAX REV. 651, at 684-685 (2006).

⁴⁵ TERRA & WATTEL, *supra* note 3, at 305.

⁴⁶ Tischler, *supra* note 39, at 1674.

⁴⁷ Stephen Bill, *Practical Application of European Value Added Tax to E-Commerce*, 38 GA. L. REV. 71, at 71 (2003).

All OECD members, save the United States, employ a VAT tax, a tax on consumption of goods and services and not income.⁴⁸ Even at the time of the Treaty of Rome in 1957, all member-states except for France used a version of the VAT tax system.⁴⁹ The EU member-states were first ordered in 1967 to have a VAT tax system in place by 1970 pursuant to the First and Second Directives on the VAT tax.⁵⁰ The VAT tax has been described as an indirect, general tax applied by member-states to goods and services.⁵¹ The VAT tax is an indirect tax in that it is paid by a consumer of goods and services instead of the traditional taxpayer.⁵² A consumer generally sees the VAT tax as a sales tax in that the tax is assessed at each level of production of a good or service throughout the stream of commerce.⁵³ The total value added by a firm is equal to the total income earned on each factor of production.⁵⁴ The VAT tax is also considered a general tax in that it is designed to apply to all expenditures associated with the consumption of goods and services, which includes all stages of the stream of commerce such as production and distribution.⁵⁵ The VAT tax is also deemed to be neutral in that it is assessed and collected at *each step* in the stream of commerce.⁵⁶ The deduction mechanism of the EU's VAT tax system ensures that within each member-state's territory, goods and services maintain the same tax level.⁵⁷

In regard to international trade throughout the EU, the VAT tax can always apply to an import regardless of whether the importer is a firm or private person; however, the VAT tax cannot apply to exports.⁵⁸ Pursuant to the EU's VAT tax system, the exporting member-state accounts for sales of exports, but not at the border, thereby reducing any trade friction at the border.⁵⁹ Exports come into the member-state with the exporting country's taxes, and the importing country will later invoice the exporting country to recoup VAT taxes.⁶⁰ The VAT tax is an important part of the EU government budget as the EU does not have the power to directly

⁴⁸ *The Pros and Cons of VAT: A Last Resort*, THE ECONOMIST (Nov. 19, 2009), <http://www.economist.com/node/14903016>.

⁴⁹ HORSPOOL & HUMPHREYS, *supra* note 42, at 286.

⁵⁰ ANTONIO CALISTO PATO & MARLON TAVARES MARQUES, FUNDAMENTALS OF VAT 15-16 (2015).

⁵¹ Bill, *supra* note 46, at 72.

⁵² PATO & MARQUES, *supra* note 49, at 20.

⁵³ *VAT Fraud in the European Union: A Tax Net Full of Holes*, THE ECONOMIST (May 11, 2006), <http://www.economist.com/node/6923936>.

⁵⁴ LARRY NEAL, THE ECONOMICS OF EUROPE AND THE EUROPEAN UNION 135 (2007).

⁵⁵ PATO & MARQUES, *supra* note 49, at 22.

⁵⁶ *Id.* at 24.

⁵⁷ *Id.*

⁵⁸ HORSPOOL & HUMPHREYS, *supra* note 42, at 286, 287.

⁵⁹ NEAL, *supra* note 53, at 136.

⁶⁰ *Id.*

tax Europeans directly.⁶¹ When a taxable person pays VAT tax, one part of the total tax goes to the member-state, and a second part goes to the EU government's coffers.⁶²

III. ADVANTAGES AND DISADVANTAGES OF THE VAT TAX.

One commentator states that the VAT tax has circumscribed the globe more quickly than any other form of taxation in modern history.⁶³ Neal cites two advantages to a VAT tax, including an incentive for firms to honestly report taxes and an end to the debate on how taxes should be levied on labor and capital.⁶⁴ Regardless, the VAT tax system has been criticized as being so complex that it is not well understood.⁶⁵ The eventual goal is to move the application of the VAT tax in the EU from the state of destination to the state of origin of goods and services, but this reality has not been achieved to date.⁶⁶ Previous to efforts to harmonize the VAT tax system, VAT tax differences within the EU distorted trade among the member-states.⁶⁷ Regardless, despite incredible efforts at harmonization, there exist VAT tax differences across the member-states.⁶⁸ Differences in VAT tax application across the member-states still leads to some trade distortion and high administrative costs associated with accounting for VAT tax.⁶⁹

Comparatively, sales and VAT taxes make up a greater portion of the overall tax bill in Europe than in the United States.⁷⁰ The United States does not implement a VAT-like tax or sales tax except at the state and local government levels.⁷¹ However, there is comment that the concept of a VAT tax is growing support in the United States despite previous arguments that the VAT tax hurts the poor and serves as a funds-generator for the implementing government.⁷² Many who claim that too much income inequality exists in the United States also argue a consumption-based tax system, if implemented in the United States, would reduce that inequality in that such a tax system would be progressive and allow the federal government to redistribute

⁶¹ CINI & BORRAGAN, *supra* note 9, at 5.

⁶² Menendez, *supra* note 30, at 306.

⁶³ SCHENK, ET AL., *supra* note 1, at 1.

⁶⁴ NEAL, *supra* note 53, at 135.

⁶⁵ Menendez, *supra* note 30, at 307.

⁶⁶ HORSPOOL & HUMPHREYS, *supra* note 42, at 287.

⁶⁷ NEAL, *supra* note 53, at 135.

⁶⁸ CLEAVER, *supra* note 4, at 128.

⁶⁹ *Id.*

⁷⁰ PAUL KUBICEK, EUROPEAN POLITICS 273 (2012).

⁷¹ SCHENK ET AL., *supra* note 1, at 1.

⁷² *The Pros and Cons of VAT: A Last Resort*, THE ECONOMIST (Nov. 19, 2009), <http://www.economist.com/node/14903016>.

income at greater levels.⁷³ Conservatives, in contrast, have argued against the VAT tax, contending that such a tax system makes it too easy for governments to raise revenue.⁷⁴ Still other supporters argue the use of the VAT tax system in the United States would shore up the U.S. Treasury, would be less visible and easier to implement than income tax because taxable persons would not have to file returns, and would expand the tax base and help pay for cash-strapped federal programs.⁷⁵ Although a VAT tax in the United States would likely end the deduction for interest on mortgages, an advisory committee in California actually endorsed a VAT tax for that state.⁷⁶

IV. THE PURPOSE OF THIS WORK

The purpose of this work is three-fold. First, this work is designed to provide a working knowledge of the EU's VAT tax system through the lens of the ECJ's jurisprudence. Second, this paper will provide an insight into the difficulties associated with the use of a Directive and accompanying jurisprudence in an effort to harmonize an area of law across the EU's member-states. Third, and most importantly, this work will examine whether the Sixth Council Directive 77/388/EEC is having the intended effect of harmonizing the VAT tax law across the EU.

V. DECISIONS BY THE EUROPEAN COURT OF JUSTICE

This work will provide an examination of the jurisprudence of the ECJ on the Sixth Council Directive 77/388/EEC through various cases placed into thirteen categories, including profits, language and uniformity, federalism, relations between organizations, forms of business association and location of services, additional taxes implemented by member-states, method of VAT tax refunds, additional administrative requirements, specific use of goods, member-state discretion, financial transactions, tax evasion, and shifting VAT tax liability.

A. Profits

In *Kennemer Golf v. Staatssecretaris van Financien*, the ECJ answered two key questions regarding the status of organizations that wish to avoid the VAT tax that many EU countries assess on goods and services.⁷⁷ First, the ECJ stated that it is the organization, not the individual services, that is the beneficiary and source of the VAT tax exemption.⁷⁸ Second, the ECJ held

⁷³ *Inequality and Taxes: Equality Doesn't Always Mean Redistribution*, THE ECONOMIST (Dec. 1, 2011, 8:39PM), <http://www.economist.com/blogs/democracyinamerica/2011/12/inequality-and-taxes>.

⁷⁴ *Tax Policy: The VAT of the Land*, THE ECONOMIST (May 3, 2012), <http://www.economist.com/blogs/democracyinamerica/2012/05/tax-policy>.

⁷⁵ *Id.*

⁷⁶ *The Pros and Cons of VAT: A Last Resort*, THE ECONOMIST (Nov. 19, 2009), <http://www.economist.com/node/14903016>; *Tax Policy: The VAT of the Land*, THE ECONOMIST (May 3, 2012), <http://www.economist.com/blogs/democracyinamerica/2012/05/tax-policy>.

⁷⁷ Case C-174/00, *Kennemer Golf v. Staatssecretaris van Financien*, [2002] ECR I-3293, at ¶ 15.

⁷⁸ *Id.* at ¶¶ 21-22.

that organizations can still fall under the protection of Article 13 of Directive 77/388/EEC even if the organization attempts to develop budgetary surpluses (i.e., “profits”) each year on the services that they provide, so long as the proceeds are not distributed to members and the proceeds are reinvested towards the organization’s mission.⁷⁹ In reaching this conclusion, the ECJ was able to simply distinguish between profitable gain for members versus profitable gain used “to pay for the maintenance of, and the future improvements to, the facilities.”⁸⁰

What made the case at bar most interesting is that the Dutch tax authority believed that it could separate the services rendered by the organization from the overall organization because the latter did indeed possess positive revenues each year largely from membership dues and admission fees that it charged to its members, and it owned physical facilities that included a golf course and clubhouse.⁸¹

B. Language and Uniformity

In a case similar to *Kennemer Golf*, the ECJ was asked in *Institute of the Motor Industry v. Commissioners* to determine the proper purpose of tax exempt organizations under Article 13 of Directive 77/388/EEC.⁸² The Institute of the Motor Industry was a voluntary-member trade union which had as its primary purposes to improve the standards of its members at work, improve career structures for its members, and enhance the public perception of the industry and the people working in the industry.⁸³ The Institute also validated courses offered by other organizations that promoted the necessary skills for the workers within the motor industry and keeping its members informed about skill changes across the industry.⁸⁴ Similar to the condition in *Kennemer Golf*, the Institute charged a membership fee to its members.⁸⁵

The British tax authority denied the Institute VAT tax-exempt status because the former believed that the latter was not an organization included within Article 13, based on the English language use of the term “trade union.”⁸⁶ However, although the ECJ acknowledged that linguistic differences can cause problems in regard to EU law interpretation, the ECJ made it clear that one language’s version is never the “sole basis for the interpretation of that provision” and that in order to achieve uniformity in EU law, the general purpose of the provision must be examined.⁸⁷ The ECJ also stated that the aim of Directive 77/388/EEC, at least in part, is to exempt activities in the public interest from the VAT tax.⁸⁸ Further, the ECJ held that if the main

⁷⁹ *Id.* at ¶ 28.

⁸⁰ *Id.* at ¶¶ 26, 28.

⁸¹ *Id.* at ¶¶ 9-10, 13.

⁸² Case C-149/97, *Inst. of the Motor Indus. v. Comm’rs*, [1998] ECR I-7053.

⁸³ *Id.* at ¶ 12.

⁸⁴ *Id.*

⁸⁵ *Id.* at ¶ 5.

⁸⁶ *Id.* at ¶¶ 7-8, 9-12.

⁸⁷ *Id.* at ¶ 16.

⁸⁸ *Id.* at ¶ 18.

purpose of an organization is to represent the collective interests of its members, such a purpose falls within the confines of Article 13's public interest requirement.⁸⁹

C. Federalism

Virtually all federal systems of government, and specifically the levels of those federal governments, will have disagreements concerning each level's sphere of influence. In *Swedish State v. Stockholm Lindopark*, the ECJ held that the Article 13 of Directive 77/388/EEC prohibits national governments from creating their own VAT tax exemption laws.⁹⁰ Here, the ECJ heard an argument from plaintiff Stockholm Lindopark, an operator of athletic facilities, that Sweden must follow the EU Directive regarding nonprofit organizations and should have the power to craft a more limited rule on tax exemption for such organizations.⁹¹ In addition to holding that the Swedish government is bound by a federalist EU Directive, the ECJ also found that a nonprofit organization could sue the national government for back taxes paid pursuant to the national law.⁹²

The ECJ upheld similar federalist principles in *Commission v. Spain*.⁹³ Specifically in the case at bar, the Spanish government argued that language in Article 13 of Directive 77/388/EEC allowed national governments to limit the application of VAT tax-exempt status.⁹⁴ Pursuant to a 1992 law, the Spanish government had enacted a law that limited the amount in membership fees that a nonprofit organization could charge and still benefit from VAT tax exemption.⁹⁵ In deciding that the Sixth Council Directive does not allow a member-state to place limitations on VAT tax exempt status, the ECJ reasoned that some truly nonprofit organizations would lose the exemption merely because of their memberships and not because of their mission and, likewise, for-profit organizations may be able to take advantage of the Spanish law by keeping their membership fees lower.⁹⁶

D. Relations Between Organizations

In *SUFA v. Staatssecretaris van Financiën*, the ECJ dealt with the sticky issue of VAT tax application to services provided by one nonprofit organization to another nonprofit organization.⁹⁷ Here, the question was whether a nonprofit organization was entitled to a VAT

⁸⁹ *Id.* at ¶ 21.

⁹⁰ Case C-150/99, *Swedish State v. Stockholm Lindopark* [2001] ECR I-493, at ¶ 23.

⁹¹ *Id.* at ¶¶ 12-12, 19.

⁹² *Id.* at ¶¶ 35-36.

⁹³ Case C-124/96, *Comm'n v. Spain*, [1998] ECR I-2501.

⁹⁴ *Id.* at ¶¶ 14-16.

⁹⁵ *Id.* at ¶ 3.

⁹⁶ *Id.* at ¶ 17.

