Chapter 8
Subject Matter and Scope

8.1 Introduction

Article 99 of the (original) EEC Treaty\textsuperscript{377} instructed the Commission as follows:

The Commission shall consider how the legislation of the various Member States concerning turnover taxes, excise duties and other forms of indirect taxation, including countervailing measures applicable to trade between Member States, can be harmonised in the interest of the common market.

The Commission shall submit proposals to the Council, which shall act unanimously without prejudice to the provisions of Articles 100 and 101.

From this wording it may be concluded that the legal character of turnover taxes mentioned in Article 99 EEC Treaty is considered to be "indirect" (cf. "and other forms of indirect taxation") and in addition, the turnover taxes are apparently treated as taxes having an identical legal character, notwithstanding the extreme differences in systems of levying the taxes in force at the time the Treaty was signed, since the term “harmonization” is used.\textsuperscript{378}

In 1960, the Commission responded to this instruction by appointing three working groups. Working group I, specially charged with the task of researching the possibilities of harmonising the turnover taxes in the EEC, appointed three study groups: sub-groups A, B and C composed of experts from the Member States and the Commission.

The question of the possibility of the removal of tax frontiers and the need for physical inspections at borders to administer the system of border tax adjustments in relation to turnover taxes was referred to sub-group A. Sub-group B was given the task of considering the adoption of a common single-stage general sales tax, to apply at a stage prior to the retail stage, and if necessary, to be combined with a separate tax on retail sales. Sub-group C considered the possibilities of a common single-stage tax at the production stage, with a separate

\textsuperscript{377} Since the Treaty of Amsterdam, Article 99 was renumbered Article 93 EC, which is now Article 113 TFEU, providing (amendment in italics):

"The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

\textsuperscript{378} See also section 7.2.1. For further discussion of the character of a tax, see Article 401 in section 21.5.
tax at the retail stage if necessary. The results of the working groups were published as the ABC report.\(^{379}\)

Furthermore, in 1960, the Commission appointed the Fiscal and Financial Committee to study the extent to which the tax systems of the Member States conflicted with the establishment of a common market.\(^{380}\) The conclusions of the ABC report and the report of the Fiscal and Financial Committee are, in substance, concordant (although the reports are differently structured). Both recommend that the Member States abolish the cascade tax and adopt the value added tax in its place.\(^{381}\)

The report of the Fiscal and Financial Committee, chaired by Professor Fritz Neumark from Germany (generally referred to as the Neumark report) summarized the defects of the cascade turnover tax as follows:

> It causes distortion of competition within the national economics where it is applied and artificially promotes the concentration of enterprises, but, in addition, it distorts the international trade regulations because of the impossibility of calculating exactly the overall charge of the turnover tax burden on the specific commodity and consequently ... when the principle of country of destination is applied ... the amount of the corresponding countervailing duties or refunds.\(^{382}\)

The recommendations to adopt the value added tax can be viewed as a rather audacious one, since the tax existed in only one of the Member States, namely in France. The Neumark report did not consider the retail sales tax as a suitable alternative,\(^{383}\) on the practical grounds of fiscal technicalities, particularly those relating to the large number of small retailer merchants, most of whom were thought unable to keep adequate books. In fact, the Neumark report considered the problem of applying the VAT in the retail stage so intractable that it recommended the exclusion of the retail stage from the value added tax.\(^{384}\)

The EEC Commission agreed with the findings of the ABC and Neumark reports and proposed, in a draft directive, that harmonization should proceed in three stages. During the first stage – ending 4 years after the implementation of the Directive – Member States should abandon their multi-stage cumulative turnover taxes and replace them by a non-cumulative system of their choice. During the second stage, to be ended on 31 December 1969, the non-cumulative systems should be replaced by a common value added tax system. The last and third

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381. Idem, p. 73 and 154.
382. Neumark report, p. 139.
stage, for which no time-limit was mentioned, should result in abolition of intra-
Community tax frontiers.

The proposal was submitted to the European Parliament. The Internal Market
Committee of the Parliament, in the “Deringer report” (named after the chairman of
the Committee, Mr Arved Deringer) advised that the envisaged three stages
should be reduced to two. There seemed little point in changing to non-cumulative
systems and in some States possibly to a single-stage system, as a temporary
measure, if the VAT would be introduced eventually in all Member States. This
objection was accepted by the Commission and resulted in the submission of two
(revised) draft directives to the Council of Ministers. Of special interest is the
interpretation of Article 99 of the EEC Treaty in the Deringer report, taking the view
that not only the turnover taxes, excise duties and other indirect taxes should be
harmonized, but that they should be harmonized in relationship to each other.
Since no attempt had been made to do so, it was prophetically observed:

On this basis, it will be necessary in twenty years time to open one’s case ... to prove
to customs that one has not wrapped cigars inside one’s pyjamas.

In fact the report’s prophecy proved to be valid for 30 years.