⁹⁷ Case C-348/87, *Stichting Uitvoering Financiële Acties ("SUFA") v. Staatssecretaris van Financiën*, [1989] ECR I-1737, at ¶ 4.

tax exemption when it provides services to a second nonprofit organization and that latter organization acts to render services for its members.⁹⁸ In response, the ECJ held that a nonprofit organization that supplies services to another organization is not exempt under Article 13 of Directive 77/388/EEC.⁹⁹ The ECJ's justification rested on its interpretation of the Directive that a VAT tax exemption requires a showing that the organization is acting on behalf of its members and is doing so independently.¹⁰⁰

E. Form of Business Association and Location of Services

The ECJ ruled in *Gregg v. Commissioners* that although a partnership may not have a legal personality under national law (here, Northern Ireland), the operators of a nursing home are entitled to a VAT tax exemption under Article 13 of Directive 77/388/EEC.¹⁰¹ In *Gregg*, the United Kingdom tax authority was not willing to extend VAT tax exemptions to a partnership operated by a married couple that offered nursing home services to patients, interpreting pursuant to UK law that a partnership was not eligible for a VAT tax exemption reserved only for "institutions."¹⁰² Article 13 of the Sixth Council Directive 77/388/EEC extends a VAT tax exemption to hospitals, medical treatment centers, similar establishments, organizations, and other entities that engage in medical care activities governed by public law as well as the supply of goods and services linked to social security and welfare.¹⁰³ UK law, pursuant to its Value Added Tax Law of 1994, extended the same VAT tax exemption to "hospitals" and "institutions."¹⁰⁴

The ECJ began its opinion by stating that the language within the Sixth Council Directive must be narrowly interpreted so as not to allow the various VAT tax exceptions to exist because the general principle behind the EU's VAT tax scheme requires that all services be subject to the VAT tax.¹⁰⁵ The ECJ believed that the various terms identified in both Directive 77/388/EEC and the UK Value Added Tax Law of 1994 were broad enough to include the activities of the plaintiffs' partnership, that the focus as to whether the EU's VAT tax system should apply must be on the activities delivered, and that the EU legislature did not intend to limit the application of the VAT tax based on the form of business association.¹⁰⁶ Furthermore, and relatedly, the ECJ believed that the principle of fiscal neutrality requires that all providers of similar services should be treated the same regardless of the form of the business association.¹⁰⁷

⁹⁸ *Id.* at ¶ 6.

⁹⁹ *Id.* at ¶ 15.

¹⁰⁰ *Id.* at ¶ 14.

¹⁰¹ Case C-216/97, *Gregg v. Comm'rs*, [1999] ECR I-4947, at ¶¶ 5, 20-21.

¹⁰² *Id.* at ¶¶ 3, 5-6.

¹⁰³ *Id.* at ¶ 4.

¹⁰⁴ *Id.* at ¶ 3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶¶ 17-19.

¹⁰⁷ *Id.* at ¶ 20.

The ECJ similarly held that pursuant to Article 13 of the Sixth Council Directive 77/388/EEC, a national government cannot condition the VAT tax exemption on the form of business association for which the organization is created.¹⁰⁸ Additionally, the ECJ has held that the tax exemption for medical services cannot be conditioned upon the location of the services and instead requires that the services, medical or therapeutic, be rendered to those in need of public welfare.¹⁰⁹ In *Ambulanter*, the German government contended that a limited liability company was not entitled to the VAT tax exemption because it was organized as such *and* that it provided medical services on an outpatient basis, often in a patient's home.¹¹⁰ Once again, the ECJ stated that the principle of fiscal neutrality prohibits member-states from implementing national law that treats economic operators of the same services differently, and the delivery of medical services is no different.¹¹¹ However, the ECJ went further and commented that its case law has been consistent in commanding that VAT tax exemptions must be dedicated to creating a common system of VAT tax espoused by Directive 77/388/EEC.¹¹² According to the ECJ, in order to be eligible for the VAT tax exemption pursuant to Directive 77/388/EEC, a particular business association is not required but rather only that medical services are rendered by a person or persons with the requisite professional qualifications.¹¹³ Furthermore, the ECJ extended the scope of the Sixth Council Directive 77/388/EEC to apply to general care and domestic help through outpatient services under Article 13's category of "supply of services," which are linked to welfare and social security, and more importantly, gave notice to economic actors that they can rely on Article 13's provisions to combat national law not in conformity with this principle.¹¹⁴

F. Additional Taxes Implemented by Member-States

In *GIL Insurance Ltd and Others v. Commissioners*, the ECJ made it clear that a VAT tax can legally be separated from other taxes, duties, and charges issued by a member-state based one of the characteristics that a VAT tax must contain, including that the VAT applies generally to transactions relating to goods or services; the levy is proportional to the value of the goods or services and the volume of transactions for which the levy applies; the levy is charged at each stage of production; and the levy is applied to the added value of the goods and services.¹¹⁵ The plaintiffs, including GIL Insurance and other insurance providers, contended that the United Kingdom's special taxation system for domestic appliances, motor cars, and travel services violated Articles 33 and 27 of the Sixth Council Directive 77/388/EEC because the Sixth Council

¹⁰⁸ Case C-141/00, *Ambulanter GmbH v. Finanzamt für Körperschaften I*, [2002] ECR I-6833, at ¶¶ 30-31.

¹⁰⁹ *Id.* at ¶ 44.

¹¹⁰ *Id.* at ¶¶ 21-24, 33.

¹¹¹ *Id.* at ¶ 30.

¹¹² *Id.* at ¶ 25.

¹¹³ *Id.* at ¶¶ 27.

¹¹⁴ *Id.* at ¶ 61.

¹¹⁵ Case C-308/01, *GIL Ins. Ltd et al. v. Comm'rs*, [2004] ECR I-4777, at ¶¶ 32-33.

Directive requires member-states to get permission from the EU Council to impose a higher rate of VAT on insurance contracts and the United Kingdom's Insurance Premium Tax ("IPT") was not a VAT tax in that it did not apply generally to all goods and services.¹¹⁶

The United Kingdom's IPT (implemented in 1994) applied a tax rate of 2.5% on the receipt of insurance premiums by an entity providing insurance services but was supplemented in 1997 by a new rate of 4.0% and a higher rate of 17.5% on insurance premiums associated with motor cars, domestic appliances (when the insurance is sold by an entity associated with the supplier of the appliance), and travel services (travel insurance sold through travel agents) applied at the same time the VAT tax was applied.¹¹⁷ The British government, in an attempt to change consumer behavior through its taxation system and raise revenue, contended that the IPT was enacted in order to assess all insurance contracts at the same, lower rate of 2.5% (then 4.0%), which was lower than the 17.5% VAT tax rate on contracts for the repair and maintenance of appliances sold or rented (which was also exempted), with the end goal of getting consumers to purchase traditional insurance from traditional insurers and thus pay the non-exempted 4.0% on the insurance contract.¹¹⁸ However, the IPT was not successful. Thus, the British government moved the IPT to the VAT rate and applied it only to certain types of insurance contracts and associated insurance transactions involving domestic appliances, motor cars, and travel services, with the belief that suppliers of these products could easily manipulate prices of the appliances and the associated insurance contracts.¹¹⁹

Three key provisions of the Sixth Council Directive were important in the case at bar. Article 33 of the Sixth Council Directive 77/388/EEC allows member-states to put forth taxes on insurance contracts so long as these taxes are not turnover taxes and so long as those imposed taxes do not interfere with trade between and among member-states.¹²⁰ Article 27 of the Sixth Council Directive allows the EU Council to grant permission to a member-state to introduce special tax measures that otherwise would interfere with the general intent of the Sixth Council Directive in order to prevent tax evasion or tax avoidance so long as those special tax measures do not affect the total amount of tax due at the final consumption stage.¹²¹ Lastly, Article 13 of the Sixth Council Directive provides for a general exemption of VAT taxes pursuant to insurance and reinsurance transactions and related services conducted by insurance brokers and agents.¹²²

On the question of whether a member-state can introduce a levy on insurance premiums that looks like a VAT tax but is not considered to be a VAT tax by that member-state's government, the ECJ found the United Kingdom's IPT did not violate Article 33 of Directive 77/388/EEC.¹²³ The plaintiffs contended that the higher rate IPT was a special tax charged on

¹¹⁶ *Id.* at ¶¶ 18, 22.

¹¹⁷ *Id.* at ¶¶ 7-10, 12. Travel insurance sold directly by insurers would be taxed the traditional 4.0% rate for both domestic appliances and travel services. *Id.* at ¶ 10, 12.

¹¹⁸ *Id.* at ¶¶ 14-16.

¹¹⁹ *Id.* at ¶ 16.

¹²⁰ *Id.* at ¶ 5.

¹²¹ *Id.* at ¶ 4.

¹²² *Id.* at ¶ 3.

¹²³ *Id.* at ¶¶ 22, 37.

insurance services and constituted a turnover tax prohibited by Article 33 since the tax met many of the criteria for a VAT tax but did not apply to all economic transactions.¹²⁴ Contrary to this position, the ECJ stated that member-states are able to impose taxes that do not meet one or all of the main characteristics of a traditional VAT tax, including the levy which is not a VAT tax not reaching all economic transactions.¹²⁵ The ECJ also believed that the IPT was allowed by Article 33 despite the fact that it did not match the VAT tax because it was not assessed at each point of production and distribution, only assessed at the conclusion of the insurance contract and did not apply to the added value of the services.¹²⁶

The ECJ next addressed whether Article 27 of the Sixth Council Directive of Directive 77/388/EEC prohibits a member-state's implementation of a levy on insurance premiums at a special rate, yet identical to the VAT tax rate, without seeking prior approval from the EU Council.¹²⁷ The plaintiffs asserted that the United Kingdom government was obliged to seek permission from the EU Council to impose a higher IPT on an insurance contract with the goal of limiting tax avoidance.¹²⁸ The United Kingdom countered that interested parties such as the plaintiffs should have realized that member-states had the authority to impose a higher rate of taxation on insurance contracts pursuant to Article 13 of the Sixth Council Directive in order to compensate for losses due to Article 13's provision for exemption of VAT on insurance premiums.¹²⁹ The ECJ agreed with the United Kingdom's position, holding that Article 27 of the Sixth Council Directive should be interpreted as to allow a member-state to impose a higher rate of taxation, separate from the VAT tax, without having to make a separate request to the EU Council to do so; and thus member-states can impose different tax rates on insurance contracts freely. The ECJ also held that the IPT was not a turnover tax as prohibited by Article 33.¹³⁰

The ECJ gave member-states freedom to levy taxes on transactions subject to the VAT tax so long as the taxes cannot be deemed turnover taxes.¹³¹ In *Kerrutt v. Finanzamt*, a German couple was ordered to pay taxes on a series of contracts that included the purchase of the grounds for a new apartment building, as well as the for the construction of the building, the supervision of the construction, documentation expenses, finance procurement, and general management.¹³² Specifically, the Kerrutts claimed that although the contractual provisions for the supply of building materials would be subject to the VAT tax, the contractual provisions for the land acquisition should be exempt under Directive 77/388/EEC, which prohibits double taxation by a member-state through the imposition of transfer taxes or VAT taxes on the same transaction

¹²⁴ *Id.* at ¶¶ 24, 25.

¹²⁵ *Id.* at ¶¶ 33, 34, 35.

¹²⁶ *Id.* at ¶ 36.

¹²⁷ *Id.* at ¶ 38.

¹²⁸ *Id.* at ¶ 39.

¹²⁹ *Id.* at ¶ 40.

¹³⁰ *Id.* at ¶ 44.

¹³¹ Case C-73/85, *Hans-Dieter and Ute Kerrutt v. Finanzamt Monchegelegbach-Mitte*, [1986] ECR 2219, at ¶ 23.

¹³² *Id.* at ¶ 3.

because in their opinion the entire group of activities amounted to one transaction.¹³³ In contrast to the position of the Kerrutts, the German government and the EU Commission contended that the individual activities the couple engaged in amounted to several, individual transactions instead of just one transaction that would be exempt pursuant to Directive 77/388/EEC since none of the activities qualified for an exemption.¹³⁴

The ECJ held that no provision of EU law, including Directive 77/388/EEC, prohibits a member-state from maintaining a tax regime that allows for a transaction to be taxed through a VAT tax and any other tax so long as the latter tax is not a turnover tax, even if the transaction is subject to what would otherwise constitute double taxation.¹³⁵ Making the ending jurisprudence easier for the ECJ was its answer to the first question. The ECJ answered affirmatively whether the contract for the purchase of goods and services supporting a building's construction was subject to the VAT tax.¹³⁶ However, the ECJ did state that the actual purchase of the property on which the building would be placed was not subject to the VAT tax.¹³⁷

Although the ECJ recognized the need for tax harmonization across the EU, while agreeing with the German government and the European Commission, the ECJ could not find any prohibition or limitation on a member-state's desire to tax the transaction in the case at bar anywhere in EU law and thus EU law does allow for a concurrent taxation system.¹³⁸

G. Method of VAT Tax Refunds

The Sixth Council Directive 77/388/EEC was amended by Directive 95/7/EC with the intent of simplifying the implementation of measures associated with the VAT tax.¹³⁹ Articles 17 and 18 of Directive 77/388/EEC, collectively, require member-states to allow taxable persons to deduct immediately from their VAT liability, as appropriate, when the deduction amount exceeds the amount of the tax due.¹⁴⁰ Also, according to Articles 17 and 18, the member-state can either issue a refund or allow the taxable person to carry the excess forward to the next taxing period.¹⁴¹ If the potential amount of the deduction is insignificant, the member-state need not allow for a refund or a carry forward.¹⁴² Italian law, however, provided that the Italian

¹³³ *Id.* at ¶ 8.

¹³⁴ *Id.* at ¶¶ 9-10.

¹³⁵ *Id.* at ¶ 22.

¹³⁶ *Id.* at ¶ 18.

¹³⁷ *Id.*

¹³⁸ *Id.* at 20, 22.

¹³⁹ Case C-78/00, *Comm'n v. Italian Republic*, [2001] ECR I-8195, at ¶ 1.

¹⁴⁰ *Id.* at ¶¶ 2, 3.

¹⁴¹ *Id.* at ¶ 3.

¹⁴² *Id.*

government, in lieu of a refund or a carry-forward provision, would issue a bond in the amount of the deduction to the taxable person.¹⁴³

The EU Commission issued a complaint against Italy contending that the Italian policy on refundable VAT taxes was in violation of Directive 77/388/EEC.¹⁴⁴ According to the EU Commission, the Directive provided for a taxable party's right to deduct the excess VAT tax it has paid and mandated that member-state governments to make the refunds immediate.¹⁴⁵ The EU Commission further reasoned that the taxable entities may need access to those funds as part of their working capital and, if ordered to hold government bonds, may need to access a loan from a bank that may charge a higher rate of interest than what is paid on the government bond.¹⁴⁶

The ECJ found that the Italian government's policy was in violation of Directive 77/388/EEC, and in doing so, rejected several arguments put forth by Italy as it attempted to provide justification for forcing taxable persons to accept bonds in lieu of an immediate refund and/or allowing for the excess VAT taxes to carry forward.¹⁴⁷ First, and perhaps most importantly, the ECJ held that the VAT taxation system was common and that all taxable persons across all member-states in the EU should be held to the same standards and benefits, resulting in a neutral taxation system.¹⁴⁸ Second, the ECJ stated the full credit owed to a taxable person must be the result of the member-state's action, and the refund must be in liquid means or an equivalent form and must be realized in a reasonable period of time, during which the Italian bonds ran the risk of not being liquid, would not result in a reasonable time for the VAT tax deduction, and might not allow for a full recovery of the value of the deduction.¹⁴⁹ Third, according to the ECJ, it did not matter that there were few firms that would actually hold the Italian bonds as part of its excess VAT tax deduction plan.¹⁵⁰ Fourth, and certainly crucial to the functioning of the EU, the ECJ did not excuse the Italian government's policy in light of the fact that Italy contended that it could not meet all of the obligations accrued by VAT tax refunds owed to taxable persons if the government were to strictly adhere to Directive 77/388/ECC.¹⁵¹

The ECJ has held, however, that the determination of whether a derogation is proportionate to a member-state's stated needs regarding its VAT tax system is best left to a

¹⁴³ *Id.* at ¶¶ 5, 6. The bonds issued by the Italian government were of five-year and ten-year maturities. *Id.* at ¶15.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at ¶ 16.

¹⁴⁶ *Id.* at ¶ 19.

¹⁴⁷ *Id.* at ¶ 39.

¹⁴⁸ *Id.* at ¶ 30.

¹⁴⁹ *Id.* at ¶¶ 34, 36.

¹⁵⁰ *Id.* at ¶ 37.

¹⁵¹ *Id.* at ¶ 38.

national court.¹⁵² Regardless, in *Molenheide v. Belgium*, the ECJ did state that some member-state legislation in the form of an attempted derogation from Directive 77/388/EEC, such as using a date different from the date when the retained VAT balance would have been otherwise paid to calculate the appropriate amount of interest, would not be proportionate to a member-state's interest.¹⁵³ Regardless, the ECJ left it for the national courts to determine whether Belgium's VAT tax withholding regulation, employed to prevent tax evasion and dubbed "preventive attachment," was acceptable given that Directive 77/388/EEC requires member-states to either refund eligible VAT tax funds or to carry the refund amount forward to the next year.¹⁵⁴ Pursuant to the Belgian legislation, the Belgian government could engage in a preventive attachment proceeding which withholds potentially refundable VAT taxes to taxable persons upon the presentment of an official report containing a presumption or evidence of ineligibility for a refund and serving the official report to the taxable person.¹⁵⁵ The retained VAT tax funds would remain retained until the presumption or evidence was refuted.¹⁵⁶ The taxable person could only attack the preventive attachment in court but the court itself could not order the release of funds until the presumption or evidence was refuted.¹⁵⁷

In all four of the cases consolidated by the ECJ, the Belgian government articulated grounds for maintaining a preventive attachment of VAT tax funds that the plaintiffs (taxable persons) argued should have been refunded to them.¹⁵⁸ Specifically, the plaintiffs contended that Directive 77/388/EEC only allowed a member-state to either refund the VAT tax funds to be deducted and carried forward and thus the Directive did not allow a member-state to engage in "preventive attachment" procedure.¹⁵⁹

In *Molenheide*, the ECJ gave perhaps its best articulation of the provision of the Sixth Council Directive 77/388/EEC, requiring a uniform VAT tax system and harmonization of VAT tax throughout the EU. The ECJ stated that the Sixth Council Directive was designed to harmonize the rules across the member-states on the subject of allowable deductions.¹⁶⁰ The ECJ then stated that although Directive 77/388/EEC does not expressly prohibit the preventive attachment method, a member-state must still show that this method of ensuring tax compliance is proportional.¹⁶¹ Proportionality, according to the ECJ, means that although a member-state

¹⁵² Case C-286/94, *Molenheide BVBA v. Belgium*; Case C-340/95, *Peter Schepens v. Belgium*; Case C-47/96, *Bureau Rik Decan-Business Research & Dev. NV*; and Case C-401/95, *Sanders BVBA v. Belgium*, [1997] ECR I-07281, at ¶ 64.

¹⁵³ *Id.* at ¶ 63.

¹⁵⁴ *Id.* at ¶¶ 4-6.

¹⁵⁵ *Id.* at ¶ 6.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at ¶¶ 36, 38.

¹⁵⁹ *Id.* at ¶ 38.

¹⁶⁰ *Id.* at ¶ 42.

¹⁶¹ *Id.* at ¶ 44-46.

may impose regulations designed to protect its finances, the regulations cannot undermine the EU requirement that there exist a common VAT tax system or fundamental requirement of that common VAT tax system, which is the right to deduct VAT tax when appropriate.¹⁶²

Of chief importance while arguing that the preventive attachment method was disproportionate and thus a violation of Directive 77/388/EEC, the plaintiffs stated that the Belgian preventive attachment system was absolute whenever a VAT tax dispute occurred and because compulsory, there was an irrebuttable presumption that goes much further than necessary to ensure tax compliance.¹⁶³ The ECJ agreed with the plaintiffs and found that the Belgian system created an irrebuttable presumption in favor of the government that, in turn, also denied taxable persons seeking a VAT tax reduction a denial of judicial review and together such a system would be disproportionate to Belgium's interests in maintaining a VAT tax system free from tax evasion.¹⁶⁴ Likewise, the ECJ agreed with the plaintiffs that use of a date, other than that on which the VAT tax refund was due, to calculate interest the Belgian government would have to pay on funds subject to a preventive attachment is disproportionate as measured against the goal of maintaining an effective VAT tax system.¹⁶⁵

H. Additional Administrative Requirements

Article 11 of Directive 77/388/EEC is designed to foster the harmonization of VAT taxes throughout the EU by fixing the taxable amount of VAT.¹⁶⁶ Article 27, however, allows member-states to engage in derogations of that fixed amount founded in Article 11 when attempting to simplify procedures for charging VAT taxes.¹⁶⁷ In *Commission v. Belgium*, the ECJ found Belgium's derogations, which allowed for variations of the VAT tax based on the age of the car at the time of sale, the use of the car, and the difference between the catalog price and the stated minimum price, to violate the tenets of Directive 77/388/EEC.¹⁶⁸

Belgian law stated that, generally, cars sold in or imported into Belgium were to be assessed a VAT tax not lower than the catalog price, but when the car has been used by a manufacturer or dealer for the manufacturer's or dealer's own use (an "appropriated car"), the VAT tax charged would be only the catalog price assessed to a new car if the car was sold within six months.¹⁶⁹ If the appropriated car was sold between six months and eighteen months, the VAT tax assessed would be equal to the amount of the difference between the catalog price and the sale price.¹⁷⁰ Lastly, if the appropriated car was sold later than eighteen months, the VAT tax

¹⁶² *Id.* at ¶ 47.

¹⁶³ *Id.* at ¶¶ 50-52.

¹⁶⁴ *Id.* at ¶¶ 52, 55, 57.

¹⁶⁵ *Id.* at ¶ 63.

¹⁶⁶ Case C-324/82, *European Comm'n v. Belgium*, [1984] ECR 1861, at ¶ 19.

¹⁶⁷ *Id.* at ¶ 21.

¹⁶⁸ *Id.* at ¶¶ 4-8.

¹⁶⁹ *Id.* at ¶ 4.

¹⁷⁰ *Id.*

charged would be based on the purchase price or the cost price of a similar, new version of the appropriated car.¹⁷¹ Belgian law also identified the catalog price of a car to be freely fixed by a manufacturer for a car sold in Belgium but set by an authorized agent if the car was sold outside of Belgium.¹⁷²

In bringing the complaint, the EU Commission contended that the derogations Belgium had made for appropriated cars was not acceptable within the scope of Article 27 of Directive 77/388/EEC because the derogations were too general in character and potentially harm the uniformity set in Article 11, which requires a fixed, taxable amount of VAT assessed to goods and services.¹⁷³ Also, the EU Commission did not find legitimacy in Belgium's argument that the derogations were needed to combat tax evasion or simplify the VAT tax system and that Belgium could implement less coercive measures.¹⁷⁴

In contrast, Belgium argued that Article 27's derogations provisions do not set limits on member-states' ability to set such exceptions and the only real limitation is that a member-state's derogations cannot affect the amount of tax charged at the final consumption stage.¹⁷⁵ Additionally, Belgium contended that its set of derogations was not disproportionate to its aims of curbing tax evasion in the auto sales sector through several acts such as false declarations of new car prices, part-exchanges associated with used cars, and the unpaid input taxes deducted by buyers.¹⁷⁶

The ECJ did not find merit in Belgium's derogations. Specifically, the ECJ found the use of Belgian catalog prices to be a real threat to price standardization and that the derogations from Article 11 were not needed to prevent tax evasion and thus were disproportionate to the goals of the member-state.¹⁷⁷ The ECJ further stated that Belgium breached Article 11 of Directive 77/388/EEC for the VAT tax assessment of both domestically-produced and imported cars.¹⁷⁸

Despite the flexibility afforded member-states pursuant to Directive 77/388/EEC, member-states cannot put forth additional requirements that make the right to deduct VAT taxes either practically impossible or excessively difficult.¹⁷⁹ In *EGI v. Belgium*, the ECJ held that although it is within the member-state's authority under Directive 77/388/EEC to require taxable parties to hold an invoice of particulars associated with sold goods, any additional information required by a member-state must be limited to what is required for that member-state to ensure

¹⁷¹ *Id.*

¹⁷² *Id.* at ¶ 6.

¹⁷³ *Id.* at ¶¶ 19, 22.

¹⁷⁴ *Id.* at ¶ 23. The Commission suggested that Belgium could utilize cross-checks between stocks of cars and dealers' sales. *Id.*

¹⁷⁵ *Id.* at ¶ 24.

¹⁷⁶ *Id.* at ¶ 25.

¹⁷⁷ *Id.* at ¶ 31, 32.

¹⁷⁸ *Id.* at ¶ 34.

¹⁷⁹ Case C-123/87, *Lea Jorion, nee Jeunehomme, and Societe anonyme d'etude et de gestion immobiliere EGI v. Belgian State*, [1988] ECR 4517, at ¶ 17.

the accuracy in the levied VAT and supervision of the VAT system.¹⁸⁰ Directive 77/388/EEC requires only that, in order to gain the deduction of VAT payable or already paid, the taxable party must hold an invoice reflecting the price of the good(s) exclusive of tax, the corresponding tax at each rate, and any exemptions.¹⁸¹ The Directive also allows member-states to determine which form of information would serve as an invoice or equivalent.¹⁸² According to Belgian law, those seeking a VAT tax deduction on the purchase of an automobile must not only possess the information required by Directive 77/388/EEC, but must also hold information on the type of vehicle, fittings, accessories, make, model, year, cylinder capacity, horsepower, bodywork model, chassis number, and the year of registration.¹⁸³

In the first of two joined cases, the Belgian government denied Mrs. Jorion's request for a refund of VAT tax on cars based on the Belgian government's belief that too many irregularities existed in the proffered paperwork, including that the serial number on the car was omitted, deleted VAT tax numbers were used, different signatures appeared throughout the documents, and some fictitious addresses were found.¹⁸⁴ In the second case, the Belgian government was demanding repayment of deducted VAT taxes due to a lack of VAT tax registration numbers of suppliers, the absence of a date on which the goods were supplied and services completed, and an inadequate description.¹⁸⁵

According to the ECJ, Directive 77/388/EEC only requires that a required invoice contain enough information allowing a member-state government to determine whether it will permit a deduction of VAT taxes.¹⁸⁶ However, although the ECJ stated that it is for a member-state's national court to determine as such, when the additional sources of information required by a member-state exceed what is necessary to determine whether VAT taxes can be deducted, that member-state violates the Directive.¹⁸⁷

In *Ampliscientifica Srl v. Ministero dell'Economia e delle Finanze*, the ECJ stated that the well-established principles of fiscal neutrality, prohibition of the abuse of rights, and the principle of proportionality as they apply to the Sixth Council Directive 77/388/EEC do not limit a member-state's ability to put in place a requirement that parent firms hold 50% of a subsidiary's share capital or stock at the beginning of the tax year, by which the parent company declares a significant tie between it and the subsidiary in order to simplify its VAT tax assessment under that member-state's law.¹⁸⁸ Article 4 of the Sixth Council Directive states that a "taxable person" is a person who independently carries on an economic activity and, subject to

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at ¶ 14.

¹⁸² *Id.*

¹⁸³ *Id.* at ¶ 8.

¹⁸⁴ *Id.* at ¶¶ 3, 4.

¹⁸⁵ *Id.* at ¶¶ 5, 6.

¹⁸⁶ *Id.* at ¶ 16.

¹⁸⁷ *Id.* at ¶¶ 17-19.

¹⁸⁸ Case C-162/07, *Ampliscientifica Srl v. Ministero dell'Economia e delle Finanze*, [2008] ECR I-4019, at ¶ 32.

Article 29 of the Sixth Council Directive, allows member-states to treat several taxable persons as one taxable person for VAT tax purposes if those persons are closely tied together through financial means, economic means, and/or organizational means.¹⁸⁹ Article 27(1) states that the EU Council can allow a member-state a derogation when the member-state is attempting to simplify the procedure for charging tax and/or prevent tax evasion so long as the taxable amount due is realized at the final consumption stage.¹⁹⁰

Pursuant to the Sixth Council Directive 77/388/EEC, the Italian government enacted a law allowing parent firms to add their subsidiaries to create one taxable entity, and the parent firm could declare that subsidiary so long as both the parent and subsidiary were located within the same jurisdiction and the parent owns at least 50% of the shares of the subsidiary at the beginning of the calendar year.¹⁹¹ Also, according to the Italian law, the parent would have to be able to act on behalf of the subsidiary, and the parent must claim the VAT tax number of the subsidiary or subsidiaries as its own.¹⁹² In *Ampliscientifica*, both the *Ampliscientifica* and *Amplifin* firms were subsidiaries of the parent *Amplifon* firm whereby more than 50% of the shares of *Ampliscientifica* were owned by *Amplifon*, and 99% of the shares of *Amplifin* were owned by *Amplifon*.¹⁹³ When *Amplifin* was deemed ineligible to make the declaration that *Ampliscientifica* was a subsidiary for VAT tax purposes, the firm objected and petitioned the Italian courts, which in turn sent the case to the ECJ for clarification.¹⁹⁴

The ECJ made three very important statements about the ability of a member-state to create a derogation that would comply with the Sixth Council Directive 77/388/EEC. First, concerning the principle of fiscal neutrality, member-states must make sure they do not treat similar goods that are in competition with each other differently within their VAT tax regime.¹⁹⁵ More narrowly, the ECJ stated that the Italian government's requirements for blending a parent and a subsidiary together for VAT tax purposes does not violate the principle of fiscal neutrality in that the Italian law is merely making compliance with the VAT tax system easier regarding payment procedures.¹⁹⁶ Second, the ECJ clarified that the abuse-of-rights principle was designed to make sure that EU law, especially in regard to the EU-wide VAT tax regime, was not used to cover abusive practices by taxable persons but could be used to prohibit artificial arrangements and thus the Italian law requiring a full-tax year relationship between the parent and the subsidiary which do not reflect economic reality and are designed only to gain a tax advantage.¹⁹⁷ Directly, the ECJ stated that the Italian law was a valid means to combat tax

¹⁸⁹ *Id.* at ¶¶ 3, 4.

¹⁹⁰ *Id.* at ¶ 5.

¹⁹¹ *Id.* at ¶ 7.

¹⁹² *Id.* at ¶¶ 8-10.

¹⁹³ *Id.* at ¶¶ 12-13.

¹⁹⁴ *Id.* at ¶¶ 13-16.

¹⁹⁵ *Id.* at ¶ 25.

¹⁹⁶ *Id.* at ¶ 26.

¹⁹⁷ *Id.* at ¶¶ 27-28.

evasion, avoidance, or abuse, which is encouraged by the Sixth Council Directive.¹⁹⁸ Third, on the subject of the principle of proportionality, the ECJ accepted the yearlong tax period as a condition that was not disproportionate to the objective set forth in the Italian law to attack tax evasion and “bogus legal arrangements.”¹⁹⁹ In fact, the ECJ commented that an arrangement that was not at least a year in existence could lead to ad hoc legal relationships designed to merely defraud.²⁰⁰

I. Specific Use of Goods

According to the ECJ in *Talacre Beach v. United Kingdom*, a member-state may tax a good and contents within that good at separate VAT tax rates.²⁰¹ Talacre Beach was a UK-based recreational vehicle sales firm specializing in the sale of caravans and the contents inside the caravan, which included dining tables, chairs, stools, beds, and floor coverings.²⁰² Pursuant to UK tax law, the caravans were subject to a zero rate of VAT tax; however, the UK government believed that any sale of a caravan with the various contents identified above would be subject to a VAT tax on the contents even if the caravan itself was subject to a zero VAT tax rate.²⁰³ In contrast, Talacre Beach believed that the caravans and the contents therein constitute a single, indivisible sale, and since the caravans were subject to a zero VAT tax rate, the contents sold within the caravan should also be subject to a zero VAT tax rate.²⁰⁴

The Sixth Council Directive 77/388/EEC allows a member-state to assess zero rates for some sales transactions, and those transactions are to be considered exemptions for purposes of the VAT tax.²⁰⁵ However, any such reduced rates adopted by a member-state must have been in place on January 1, 1991.²⁰⁶

The ECJ stated in its decision that there was nothing in EU law that prevented a member-state from allowing one element of a good to be taxed at one rate (the caravan) and other elements to be taxed at other rates (the items within the caravan) in a way that would jeopardize the integrity of the EU-wide VAT tax system.²⁰⁷ The ECJ did acknowledge that much of the case law on the topic suggested that the single sale of an item or group of items as a whole should be taxed at one VAT tax rate, and that same case law did not completely prohibit the

¹⁹⁸ *Id.* at ¶¶ 29-30.

¹⁹⁹ *Id.* at ¶¶ 31.

²⁰⁰ *Id.*

²⁰¹ Case C-251/05, *Talacre Beach Caravan Sales Ltd. v. Comm’rs of Customs & Excise*, [2006] ECR I-6269, at ¶ 27.

²⁰² *Id.* at ¶¶ 3-4.

²⁰³ *Id.* at ¶¶ 5, 7, 9.

²⁰⁴ *Id.* at ¶¶ 5-6.

²⁰⁵ *Id.* at ¶ 8.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at ¶ 26.

items within the group in a single sale to be taxed at different rates within the Sixth Council Directive 77/388/EEC.²⁰⁸

The ECJ provided one of its best evaluations of the ability to deduct from the VAT tax in *Commissioners of Customs and Excise v. Midland*.²⁰⁹ In *Midland*, the ECJ explained that the Sixth Council Directive 77/388/EEC maintains a deduction system that is designed to relieve a trader in goods and services of the burden of the VAT tax payable or previously paid in the course of the trader's economic activities provided that those same activities are subject to the VAT tax.²¹⁰ The ECJ additionally commented that Directive 77/388/EEC, specifically Article 17 of the Sixth Council Directive, requires a direct and immediate link between the goods and services acquired by a trader and the transaction or transactions that follow, which are also subject to the VAT tax before a deduction can be earned.²¹¹ However, the ECJ also stated that the right to deduct from the VAT tax exists if the trader has been unable to use the goods or services that serve as inputs into a later transaction that is subject to the VAT tax and the inability to do so is beyond the control of the trader.²¹² Furthermore, the ECJ contended that an exception can be made in special circumstances to the general rule when a direct and immediate link between the goods and services the trader purchased and the later transaction giving rise to the ability to deduct cannot be established.²¹³

The ECJ also answered a second question in *Midland* on the issue of whether a trader can deduct VAT tax in a later transaction for expenses related to the securing of goods and services that support the later transaction but where the later transaction was supported by those goods and services merely by consequence.²¹⁴ According to the ECJ, the only way by which the trader could deduct from the VAT tax in that situation is if the trader can show by means of objective evidence that the expenses associated with acquiring the goods and services supported some of the components of the later transaction subject to the VAT tax.²¹⁵ Similarly, the ECJ also stated that it should be the determination of the reviewing national court to find that cases whereby the purchased goods and services support some of the components of a later transaction subject to the VAT tax in a mere consequential manner.²¹⁶

The facts of *Midland* are worth description. Here, the United Kingdom tax authorities challenged the ability of the Midland firm to deduct legal expenses from stemming from a lawsuit that was related to an attempt to purchase a component of another firm.²¹⁷ Although

²⁰⁸ *Id.* at ¶ 24.

²⁰⁹ Case C-98/98, *Comm'rs of Customs and Excise v. Midland Bank plc*, [2000] ECR I-4177.

²¹⁰ *Id.* at ¶ 19.

²¹¹ *Id.* at ¶ 24.

²¹² *Id.* at ¶ 22.

²¹³ *Id.* at ¶ 22.

²¹⁴ *Id.* at ¶ 27.

²¹⁵ *Id.* at ¶ 33.

²¹⁶ *Id.* at ¶ 33.

²¹⁷ *Id.* at ¶¶ 8-11.

Midland attempted to deduct the goods and services purchased (the legal services) to engage in the purchase of another firm, which is a transaction subject to the VAT tax and a deduction for goods and services purchased to support that transaction, the British government believed that the legal services were related to Midland's business generally, specifically the lawsuit, and not to the attempt to purchase another firm.²¹⁸ However, the British government did suggest that some, but not all of the legal services could be deducted from the VAT tax.²¹⁹

Article 17 of the Sixth Council Directive states that the right to deduct goods and services from the VAT tax occurs only when a later transaction gives rise to a VAT tax charge and allows for the deduction of VAT tax when the goods and services support a later transaction, when those same goods and services are consumed both in cases, and when the later transaction is exempt from the VAT tax and when not exempt from the VAT tax.²²⁰ However, Article 17 also allows for a proportional deduction from the VAT tax in cases where two or more later transactions giving rise to the VAT tax are supported by goods and services purchased by the trader, and only the goods and services purchased by the trader may be deducted that support the transaction or transactions that allow for a deduction.²²¹

Although the ECJ would allow for deductions pursuant to Article 17 of the Sixth Council Directive 77/388/EEC, the ECJ made it clear that the factual determinations should be left to national courts in cases where a direct and immediate link cannot be established between the trader's purchased goods and services and the trader's later transaction due to circumstances beyond the trader's control, or where the goods and services support part of the later transactions that give rise to a VAT tax deduction.²²²

Article 2 of the Sixth Council Directive 77/388/EEC states that the VAT tax is applicable to the sale of goods or services sold within a member-state by a taxable person while Article 5(1) of the Sixth Council Directive defines the sale of goods as the transfer of the right to dispose of tangible property as the owner.²²³ Article 5(8) of the Sixth Council Directive further provides that when the property is transferred to a new owner, in order to determine whether the sale includes a partial or a total transfer of assets, member-states may consider that no supply of goods has taken place and, when doing so, the recipient owner will be treated as a successor to the transferor. When appropriate, the member-state can also enact measures to prevent distortion of competition when that same successor is not wholly liable to pay taxes.²²⁴ Article 17(2) of the Sixth Council Directive provides that when goods are purchased for taxable transactions, the taxable person who is also the purchaser of those same goods is entitled to a VAT tax deduction.²²⁵ In *Zita Modes Sarl v. Administration de l'enregistrement et des domaines*, the ECJ

²¹⁸ *Id.* at ¶ 15.

²¹⁹ *Id.* at ¶ 13.

²²⁰ *Id.* at ¶ 5.

²²¹ *Id.*

²²² *Id.* at ¶¶ 25, 33.

²²³ Case C-497/01, *Zita Modes Sarl v. Administration de l'enregistrement et des domaines*, [2003] ECR I-14393, at ¶¶ 3, 4.

²²⁴ *Id.* at ¶ 5.

²²⁵ *Id.* at ¶ 6.

held that member-states can determine that a sale of a business's totality of assets to a successor taxable person includes no supply of goods for the purposes of the VAT tax, but when doing so, that member-state must only use such a determination in order to prevent distortion in competition.²²⁶

In *Zita Modes*, the plaintiff firm, Zita Modes, sold to another firm, Milady, a ready-to-wear clothing business and the accompanying invoice claimed that the transaction was not subject to the VAT tax in Luxembourg.²²⁷ Pursuant to Luxembourg tax law, like Article 5(1) of the Sixth Council Directive, the supply of goods applies to the transfer of ownership rights whereby the successor may dispose of the tangible property as the owner, but also provided that the transfer of a totality of assets or partial assets is not to be deemed a supply of goods.²²⁸ Following the sale of the ready-to-wear clothing business to Milady, a perfumery, the Luxembourg tax authorities notified Zita Modes that since Milady did not continue the business sold to it (ready-to-wear clothing), the Luxembourg tax law did not apply and thus no VAT tax deduction would be allowed pursuant to Article 17(2) of the Sixth Council Directive of Directive 77/388/EEC.²²⁹ Zita Modes countered that the Luxembourg tax law did not specifically state that the successor business had to maintain business operations, and since both the buyer and seller were taxable persons, there should be a full refund of the VAT tax.²³⁰

The ECJ made several important statements about the nature of such a transaction for VAT tax purposes, concluding that Article 5(8) of the Sixth Council Directive of Directive 77/388/EEC allows a member-state to determine that no supply of goods has taken place in a sale of a business between taxable persons, even if the totality of assets has been transferred.²³¹ The ECJ also concluded that a member-state can require the buyer to continue the same business operations as the seller in order to be exempt from the VAT tax.²³² First, when a member-state uses its discretion to determine that the no-supply-of-goods rule applies to a transaction between a seller and a buyer, the VAT tax is simply not applicable.²³³ Second, this discretion can only be used to favor a transferee of the sale in order to avoid the distortion of competition.²³⁴ The ECJ commented that these two requirements are founded in the purpose of the Sixth Council Directive, which is to make sure that the VAT tax system applies uniformly across the member-states and prevents divergences in interpretation from member-state to member-state.²³⁵

²²⁶ *Id.* at ¶ 46.

²²⁷ *Id.* at ¶ 9.

²²⁸ *Id.* at ¶¶ 4, 7, 8.

²²⁹ *Id.* at ¶¶ 11, 13.

²³⁰ *Id.* at ¶ 12.

²³¹ *Id.* at ¶ 20.

²³² *Id.*

²³³ *Id.* at ¶ 29.

²³⁴ *Id.* at ¶ 30.

²³⁵ *Id.* at ¶ 31.

Third, the ECJ remarked that member-states must exercise their discretion pursuant to Article 5(8) in a way that simplifies the transfer of assets from a buyer to a seller in a way that also prevents the overburdening of the transferee's assets, which, without the use of protective discretion, would otherwise bear the costs of the VAT tax.²³⁶ Fourth, the ECJ determined that member-states' use of discretion when deciding whether no supply of goods has taken place in a sale of assets must apply to all transactions and not just certain transfers of assets.²³⁷ Fifth, the same discretion must also apply in cases where the buyer purchases the assets but does not have the member-state's permission to engage in the same business as the seller.²³⁸

J. Member-State Discretion

In *Jetair NV v. FOD Financien*, five questions were posed to the ECJ regarding limitations on a member-state's ability to charge VAT taxes on travel agent activities involving excursions outside the EU.²³⁹ The plaintiffs, Jetair and Travel4you, worked together to organize clients' international travel, offering mainly air travel and hotel reservations, and when billed by the Belgian government for VAT taxes, claimed back a substantial amount in VAT taxes paid ahead.²⁴⁰ However, the Belgian government did not refund the entire amount of claimed back VAT taxes, forcing the commercial partners to litigate on the question of whether Belgian law, as amended in 1999, would allow the Belgian government to keep the withheld VAT taxes.²⁴¹

Directive 77/388/EEC addresses the mission of tax harmonization and the plight of travel agents. Article 1 of the Sixth Council Directive requires member-states to adopt the necessary domestic law to ensure equal treatment by January 1, 1978.²⁴² Article 26 of the Sixth Council Directive states that EU member-states must apply the VAT tax to the activities of travel agents except when they are acting as intermediaries and not directly with their own clients.²⁴³ Specifically, and narrowly, if a travel agent is working as an intermediary, the travel agent must be treated as such for taxation purposes.²⁴⁴ Problematically for the parties in the case at bar, the Sixth Council Directive also allowed member-states to continue to subject intermediaries to the VAT tax during a transitional period that began on January 1, 1978 and lasted another five years.²⁴⁵

²³⁶ *Id.* at ¶ 39.

²³⁷ *Id.* at ¶ 49.

²³⁸ *Id.* at ¶ 54.

²³⁹ Case C-599/12, *Jetair NV v. FOD Financien*, [2014] ECR I-0000, at ¶ 24.

²⁴⁰ *Id.* at ¶¶ 15-18.

²⁴¹ *Id.* at ¶ 22.

²⁴² *Id.* at ¶ 3.

²⁴³ *Id.* at ¶ 4.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at ¶ 5.

Directive 2006/112/EC (“the VAT Directive”) also required that member-states exempt the transactions conducted by intermediaries if such transactions are conducted outside the EU but allowed for the VAT tax to apply to travel agents engaged in activities inside the EU.²⁴⁶ However, the VAT Directive did allow a member-state to continue to tax the activities of travel agents when acting as intermediaries, even when the activities are conducted outside the EU, as long as that same member-state taxed such activities before or on January 1, 1978.²⁴⁷ Prior to December 1, 1977, Belgian law exempted the activities of travel agents acting as intermediaries when acting outside the EU, but the law was amended on that date so that the VAT tax would apply to such activities.²⁴⁸ Belgian law was again amended in 1999 and provided that travel agents could not be treated as intermediaries so that the VAT tax would apply to travel agents regardless of their activities and whether they were being conducted outside the EU.²⁴⁹

The ECJ first stated that neither Directive 77/388/EEC nor the VAT Directive prohibited Belgium from changing its law just before the January 1, 1978 date on which the tax harmonization legislation had to be adopted by member-states and thus travel agent activities that were focused on travel outside the EU could be subject to the VAT tax.²⁵⁰ The ECJ stated that, despite the midnight-hour nature of the change, the change would not seriously compromise the mission of tax harmonization.²⁵¹ This rationale was adopted by the ECJ despite the fact that it cited its own precedent that member-states cannot engage in legal maneuvers that would risk the thrust of any EU law.²⁵²

The ECJ also held that the VAT Directive did not mandate that travel agents be treated as intermediaries when engaged in activities outside the EU for the purposes of taxation.²⁵³ According to the ECJ, the VAT Directive actually gave member-states the option of taxing activities if the same member-state taxed the activity before January 1, 1978.²⁵⁴ Furthermore, the ECJ claimed that neither Belgian law nor the VAT Directive violated the broader tenets of EU law generally by allowing member-states to tax the activities of travel agents occurring outside the EU.²⁵⁵ Surprisingly, the ECJ contended that EU law tolerates differences among the member-states so long as the EU legislatures have not created a definitive system of their own on the subject matter, and the member-states maintain their existing legislation as Belgium had since December 1, 1977 and thus before January 1, 1978.²⁵⁶ The ECJ boldly stated that so long

²⁴⁶ *Id.* at ¶¶ 7-8.

²⁴⁷ *Id.* at ¶ 11.

²⁴⁸ *Id.* at ¶¶ 13-14.

²⁴⁹ *Id.* at ¶ 15.

²⁵⁰ *Id.* at ¶ 38.

²⁵¹ *Id.* at ¶ 37.

²⁵² *Id.* at ¶ 35.

²⁵³ *Id.* at ¶ 43.

²⁵⁴ *Id.* at ¶ 41.

²⁵⁵ *Id.* at ¶ 51.

²⁵⁶ *Id.* at ¶¶ 45, 50.

as the Belgian government taxed the activity before January 1, 1978, Belgium has the right to choose whether to continue to tax that activity.²⁵⁷

Lastly, and certainly in a more constitutional fashion, the ECJ stated that Belgium does not violate the principles of equality, proportionality, and fiscal neutrality by treating travel agents and intermediaries differently for taxation purposes whereby the activities of travel agents, but not intermediaries, are subject to the VAT tax.²⁵⁸ According to the ECJ, the EU legislature contemplated this difference when drafting both Directive 77/388/EEC and the VAT Directive and found that travel agents and intermediaries do not act comparably.²⁵⁹ The ECJ contended that its own jurisprudence only requires similar treatment when such actors are acting in a similar fashion unless objective justification is found and precedent has been established that travel agents and intermediaries do not operate similarly.²⁶⁰

Anyone who engages in freelance activity of a professional nature should become familiar with the ECJ's decision in *Werner Haderer v. Finanzamt Wilmersdorf*, in which the ECJ limited the ability of a national government to narrowly tailor for its own purposes the scope of Directive 77/388/EEC, holding that freelance university-level instructors must be exempted from the VAT tax pursuant to the Sixth Council Directive of Directive 77/388/EEC.²⁶¹ In *Haderer*, the German government contended that Mr. Haderer, a part-time instructor, must pay the VAT tax for his teaching activities at adult education institutes where he was paid by a subunit of the German federal government, the Land of Berlin, over a series of years.²⁶² Mr. Haderer was paid an hourly rate, with contributions to his pension, health insurance, and a proportional leave allowance, only if his courses had sufficient enrollment; however, his total compensation did not include provisions for social security contributions, insurance, and taxes, all of which was spelled out in each six-month contract.²⁶³

The Sixth Council Directive 77/388/EEC specifically exempts from the VAT tax educational activities in support of children's education, school or university education, vocational training and retraining, individual instruction given by teachers in a school or university setting, including the supply of services that are closely related to these activities.²⁶⁴ German domestic law provided in regard to the VAT tax that freelance workers such as Mr. Haderer would not be exempt from paying the VAT tax if their activities amounted to individual instruction but did exempt the institutions that provide that instruction so long as the instructional activity is in the public interest or pursuant to the needs of a professional organization.²⁶⁵

²⁵⁷ *Id.* at ¶ 45.

²⁵⁸ *Id.* at ¶ 58.

²⁵⁹ *Id.* at ¶ 55.

²⁶⁰ *Id.*

²⁶¹ Case C-445/05, *Werner Haderer v. Finanzamt Wilmersdorf* [2007] ECR I-04841, at ¶¶ 26, 38.

²⁶² *Id.* at ¶¶ 5-6, 10.

²⁶³ *Id.* at ¶¶ 6-8.

²⁶⁴ *Id.* at ¶ 3.

²⁶⁵ *Id.* at ¶ 4.

The ECJ first found that although Directive 77/388/EEC did have specific activities that are subject to the VAT tax exemption, there did exist some activities that would be included within the public interest category that are explicitly absent from the Directive.²⁶⁶ Furthermore, the ECJ contended that the provisions in Directive 77/388/EEC did allow for exemptions that would otherwise meet the intended effect of the Sixth Council Directive regarding either the activity or the economic agent performing those activities.²⁶⁷ The German government's chief contention with the teaching duties of Mr. Haderer was that the instruction of pottery and ceramics courses were not at the same level of a traditional university course and thus should not be considered within the definitions of education, vocational training, or training, and instead were courses more so designed for leisure.²⁶⁸

Contrary to the German government's position, the ECJ stated that creating divisions based on what constituted education, vocational training, or training under domestic law could not be tolerated since such divisions would risk the VAT tax system's mission of uniformity across the EU member-states.²⁶⁹ Also, the ECJ commented that it was not necessary to create a common definition of what constitutes school or university education, but rather, it is incumbent upon member-states to make sure that the concept of school or university education is not limited to the traditional courses that end with examinations, qualifications, and/or professional or trade activity.²⁷⁰ According to the ECJ, the activities of Mr. Haderer were within the exemptions found in Directive 77/388/EEC merely because, although the lessons were mostly private, there was a link between his qualifications as a teacher and the content of the instruction.²⁷¹ Further, the instruction provided by Mr. Haderer would be exempt from the VAT tax even if there was not a direct link between the students and the instructor.²⁷² The ECJ also hinted that the employment relationship between Mr. Haderer and the Land of Berlin was that of a contractual relationship even as the employment contract signed by Mr. Haderer stated there was no contractual relationship.²⁷³

The ECJ made several pronouncements concerning the interpretation of the Sixth Council Directive 77/388/EEC in *Navicon SA v. Administracion del Estado* to assist member-states in their quest to write accompanying legislation.²⁷⁴ In *Navicon*, the ECJ was asked to settle a debate between an international shipping firm, Navicon SA, and the Spanish government on whether an exemption on the VAT tax pursuant to Article 15(5) of the Sixth Council Directive of Directive 77/388/EEC could be limited to situations where an international shipper is chartering

²⁶⁶ *Id.* at ¶ 16.

²⁶⁷ *Id.* at ¶¶ 18, 19.

²⁶⁸ *Id.* at ¶¶ 22, 23.

²⁶⁹ *Id.* at ¶ 24.

²⁷⁰ *Id.* at ¶ 26.

²⁷¹ *Id.* at ¶ 31.

²⁷² *Id.* at ¶ 32.

²⁷³ *Id.* at ¶¶ 33-34.

²⁷⁴ Case C-97/06, *Navicon SA v. Administracion del Estado*, [2007] ECR I-8755.

a vessel's entire cargo space and leaving a member-state with a final destination outside the EU.²⁷⁵

Pursuant to Article 15(5), VAT tax is to be exempted by member-states when goods are being exported to a location outside the EU by or on behalf of the vendor.²⁷⁶ However, according to Spanish legislation, such an exporting act whereby goods are being shipped to a location outside the EU, the act must include a full chartering of the vessel in order to get the VAT tax exemption.²⁷⁷ The Spanish government denied Navicon SA's request for a full VAT tax exemption because the goods in question did not occupy the entirety of the vessel and thus did not constitute a full chartering of the vessel.²⁷⁸ The Spanish courts, after receiving Navicon SA's challenge, referred the question of whether a member-state could limit the VAT tax exemption to a full chartering of a vessel or, instead, whether a partial chartering of a vessel taking exported goods to a location outside of the EU could qualify for the VAT tax exemption under Article 15(5) of the Sixth Council Directive 77/388/EEC.²⁷⁹

First, while citing Articles 3(3) of the Sixth Council Directive and 22.1 of the more general VAT Law, the ECJ stated that goods being shipped from an EU member-state to another location outside of the EU, such as in this case from the Iberian Peninsula to the Canary Islands, would qualify as an export pursuant to the concept of a VAT tax.²⁸⁰ Second, according to the ECJ, these two provisions of EU law must be interpreted strictly to ensure that at least preliminarily all goods and services are subject to the VAT tax and, pursuant to the concept of fiscal neutrality, economic operators are treated the same when engaging in the same transaction in regard to the VAT tax.²⁸¹ However, despite these two concerns, a strict interpretation of EU law cannot strip VAT tax exemptions from their intended effect.²⁸² Third, since Article 15(5) of the Sixth Council Directive did not define the term "chartering," as with any provision of EU law, the ECJ held itself accountable to examine the wording of the law, the context of the law, and the objective pursued by the law.²⁸³

These pronouncements made the remaining parts of the ECJ's decision easier. The ECJ held that the VAT tax exemption under Article 15(5) of the Sixth Council Directive 77/388/EEC should apply to exports delivered to a location outside the EU either by a full chartering of a vessel or a partial chartering of a vessel.²⁸⁴ The ECJ believed that Article 15(5) did not distinguish between "full chartering" and "partial chartering" concerning eligibility for the VAT

²⁷⁵ *Id.* at ¶¶ 5-8.

²⁷⁶ *Id.* at ¶ 3.

²⁷⁷ *Id.* at ¶ 4.

²⁷⁸ *Id.* at ¶¶ 5-7.

²⁷⁹ *Id.* at ¶ 8.

²⁸⁰ *Id.* at ¶ 19.

²⁸¹ *Id.* at ¶¶ 21-22.

²⁸² *Id.* at ¶ 22.

²⁸³ *Id.* at ¶ 24.

²⁸⁴ *Id.* at ¶ 33.

tax exemption nor did Article 22.1 of the more general VAT Law from which Article 15(5) of the Sixth Council Directive of Directive 77/388/EEC is based.²⁸⁵ Although the ECJ contended that member-states are responsible for enacting domestic law to implement the Sixth Council Directive, any domestic law may not interfere with the subject matter of the exemptions presumed to apply by the EU government.²⁸⁶ The ECJ also addressed the larger scope of international business and stated that VAT tax exemptions are designed to make sure that goods are taxed at their destination and that the Spanish government's requirement of full chartering would create a condition whereby goods shipped via a full chartering of a vessel would be taxed at the destination since the VAT tax exemption would apply at the point of shipment, yet goods delivered through a partial chartering would be taxed at the point of shipment since no VAT tax exemption would apply.²⁸⁷ Relatedly, the ECJ stated that the Spanish regulation, if upheld, would tie the taxation of exported goods to the size of a vessel so that large vessels carrying the goods of several exporters would face a point of departure VAT tax and exports carried on a small vessel, likely to be those of just one exporter, would be exempt from the VAT tax.²⁸⁸

K. Financial Transactions

Articles 5 and 6 of the Sixth Council Directive of Directive 77/388/EEC address possible exemptions from the VAT tax for the sale of non-tangible interests in property. Specifically, Article 5 allows member-states to label as tangible property shares or interests, providing the owner rights of ownership or possession over immovable property as a form of supply of goods, but also allows member-states to label the selling of those shares or interests as not amounting to a supply of goods.²⁸⁹ Article 6 of the Sixth Council Directive 77/388/EEC mandates that a supply of services transaction must not be labeled a supply of goods transaction and a supply of goods transaction includes the sale of intangible property regardless of whether that intangible property establishes title rights.²⁹⁰ Article 13 of the same Directive excludes from the VAT tax the sale of shares or interests in firms and other securities provided that the sale does not include management and safekeeping of the firm or security.²⁹¹

In *Staatssecretaris van Financien v. X BV*, the ECJ was asked to determine whether the sale of 30% of a firm's shares to which the shares' seller supplied services was exempt from the VAT tax despite the seller's services not being exempt from the VAT tax.²⁹² In the case at bar, the plaintiff, dubbed "X" by the ECJ, sold 30% of the shares dubbed "A" to another firm.²⁹³

²⁸⁵ *Id.* at ¶¶ 26-27.

²⁸⁶ *Id.* at ¶¶ 27-28.

²⁸⁷ *Id.* at ¶ 29.

²⁸⁸ *Id.* at ¶ 31.

²⁸⁹ Case C-651/11, *Staatssecretaris van Financien v. X BV*, [2013] ECR I-0000, at ¶ 3.

²⁹⁰ *Id.* at ¶ 4.

²⁹¹ *Id.* at ¶ 6.

²⁹² *Id.* at ¶ 18.

²⁹³ *Id.* at ¶ 8.

However, at the time of the sale, X had been providing managerial services to A for an agreed-upon remuneration, but the services ceased when X disposed of the shares and X left the managerial board at A as well.²⁹⁴ The Dutch government disagreed with X's belief that the VAT taxes billed by the Dutch government pursuant to the sale of the shares in A should be refunded.²⁹⁵

Before getting to the more complicated question about whether X's transaction was subject to the VAT tax regime, the ECJ first had to decide whether Articles 5 and 6 of the Sixth Council Directive must be read together as mandating that sale of a firm's shares be considered a transfer of a totality of assets or services or rather a part thereof whereby the seller was also providing managerial services subject to the VAT tax.²⁹⁶ According to the ECJ, the purpose of the Sixth Council Directive was to make transfers of assets easier by guarding against the possibility that a transferor would be consumed by VAT taxes.²⁹⁷ The ECJ agreed with the German government's contention that the totality of a transfer of assets can only occur if the firm is independent and engages in independent economic activity separate from the economic activity of the seller of the firm's shares.²⁹⁸ The ECJ also stated that the mere selling of shares at the same time the assets of the firm are not sold does not constitute independent economic activity.²⁹⁹ Also, the transaction is not subject to the VAT tax when a member-state exercises its option to judge the transaction as one not involving the supply of goods when an owner transfers the totality of assets.³⁰⁰ The ECJ also found that the Dutch government had exercised this option.³⁰¹

The ECJ found that the transfer of the shares in question here could not be considered the equivalent of the transfer of a totality of assets or a part thereof for the purposes of Article 5 of the Sixth Council Directive.³⁰² Specific to X's case, the ECJ stated that there were two separate transactions including the sale of the shares by X and the ceasing of managerial services by X.³⁰³ Therefore, X's right to deduct depends on whether the costs of the services provided by X as a consultant relating to the sale of the shares are costs related to the firm's overall economic

²⁹⁴ *Id.* at ¶¶ 9-10.

²⁹⁵ *Id.* at ¶ 12.

²⁹⁶ *Id.* at ¶ 25.

²⁹⁷ *Id.* at ¶41.

²⁹⁸ *Id.* at ¶ 38.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at ¶ 29.

³⁰¹ *Id.* at ¶ 30.

³⁰² *Id.* at ¶¶ 40, 51.

³⁰³ *Id.* at ¶ 53.

activity yet separate from the selling price for those shares.³⁰⁴ However, the ECJ left it up to the Dutch national courts to determine whether this reality existed in X's case.³⁰⁵

In *Regie dauphinoise – Cabinet A. Forest SARL v. Ministre du Budget*, the ECJ went to great lengths to tie many provisions of the Sixth Council Directive 77/388/EEC together to determine whether property managers can deduct interest payments they receive on their clients' funds entrusted to them from the VAT tax.³⁰⁶ According to the ECJ, Article 2 of the Sixth Council Directive defines the scope of the EU's VAT tax system, providing that only activities that are economic in nature are subject to the VAT tax, and makes clear that a taxable person must be acting within the scope of an economic activity in order for the VAT tax to apply.³⁰⁷ Article 4(1) states that a taxable person includes a person who independently engages in an economic activity while Article 4(2) includes activities of producers, traders, service suppliers, exploiters of tangible and intangible property for the purposes of obtaining income on a continuing basis within the definition of economic activities.³⁰⁸

Article 17 of the Sixth Council Directive 77/388/EEC generally governs the right to deduct from the VAT tax assessment, allows only a deduction when the taxable person when the goods and services in question are used for the purposes of the taxable transactions, and provides that only such a proportion of the VAT tax can be deducted that is attributable to VAT tax-eligible activities when a taxable transaction includes both VAT tax-eligible components and non-VAT tax eligible components.³⁰⁹ Article 13 of the Sixth Council Directive requires member-states to exempt from the VAT tax not only transactions that involve the granting, negotiation, and management of credit, but also transactions that include the negotiation of deposit and current accounts, payments, transfers, debts, checks, and other negotiable instruments.³¹⁰ Article 19 of the Sixth Council Directive provides that turnover amounts attributable to the supply of goods and services used by the taxable person for the purposes of the business cannot be excluded from the VAT tax.³¹¹

In the case at bar, *Regie*, a property management firm, was told by the French tax authority that it could only take a pro-rated deduction on its VAT tax assessment since the transactions it had engaged in on behalf of its clients were exempt from French tax law.³¹² More specifically, *Regie*, as part of its general management of leased and owned property of its clients, would take payments from co-owners and lessees of these properties and invest the funds on *Regie's* own account so that *Regie* would gain the interest on those principal funds, which

³⁰⁴ *Id.* at ¶ 56.

³⁰⁵ *Id.* at ¶ 57.

³⁰⁶ Case C-306/94, *Regie Dauphinoise – Cabinet A. Forest SARL v. Ministre du Budget*, [1996] ECR I-3695, at ¶¶ 13, 15.

³⁰⁷ *Id.* at ¶ 15.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at ¶ 3.

³¹⁰ *Id.* at ¶ 5.

³¹¹ *Id.* at ¶ 4.

³¹² *Id.* at ¶ 9.

averaged 14%, and then repay the principal funds to the clients.³¹³ The French tax authority determined that the turnover amounts corresponding to the investment transactions Regie had made on behalf of its clients could not be deducted from the VAT tax assessment as “incidental financial transactions,” which Regie contested.³¹⁴

The ECJ held that a member-state can prohibit a deduction for interest received on sums received from clients from a VAT tax assessment as an incidental financial transaction. The ECJ found a critical difference between merely holding sums on behalf of clients and actively investing those sums on behalf of clients.³¹⁵ More narrowly, the ECJ admitted that services including the mere holding of funds submitted to a bank or property manager would not be subject to a VAT tax assessment, but this case was different because Regie not only collected the funds from lessees and co-owners, but also received the funds as a part of their general business and then invested the funds as a taxable person engaged in a taxable activity.³¹⁶ According to the ECJ, the purpose behind allowing a deduction from a VAT tax assessment for incidental financial transactions within the scope of Article 19 of the Sixth Council Directive is to meet the objective of complete neutrality within the EU’s VAT tax system, especially in a case where the receipts from those transactions would wind up being VAT tax-assessed and the associated activities did not entail the goods or services subject to the VAT tax.³¹⁷ The ECJ saw Regie’s activities differently because it had the consent of its clients to place the funds into Regie’s own accounts for investment, and such an activity constituted a “direct, permanent and necessary extension” of a taxable activity performed by a taxable person—here, a property management firm—and thus such an activity could in no way be characterized as an incidental financial management transaction.³¹⁸

L. Tax Evasion

In *Finanzamt Bergisch Gladbach v. Skripalle*, the ECJ wrestled with the question of whether two provisions of Directive 77/388/EEC are compatible.³¹⁹ Article 11 of the Directive 77/388/EEC provides that concerning supplies of goods and services, the entire costs incurred by the supplier constitutes the consideration that the purchaser must acknowledge upon sale.³²⁰ Article 27 of the same directive allows the EU Council to allow member-states to enact derogations from Directive 77/388/EEC in order to simplify the method or process of taxation or to prevent tax evasion.³²¹ Specifically, the question posed to the ECJ was whether Article 27 of

³¹³ *Id.* at ¶ 6.

³¹⁴ *Id.* at ¶¶ 9-11.

³¹⁵ *Id.* at ¶¶ 18, 23.

³¹⁶ *Id.* at ¶ 18.

³¹⁷ *Id.* at ¶¶ 20-21.

³¹⁸ *Id.* at ¶ 22.

³¹⁹ Case C-63/96, *Finanzamt Bergisch Gladbach v. Werner Skripalle*, [1997] ECR I-2847, at ¶ 13.

³²⁰ *Id.* at ¶ 6.

³²¹ *Id.*

Directive 77/388/EEC allowed for derogations by member-states to prevent tax evasion in the case of supplies for consideration between associations pursuant to Article 11 of the same Directive.³²² If the two Articles of Directive 77/388/EEC are compatible, it is possible for the minimum basis for assessing the VAT tax to be greater than the market rate yet no tax evasion would occur in a transaction.³²³

In the case at bar, Germany's VAT tax law stated that such tax was determined by a function of consideration, which included everything the purchaser of the supplies spends to acquire the supplies after the turnover tax has been deducted.³²⁴ The German government, however, adopted a derogation from German law by adopting a policy that in the case of supplies for one's own consumption, the cost of the supplies would be the controlling factor in determining the turnover tax, which the German government considered a "notional minimum basis of assessment."³²⁵ Skripalle challenged the German government's assessment of the VAT tax on his rental property. The German government believed the minimum basis of assessment to be higher than the rent Skripalle and his family members who operated the tenant firm had agreed to even though the the rent was at market value.³²⁶

Specifically, both Skripalle and the EU Commission contended that Article 27 of Directive 77/388/EEC must be strictly interpreted only to account for tax evasion concerns, and cannot allow member-states to create changes associated with how the VAT is calculated as dictated in Article 11.³²⁷ Since according to the EU Commission and Skripalle the rent in question was at market rates, tax evasion could not be an issue and thus the German policy of establishing a notional minimum basis was not necessary or permissible.³²⁸ Separately, Mr. Skripalle stated that the German law in question created a presumption that a rent agreement between family members is designed to avoid taxes.³²⁹ The German government, in contrast, stated that its notional minimum basis policy was necessary since very few situations were reflected by the facts in the case at bar, whereby the agreed-upon rent reflected the market rate and yet was below the notional minimum basis, which is appropriate to combat tax evasion.³³⁰

The ECJ opened the heart of its opinion by stating that there was no disagreement that the German government had engaged in a derogation by enacting its policy on maintaining a notional minimum basis for assessing the VAT tax. However, the ECJ further opined that any such derogations must be strictly construed and that although there is a risk that agreements between family members may pose a risk of tax evasion, there is no risk of tax evasion when,

³²² *Id.* at ¶ 13.

³²³ *Id.*

³²⁴ *Id.* at ¶ 4.

³²⁵ *Id.* at ¶ 5.

³²⁶ *Id.* at ¶¶ 3, 5.

³²⁷ *Id.* at ¶ 17.

³²⁸ *Id.* at ¶ 18.

³²⁹ *Id.* at ¶ 19.

³³⁰ *Id.* at ¶ 20.

objectively, the facts show that the involved parties have acted properly and especially in this case where the parties had agreed to a rent value that was in line with the marketplace.³³¹ According to the ECJ, the German policy on the VAT tax was not limited to concerns over tax evasion, strictly, as required by Article 27.³³² The ECJ found this to be important since the German government had asked for the derogation to combat only tax evasion and not for the purpose of simplifying the taxation procedure.³³³ In the end, the ECJ found the German government's use of a notional minimum basis for assessing the VAT tax on rent to be an unallowable derogation in the face of Directive 77/388/EEC.³³⁴

M. Shifting VAT Tax Liability

According to the ECJ in *Staatssecretaris van Financiën v. Pactor Vastgoed BV*, pursuant to the Sixth Council Directive of Directive 77/388/EEC, when an adjustment occurs following an assessment of the VAT tax, only the person who applied the VAT deduction can be assessed a recovery by a member-state.³³⁵ In the case at bar, a supplier that had acquired some immovable property years earlier and chose at that time to opt for taxation on the property and had the VAT deducted sold the property to the plaintiff, Pactor Vastgoed, and both Pactor Vastgoed and the supplier once again opted for taxation on the property.³³⁶ Initially, Pactor Vastgoed leased the property, a transaction that was exempt from the VAT tax, but sometime later sold the property, also a transaction exempt from the VAT tax.³³⁷ The Dutch government believed that the transaction involving the initial sale of the property to Pactor Vastgoed under Dutch law should have been exempted from the VAT tax and thus issued an additional assessment of VAT tax against Pactor Vastgoed.³³⁸ In other words, the Dutch government contended that the supplier and Pactor Vastgoed should not have been able to elect taxation at the original sale.³³⁹ Pactor Vastgoed levied an objection to the additional assessment of VAT tax with the Dutch tax authorities, lost the objection, and then appealed to the Dutch courts, which in turn sent the issue to the ECJ for clarification under EU law.³⁴⁰

Article 4 of the Sixth Council Directive 77/388/EEC allows member-states to elect to subject to the VAT tax to transactions involving the sale of a building before it is first occupied,

³³¹ *Id.* at ¶ 26.

³³² *Id.*

³³³ *Id.* at ¶ 30.

³³⁴ *Id.* at ¶ 31.

³³⁵ Case C-622/11, *Staatssecretaris van Financiën v. Pactor Vastgoed BV*, [2013] ECR I-0000, at ¶ 47.

³³⁶ *Id.* at 16-17.

³³⁷ *Id.* at ¶¶ 18-19.

³³⁸ *Id.* at ¶ 20.

³³⁹ *Id.*

³⁴⁰ *Id.* at ¶¶ 21-25.

or the sale of parts of the building, and/or the land on which the building sits.³⁴¹ Article 13 of the Sixth Council Directive mandates that member-states exempt from the VAT tax the sale of buildings and/or the land on which the building will sit if the transaction is not covered by Article 4, but also permits member-states to provide the option to taxpayers to elect to pay taxes on those transactions.³⁴² Article 17 allows a taxed person to deduct VAT taxes from a member-state's tax regime when goods or services are supplied to that same taxable person by another taxable person.³⁴³ Article 20 of the Sixth Council Directive allows member-states to make adjustments in VAT tax calculations when the VAT tax deduction was higher or lower than what was initially calculated in several scenarios, but whenever doing so, the member-state must make sure that the adjustment does not provide an unjustified advantage to one of the parties.³⁴⁴ Article 27 of the Sixth Council Directive allows the EU Council to adopt derogations to the general principles of the Sixth Council Directive to simplify a member-state's tax regime so long as there is no effect on the final taxed amount at the last stage of consumption.³⁴⁵ Council Decision 88/498/EEC was adopted pursuant to Article 27 of the Sixth Council Directive of Directive 77/388/EEC, which allows the Netherlands government to impose VAT tax liability on the purchaser of buildings and/or parts thereof and/or land on which the building will sit.³⁴⁶

The Netherlands tax regime at the time of the case at bar allowed sales of immovable property to be immune from the VAT tax unless the sale of the building and/or the land on which the building sat was involved in a transaction involving its sale within two years of the building's first occupation.³⁴⁷ Dutch law also stated that if improper use of the immovable property, such as activity that would not allow for a full deduction of the VAT tax, the Dutch government was allowed to apply an additional tax assessment to the seller.³⁴⁸

According to the ECJ, only the party that applied for the VAT tax deduction could be subject to a member-state's attempt to adjust the VAT tax amount pursuant to Article 20 of the Sixth Council Directive 77/388/EEC.³⁴⁹ The ECJ further stated that it would go against the purpose of the Sixth Council Directive by allowing an adjustment of VAT tax to be levied against a party other than the party originally benefitting from the VAT tax deduction.³⁵⁰ More narrowly, the ECJ contended that the Sixth Council Directive was designed to maintain the

³⁴¹ *Id.* at ¶ 3.

³⁴² *Id.* at ¶ 4.

³⁴³ *Id.* at ¶ 6.

³⁴⁴ *Id.* at ¶ 7.

³⁴⁵ *Id.* at ¶ 9.

³⁴⁶ *Id.* at ¶ 10. Council Decision 88/498/EEC was later repealed by Council Directive 2006/69/EEC, which also amended Directive 77/388/EEC, nullifying many of the derogations that were allowed by member-states pursuant to Council Decision 88/498/EEC. *Id.* at ¶ 11.

³⁴⁷ *Id.* at ¶ 12.

³⁴⁸ *Id.* at ¶ 13.

³⁴⁹ *Id.* at ¶¶ 35-36.

³⁵⁰ *Id.* at ¶ 37.

neutrality of the VAT tax and that any tax regime allowing another party to pay an amount following an adjustment would compromise the VAT tax system.³⁵¹

Additionally, the ECJ found that, although the Sixth Council Directive does allow member-states some discretion when imposing the VAT tax, forcing a party to pay a VAT tax adjustment would go beyond what is allowed under EU VAT law. Specific to the facts in the case at bar, when the transaction between the supplier and Pactor Vastgoed took place, that transaction was exempted from the VAT tax, and when the supplier applied for the VAT deduction and received the deduction, any later adjustment must be assessed by the supplier and at no time could the Netherlands government find that Pactor Vastgoed gained an “unjustified advantage” pursuant to Article 20 of the Sixth Council Directive.³⁵² Furthermore, although Decision 88/498/EEC allowed member-states to assess VAT tax against the purchaser of immovable property, once the supplier became the recipient of the VAT deduction, only the supplier could be assessed an adjustment.³⁵³

VI. DOMINANT THEMES FROM THE ECJ’S DECISIONS CONCERNING SIXTH COUNCIL DIRECTIVE 77/388/EEC.

There are four dominant themes reflected in the ECJ’s jurisprudence on the Sixth Council Directive 77/388/EEC. First, the ECJ does not allow member-states to determine the parameters of the VAT tax. According to the ECJ, member-states cannot use their inherent discretion associated with Directive 77/388/EEC to limit the ability to take advantage of the VAT tax based on the form of business organization chosen by the firm and whether or not profits are realized.³⁵⁴ The ECJ went further in *Ambulanter* stating that member-states cannot condition the use of the VAT tax deduction based on the form of business association, the location of the organization’s services, or the reason for the services.³⁵⁵ The ECJ also held that member-states cannot impede a firm’s use of the VAT tax deduction based on an arbitrary quantitative value such as the amount of membership fees charged by a nonprofit organization.³⁵⁶

The ECJ’s decision in *Commission v. Belgium* explicitly stated that Belgium’s derogations based on the price, use, and value of a car found in a pricing catalog to threaten the VAT tax harmonization sought by the Sixth Council Directive 77/388/EEC and also warned member-states about government-identified price differences between imported and domestic cars.³⁵⁷ Member-states are also not permitted to make available a VAT tax deduction based on a judgment as to the quality of services rendered by an individual actor.³⁵⁸ In *Werner Haderer*, the

³⁵¹ *Id.* at ¶ 41.

³⁵² *Id.* at ¶ 44.

³⁵³ *Id.* at ¶ 46.

³⁵⁴ Case C-174/00, *Kennemer Golf v. Staatssecretaris van Financien*, [2002] ECR I-3293, at ¶¶ 15, 21-22.

³⁵⁵ Case C-141/00, *Ambulanter GmbH v. Finanzamt für Körperschaften I*, [2002] ECR I-6833, at ¶¶ 30-31.

³⁵⁶ Case C-124/96, *Comm’n v. Spain*, [1998] ECR I-2501, at ¶¶ 3, 17.

³⁵⁷ Case C-324/82, *European Comm’n v. Belgium*, [1984] ECR 1861, at ¶¶ 4-8, 31-32.

³⁵⁸ Case C-445/05, *Werner Haderer v. Finanzamt Wilmersdorf*, [2007] ECR I-04841, at ¶¶ 18, 19.

ECJ made it clear that divisions based on whether a university course is of high level should not dictate whether the economic actors should be entitled to a VAT tax deduction and such divisions could threaten the EU-wide VAT tax system.³⁵⁹ Member-states must only extend eligibility for the VAT tax deduction to those who have applied for the VAT tax deduction.³⁶⁰ Furthermore, in *Pactor Vastgoed*, the ECJ stated that when a member-state allows for adjustments for VAT tax purposes to extend to parties other than those who have applied for the deduction, the member-state exceeds the scope of EU law, and the VAT tax system should be used by member-states in a way that does not allow for an unjustified advantage.³⁶¹

In contrast to the above-mentioned cases on the point of member-state discretion on the scope of the VAT tax, the ECJ did state that member-states can define the activity supporting the claim that a VAT tax deduction is applicable.³⁶² In *Regie Dauphinoise*, the ECJ held that member-states can bar interest on clients' accounts from a VAT tax assessment when the service provider is believed to be trading for its own interest and not merely holding assets for clients.³⁶³

The second major theme from the ECJ's jurisprudence is that the ECJ will not permit a member-state to implement barriers in the form of additional administrative measures that will interfere with access to VAT tax refunds. In *Molenheide*, the ECJ found in violation of the Sixth Council Directive 77/388/EEC that a member-state's preventive attachment system would require a firm seeking a VAT tax deduction to engage in additional administrative efforts to gain a VAT tax deduction since the preventive attachment itself created a presumption of ineligibility.³⁶⁴ Although the ECJ did not find the preventive attachment system a per se violation of the Sixth Council Directive 77/388/EEC, the ECJ found Belgium's approach to be disproportionate to its interests because the system in effect created an irrebuttable presumption against eligibility for a VAT tax deduction.³⁶⁵ Likewise, member-states cannot require economic actors seeking a VAT tax refund to accept a government bond in lieu of either taking the immediate deduction or carrying the deduction value forward.³⁶⁶ The ECJ made it clear that VAT tax refunds should be immediate, liquid, and delivered in a reasonable amount of time.³⁶⁷

Concerning the principle that any excess administrative barriers to a VAT tax deduction be prohibited, the ECJ in *Ampliscientifica* did allow a member-state to condition receipt of a VAT tax deduction collectively as one taxable person on the requirement that a parent firm own

³⁵⁹ *Id.* at ¶ 16.

³⁶⁰ Case C-622/11, *Staatssecretaris van Financien v. Pactor Vastgoed BV*, [2013] ECR I-0000, at ¶¶ 35, 36.

³⁶¹ *Id.* at ¶ 44.

³⁶² Case C-306/94, *Regie Dauphinoise – Cabinet A. Forest SARL v. Ministre du Budget*, [1996] ECR I-3695, at ¶¶ 18, 23.

³⁶³ *Id.*

³⁶⁴ Case C-286/94, *Molenheide BVBA v. Belgium*; Case C-340/95, *Peter Schepens v. Belgium*; Case C-47/96, *Bureau Rik Decan-Business Research & Dev. NV*; Case C-401/95, *Sanders BVBA v. Belgium*, [1997] ECR I-07281, at ¶¶ 52, 55, 57.

³⁶⁵ *Id.* at ¶¶ 52, 55, 57, 62.

³⁶⁶ Case C-78/00, *Comm'n v. Italian Republic*, [2001] ECR I-8195, at ¶¶ 34, 36.

³⁶⁷ *Id.* at ¶¶ 34, 36, 39.

50% of a subsidiary at the beginning of a taxable year, for which the ECJ found an allowable derogation from the Sixth Council Directive 77/388/EEC.³⁶⁸ However, in allowing this derogation that seemingly interfered with the idea that no additional administrative barriers exist, the ECJ put forth perhaps its best articulation of when derogations from the Sixth Council Directive will be allowed.³⁶⁹ Specifically, the ECJ stated that such derogations will be allowed when the member-state is treating similar goods and services in a similar manner (fiscal neutrality), the member-state is attempting to prohibit special arrangements to avoid taxes (abuse of rights), and the derogation is not excessive (proportionality).³⁷⁰

Third, the ECJ's jurisprudence on the Sixth Council Directive reflects a willingness on the part of the ECJ to allow for variations among member-states in their discretion so long as there is no threat to harmonization of VAT tax law. In *Institute of the Motor Industry*, the ECJ demanded that member-states not allow linguistic differences to alter VAT tax law that would allow for intolerable interference with harmonization.³⁷¹ However, due to a perceived lack of threat to VAT tax harmonization in *SUFA*, the ECJ upheld the denial of a VAT tax exemption to a nonprofit organization that was supplying services to another nonprofit organization.³⁷²

The *Jetair NV* case is perhaps the best articulation of the ECJ's willingness to show flexibility in the face of the need for harmonization while also showing that flexibility and harmonization can work together. Here, the ECJ stated that member-states can alter deadlines for economic actors, specifically setting such deadlines earlier for VAT tax purposes in order to get parties to act in a way that forces them to engage in activities that lead to harmonization earlier than required even if member-states would have differing deadlines for a limited time period.³⁷³ Also specific to the *Jetair NV* case, the ECJ held that member-states can continue to tax activities outside the EU so long as there is no risk to harmonization and the EU has not created a definitive system through legislative action on the subject matter of the member-state's tax.³⁷⁴

Lastly, the ECJ has drafted opinions concerning the Sixth Council Directive 77/388/EEC that allow for high levels of efficiency leading to the avoidance of trade distortion and tax evasion. In *Skripalle*, the ECJ commented that derogations from the language in Directive 77/388/EEC must be strictly construed and that tax evasion is likely to contribute to an allowable derogation while a member-state's need for simplicity in calculation is not.³⁷⁵ In *X BV*, the ECJ made it clear that the thrust of the Sixth Council Directive 77/388/EEC is to make the transfer of

³⁶⁸ Case C-162/07, *Amplisientifica Srl v. Ministero dell'Economia e delle Finanze*, [2008] ECR I-4019, at ¶ 32.

³⁶⁹ *Id.* at ¶¶ 25-31.

³⁷⁰ *Id.*

³⁷¹ Case C-140/97, *Inst. of the Motor Indus. v. Comm'rs*, [1998] ECR I-7053 at ¶ 16.

³⁷² Case C-348/87, *Stichting Uitvoering Financiële Acties ("SUFA") v. Staatssecretaris van Financien*, [1989] ECR I-1737, at ¶ 15.

³⁷³ Case C-599/12, *Jetair NV v. FOD Financien*, [2014] ECR I-0000, at ¶¶ 37, 38.

³⁷⁴ *Id.* at ¶ 51.

³⁷⁵ Case C-63/96, *Finanzamt Bergisch Gladbach v. Werner Skripalle*, [1997] ECR I-2847, at ¶¶ 30, 31.

assets easier and distinguish transfer of shares from transfer of assets while allowing member-states to decide when a VAT tax deduction should apply to a particular transaction involving the sale of shares by granting the freedom to decide what is an independent activity.³⁷⁶ Similar to the difficult distinction between a sale of shares and a sale of assets, the ECJ gave member-states the ability to tax a larger good at one VAT tax rate even when smaller goods included within the larger good and those smaller goods are taxed at a different VAT tax rate.³⁷⁷ The ECJ also held that there must be a link between the VAT tax deduction claim and the taxable activities supporting the claim.³⁷⁸

Perhaps the best example of an ECJ decision that promoted efficiency is found in the *Navicon SA* decision holding that a member-state cannot condition the availability of a VAT tax exemption on the requirement that an exporter of goods charter an entire cargo capacity of a vessel.³⁷⁹ According to the ECJ, to do otherwise would lead to a condition whereby the VAT tax system is not living up to the intent of the Sixth Council Directive 77/388/EEC.³⁸⁰ Additionally, the ECJ also remarked in *Navicon SA* that domestic law cannot interfere with the objectives of Directive 77/388/EEC.³⁸¹ In *Zita Modes*, the ECJ claimed that member-states do have the flexibility to exclude the sale of goods from the total sale of assets that would otherwise be taxed through the VAT tax regime so long as distortion in competition does not exist.³⁸² More narrowly, the ECJ commented that the prohibition on trade distortion practices will protect harmonization and prevent divergence among the member-states.³⁸³

There are, however, two cases cited in this work that could allow for trade distortions and/or tax avoidance. In *Gil Insurance*, the ECJ let stand additional taxes that could be applied to the same transaction that would be covered by the VAT tax system but only so long as the additional taxes are not turnover taxes, the additional taxes do not interfere with cross-border trade among the member-states, and the additional taxes do not alter the final tax amount at the final stage of consumption.³⁸⁴ According to the ECJ, these additional taxes could be implemented by a member-state even if the tax rate does not match the VAT tax rate and even if the additional tax was not applied at the same point in the stream of commerce as the VAT tax.³⁸⁵ Furthermore, member-states need not acquire permission from the EU government to

³⁷⁶ Case C-651/11, *Staatssecretaris van Financiën v. X BV*, [2013] ECR I-0000, at ¶¶ 40, 41, 51.

³⁷⁷ Case C-251/05/, *Talacre Beach Caravan Sales Ltd. v. Comm'rs of Customs & Excise*, [2006] ECR I-6269, at ¶ 27.

³⁷⁸ Case C-98/98, *Comm'rs of Customs & Excise v. Midland Bank plc*, [2000] ECR I-4177, ¶ 24.

³⁷⁹ Case C-97/06, *Navicon SA v. Administracion del Estado*, [2007] ECR I-8755, at ¶ 33.

³⁸⁰ *Id.* at ¶ 22.

³⁸¹ *Id.* at ¶¶ 27-28.

³⁸² Case C-497/01, *Zita Modes Sarl v. Admin. de l'enregistrement et des domaines*, [2003] ECR I-14393, at ¶¶ 29, 30.

³⁸³ *Id.* at 31.

³⁸⁴ Case C-308/01, *GIL Ins. Ltd. et al. v. Comm'rs*, [2004] ECR I-4777, at ¶¶ 5, 22, 37.

³⁸⁵ *Id.* at ¶ 36.

levy the additional taxes.³⁸⁶ Similarly, in *Kerrutt*, the ECJ stated that member-states can implement additional taxes on the same transaction covered by the VAT tax regime even if it leads to double taxation of that transaction.³⁸⁷

VII. THE EFFECTIVENESS OF DIRECTIVE 77/388/EEC: THE POTENTIAL THREATS TO HARMONIZATION

Despite the above-mentioned dominant themes found in the ECJ's jurisprudence on the Sixth Council Directive 77/388/EEC, several threats exist to the mission of VAT tax harmonization throughout the EU. The first lies with the ECJ's position that, at least in some cases, the national courts of member-states should maintain some discretion. For example, in *Midland*, after deciding that there needs to be an immediate link between a transaction and the claim for a VAT tax deduction, the ECJ held that national courts can decide whether this link exists.³⁸⁸ The ECJ's decision that an immediate link must exist between the transaction and the claim would seemingly create a strong prophylactic against tax evasion, yet the decision threatens harmonization as each member-state court decides the same question differently. If such discretion is left to the national courts of the member-states, taxable persons and entities will likely move their activities to member-states that maintain the most flexible rules on whether an immediate link exists. Clearly, this is not what the Framers of the Sixth Council Directive 77/388/EEC had envisioned. Member-states, in order to attract investment would have an incentive to create very flexible rules creating a weak link between the transaction and the VAT tax deduction claim. At worst, the only penalty for doing so is facing a complaint by a private party or the EU Commission followed by potentially lengthy litigation whereby the best result would be a favorable ECJ decision granting discretion. This reality, in turn, would cause a race to the bottom leading to an evaporation of the revenue the member-state governments could use to reinvest in their countries.

In *Commission v. Italy*, the ECJ firmly held that member-states cannot demand that taxable persons hold bonds in lieu of immediate VAT tax refunds, but still left the question of whether an additional requirement or non-cash refunds was proportionate to member-states' needs in the face of Directive 77/388/EEC to the national courts in *Molenheide*.³⁸⁹ However, after digesting the opinions in *Commission v. Italy* and *Molenheide*, if a member-state government realizes that it cannot force a VAT tax refund declarant to hold a bond, the member-state may believe that less onerous, yet more proportionate methods of providing VAT tax refunds may pass ECJ muster if the national court provides an approval. Likewise, in *EGI*, the ECJ stated that member-states cannot insist on additional, burdensome administrative requirements in order for a taxable person to gain a VAT tax refund, yet still gave member-state courts the discretion to determine what might be an overly burdensome requirement that might

³⁸⁶ *Id.* at ¶ 44.

³⁸⁷ Case C-73/85, *Hans-Dieter & Ute Kerrutt v. Finanzamt Monchegladbach-Mitte*, [1986] ECR 2219, at ¶ 22.

³⁸⁸ Case C-98/98, *Comm'rs of Customs & Excise v. Midland Bank plc*, [2000] at ¶¶ 19, 33.

³⁸⁹ Case C-286/94, *Molenheide BVBA v. Belgium*; Case C-340/95, *Peter Schepens v. Belgium*; Case C-47/96, *Bureau Rik Decan-Business Research & Dev. NV*; Case C-401/95, *Sanders BVBA v. Belgium*, [1997] ECR I-07281, at ¶ 64; Case C-78/00, *Comm'n v. Italian Republic*, [2001] ECR I-8195, at ¶¶ 5, 6, 39.

interfere with the thrust of Directive 77/388/EEC.³⁹⁰ The ECJ also left the decision as to whether a firm's consulting services are part of the firm's overall economic activity for the purposes of the VAT tax regime when the consulting services are related to the sale of shares in *X BV*.³⁹¹

In the above cases on the subject mediums for VAT tax refunds, administrative requirements, and measuring the value of consulting services, the ECJ has opened the door to greater discretion among member-states and their national courts that could lead to greater differences among the member-states about the VAT tax regime, which puts VAT tax harmonization in jeopardy. Member-states will certainly have the ability and incentive to experiment within the range of flexibility provided to them by the ECJ's jurisprudence.

Relatedly, the ability of member-states to engage in double taxation and/or assess additional taxes on the same transaction poses a threat to overall harmonization of taxes across the EU even if the threat to VAT tax harmonization does not exist. The *Gil Insurance* case is perhaps the best example of such a threat. If a member-state is allowed to apply additional taxes to a transaction already covered by the VAT tax regime, the total tax amount of that transaction can increase substantially. In *Kerrutt*, the ECJ went as far as to state that the Sixth Council Directive does not prohibit double taxation of transactions subject to the VAT tax system.³⁹² Such increased tax levels could lead to the movement of the production of goods and services to other member-states that merely maintain a traditional VAT tax on the transaction. Although member-states are not likely to tax merchants and producers to the point that exodus from the original member-state is a likely option due to concerns over the loss of any tax revenue, the threat to tax harmonization still exists.

In addition, the judicial debate on these issues is too time consuming. One could potentially think that the standards espoused by the various ECJ decisions cited in this work, including the requirement of fiscal neutrality and proportionality, would serve as adequate safeguards. There simply exists too much flexibility on the part of the member-state about whether fiscal neutrality is met and, likewise, whether a member-state's legislation is proportional. Relatedly, the adoption of later Council Directives such as 95/7/EC and 2006/112/EC, which also allow for member-state discretion, do not force member-states toward harmonization but rather serve as guidelines as to how to get to a condition of harmony regarding the VAT tax.

Put bluntly, the various threats to harmonization of the VAT tax regime in the EU under the Sixth Council Directive 77/388/EEC could be solved either by replacing the Directive with a Regulation or the end of the ECJ's jurisprudential practice of allowing member-state national courts to maintain discretion, or preferably both. As stated above, a Regulation is different from a Directive in that a Regulation does not provide member-states with the discretion to pass legislation to meet the intent of EU legislation; rather, it is directly effective on member-states without implementing domestic legislation. Therefore, if EU law on the VAT tax were to be recrafted in the form of a Regulation, EU-wide VAT tax law would be much more harmonious. Likewise, if the ECJ left in place its black letter law holdings without providing an escape hatch

³⁹⁰ Case C-123/87, *Lea Jorion, nee Jeunehomme, and Societe anonyme d'etude et de gestion immobiliere EGI v. Belgian State*, [1988] ECR 4517, at ¶¶ 17-19.

³⁹¹ Case C-651/11, *Staatssecretaris van Financiën v. X BV* [2013] ECR I-0000, at ¶ 57.

³⁹² Case C-73/85, *Hans-Dieter and Ute Kerrutt v. Finanzamt Monchegladbach-Mitte*, [1986] ECR 2219, at ¶ 22.

for member-states in the form of national court discretion, EU-wide VAT tax law would be further strengthened. The ECJ's decision in *Jetair* is a terrific example of this reality. In *Jetair*, the ECJ stated that EU law tolerates differences in domestic law across the member-states so long as EU legislatures have not created a definitive legal regime on the subject matter at issue.³⁹³

Part of the responsibility of the Sixth Council Directive 77/388/EEC is to foster the cross-border movement of goods. As stated above, the ECJ is responsible for making sure the 28 member-states follow EU law. The flexibility noted above places the common market in jeopardy and increases the threat of tax avoidance. Given the various threats to harmonization of VAT tax law across the EU, now is the time for greater legislative *and* judicial activism. The efforts of the European Commission are limited to bringing complaints against member-states for non-compliance with Directive 77/388/EEC. Such use of this branch of EU government is not an efficient or effective means by which to bring legislative activism to promote harmonization of the VAT tax system through the replacement of Directive 77/388/EEC with a Regulation that would remove part of the discretion the member-states have in regard to the VAT tax through the adoption of implementing law. The use of a Regulation would foreclose the problem identified in *Jetair* as the EU legislatures would have created a legal regime that ends much of the member-state discretion threatening harmonization. Judicial activism could come in the form of a series of ECJ decisions removing leeway from the member-states especially about leaving some decisions to national courts. This two-part approach, the replacement of a Directive with a Regulation and the removal of flexibility within the national courts, should serve as forceful means by which to further harmonize VAT tax law across the EU's 28 tax jurisdictions. It should also be noted that the adoption of a Regulation would immediately implement a harmonized VAT tax law without waiting for the 18-24 month implementation period. Further, the EU government would spend fewer resources on tax compliance.

The threats identified here can be a chief barrier not only to the harmonization of VAT tax law across the EU, but also to further integration of the EU. Such interference with integration can harm the EU's global competitiveness as global firms curb their investment in a region that maintains uncertainty. In contrast, greater reliability brought on by the use of a Regulation and less national court discretion would make the EU business environment more competitive. A greater level of uniformity would also stabilize the accounting challenges associated with a 28-member EU. One of the chief advantages of the VAT tax was that the total value added at each stage of production or distribution was equal to the total income earned. If uncertainty is allowed to continue or worsen through increased legislative and judicial discretion at the member-state level, the values associated with the VAT tax could become less certain. In other words, the "total value added" for the same good and the same transaction in one member-state could be different in another member-state. Such value differences could lead to accounting difficulties and investment uncertainty. Perhaps the *Zita Modes* case, in which the ECJ gave member-states the discretion to use the no supply of goods rule, is the best example of this reality.³⁹⁴

A list of threats to harmonization is not to say that the ECJ has not done some admirable work on the issue of VAT tax harmonization. The decisions in *Kennemer Golf* and *Ambulater*

³⁹³ Case C-599/12, *Jetair NV v. FOD Financien*, [2014] ECR I-0000, at ¶¶ 45, 50.

³⁹⁴ Case C-497/01, *Zita Modes Sarl v. Administration de l'enregistrement et des domaines*, [2003] ECR I-14393, at ¶ 46.

gave firms the freedom to choose, without VAT tax discrimination, the form of business association that will best fit their needs which, presumably, would be the most efficient form of business association.³⁹⁵

VIII. CONCLUSION

The vision of the Framers of the Treaty of Rome was to create an “ever-closer union” among the member-states that would later constitute the EU.³⁹⁶ Following a 2016 referendum, the United Kingdom is scheduled to leave the EU on March 29, 2019.³⁹⁷ One of the chief concerns associated with the United Kingdom’s departure from the EU is the impact on financial markets.³⁹⁸ The void left by the United Kingdom’s contributions to the EU government’s budget could be substantial.³⁹⁹ One estimate of this tax deficit is between €10-15 billion per year that must be absorbed by the remaining 27 member-states.⁴⁰⁰ The risk to international trade has been perceived as so great that just before the June 2016 referendum, nearly one-third of the largest firms in the United Kingdom banded together to make clear that the best future for the United Kingdom requires that it remain with the EU.⁴⁰¹ Regardless of the impact on the EU budget, the negotiations between the United Kingdom and the EU are in a very uncertain state because much international trade is threatened by the mere lack of agreement about what is to happen after March 29, 2019.⁴⁰² Interestingly enough, the United Kingdom’s departure from the EU could give it an advantage in the war to attract large businesses as the United Kingdom would no longer have the restraints imposed by EU tax law.⁴⁰³

³⁹⁵ Case C-174/00, *Kennemer Golf v. Staatssecretaris van Financiën*, [2002] ECR I-3293, at ¶ 15; Case C-141/00, *Ambulanter GmbH v. Finanzamt für Körperschaften I*, [2002] ECR I-6833, at ¶ 27.

³⁹⁶ *Ever Farther Union*, THE ECONOMIST (Feb. 27, 2016), <http://www.economist.com/news/europe/21693620-principle-ever-closer-union-died-long-britain-demanded-exemption-ever-farther>.

³⁹⁷ George Parker & Arthur Beasley, *Theresa May Under Renewed Tory Pressure Over Customs Union*, THE FIN. TIMES (Apr. 26, 2018), <https://www.ft.com/content/ddcf2898-495e-11e8-8ee8-cae73aab7ccb>.

³⁹⁸ Jim Brunsten & Caroline Binham, *EU and EU Agree to Prepare for Market Turmoil in Worst-Case Brexit*, THE FIN. TIMES (Apr. 27, 2018), <https://www.ft.com/content/48cfa790-4a1c-11e8-8ee8-cae73aab7ccb>.

³⁹⁹ Simon Nixon, *With a Year to Go, Britain is Still in the Dark Over Brexit*, WALL ST. J. (Mar. 25, 2018), <https://www.wsj.com/articles/with-a-year-to-go-britain-is-still-in-the-dark-over-brexit-1522022717?mod=searchresults&page=1&pos=14>.

⁴⁰⁰ Alex Barker & Mehreen Khan, *Is There a Black Hole in the EU Budget*, THE FIN. TIMES (Apr. 25, 2018), <https://www.ft.com/content/0ac525c2-4839-11e8-8ee8-cae73aab7ccb>.

⁴⁰¹ Jenny Gross, *U.K. Companies Join Push for EU “Yes” Vote*, WALL ST. J. (Feb. 22, 2016, 5:18PM), <http://www.wsj.com/articles/u-k-companies-line-up-for-eu-yes-vote-1456179516>.

⁴⁰² George Parker, *Euro-sceptics Fear ‘Bonkers’ Post-Brexit Customs Union Plan*, THE FIN. TIMES (Apr. 29, 2018), <https://www.ft.com/content/907b028e-4bb0-11e8-97e4-13afc22d86d4>.

⁴⁰³ *Beauty Contest: Unilever Dodges the Brexit Crossfire*, THE ECONOMIST (Nov. 29, 2017), <https://www.economist.com/news/business-and-finance/21731798-dual-nationality-consumer-giant-has-choose-between-britain-and-netherlands-ultimately>.

The uncertainty posed by the threat of a United Kingdom exit from the EU is akin to the uncertainty the ECJ, and the EU government in general, leaves open by collectively allowing for member-state discretion in determining what implementing legislation can be used to meet the requirements of the Sixth Council Directive 77/388/EEC, allowing national courts to determine what member-state implementing legislation meets the requirements of Directive 77/388/EEC, and using a Directive instead of a Regulation to harmonize VAT tax law across the EU.

The level of VAT tax harmonization that exists in the EU should be described as fragile with a few sources of threat. Although this work recommends transplanting a Directive with a Regulation, the author of this work admits that perhaps the flexibility of a Directive is what keeps many member-states in the EU, whereas the adoption of more Regulations may lead to further referendums by member-state polities as to whether to remain in the common market. However, not one member-state has left the EU since its founding.