The First Directive of 11 April 1967,385 together with the Second Directive of the
same date, instructed the Member States to replace the existing turnover tax
systems by a common system of “Tax on Value Added”. This common system was
described in Article 2 of the First Directive (see now Article 1 of the VAT Directive)
as follows:

The principle of the common system of value added tax involves the application to
goods and services of a general tax on consumption exactly proportional to the price
of the goods and services, whatever the number of transactions which take place in
the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services
at the rate applicable to such goods or services, shall be chargeable after deduction of
the amount of value added tax borne directly by the various cost components.

The common system of value added tax shall be applied up to and including the retail
trade stage.

The above definition sets out the essential characteristics of a theoretical model to
which the actual Community system aspires.386 In all stages of production and
distribution tax is levied on all supplies of goods and services. Although it is the
purpose to tax only private consumption, tax is levied by entrepreneurs and also
on expenditure of entrepreneurs. In principle double taxation is avoided by

allowing businesses to deduct tax on their purchases from the tax they have to charge on their sales and pay to the Revenue.

The choice has fallen on this system, since in contrast to cumulative systems competition is not distorted and the free movement of goods and services within the common market is not distorted.

The eighth recital of the preamble of the First Directive stated the following:

Whereas the replacement of the cumulative multi-stage tax system in force in the majority of Member States by the common system of value added tax is bound, even if the rates and exemptions are not harmonised at the same time, to result in neutrality in competition, in that within each country similar goods bear the same tax burden, whatever the length of the production and distribution chain, and that in international trade the amount of the tax burden borne by goods is known so that an exact equalisation of that amount may be ensured; whereas therefore, provision should be made, in the first stage, for adoption by all Member States of the common system of value added tax, without an accompanying harmonisation of rates and exemptions.

The common system of value added tax was set out in the Second Directive, 387 which provided that the value added tax should apply to:

(a) the supply of goods and the provision of services within the territory of the country by a taxable person against payment;
(b) the importation of goods (Article 2).

The expressions “territory of the country”, “taxable person”, “supply of goods” and “provision of services” were further defined (Articles 3-7), albeit that only services listed in Annex B were compulsorily subject to VAT.

The tax should be calculated on the basis of the consideration or price for the supply of goods or provision of services or, in the case of importation, on the customs value of the goods (Article 8).

Member States were free to establish their own standard rate of tax and to subject supplies of certain goods and services to increased or reduced rates (Article 9). However, according to the preamble, 388 the application of zero rates should be strictly limited. Moreover, imported goods should be taxed at the same rate as that applied internally to the supply of goods.

Also, subject to consultation, the Member States were free to determine their own exemptions (Article 10).

388. Fifth consideration, preamble to the Second Directive.
A taxable person was required to keep sufficiently detailed accounts and to issue invoices in respect of goods and services supplied by him to another taxable person (Article 12).

The taxable person was authorized to deduct from the tax for which he is liable the value added tax invoiced to him in respect of his purchases and imports, where these goods and services were used for the purposes of his business (Article 11). However, Member States were allowed to apply in respect of capital goods the method of deduction by annual instalments – the so-called deductions pro rata temporis (Article 17).

Within this framework Member States were free to adopt special measures to simplify the procedures or prevent fraud (Article 13) or to apply a special system to small undertakings whose subjection to the normal system of VAT would meet with difficulties (Article 14) or to apply a special system, best suited to national requirements and possibilities, to the agricultural sector, until further proposals for directives or common procedures had been accepted (Article 15).

From the provisions above it follows that the system actually established by the First and Second Directives fell short of the model described in Article 2 of the First Directive, since Member States could choose not to apply the VAT at the retail stage, only services listed in Annex B were compulsorily subject to VAT, subject to consultation the Member States were free to determine their own exemptions and within limits Member States could restrict or refuse deduction in respect of capital goods.389

Adoption of the necessary national legislation to implement the First and Second Directives did not cause serious difficulties in most Member States.390 In France, the already existing system of taxe sur la valeur ajoutée (TVA) had to be adapted on a number of, and after all, essential points. Germany too was prompt in implementing the obligations set forth in the Directives, which entered into force in 1968. The tax was introduced in the Netherlands at the beginning of 1969; and in Luxembourg 1 year later. Major difficulties were encountered in Belgium and Italy.

In Belgium the main problem391 was the fear that the introduction of the new tax would have serious budgetary repercussions. Since most of the revenue from the existing turnover tax was collected by means of prepaid stamps, the change to the new system would cause a gap in the flow of revenue.

389. It should be noted that the First VAT Directive has been incorporated into the Recast VAT Directive and, thus, still applies and is a valuable source of interpretation for the Court of Justice.
In Italy, the introduction of the new tax met with serious difficulties, mainly because
the value added tax was proposed as part of a general plan of (necessary) tax
reforms.\textsuperscript{392} This coupling of the VAT with other issues influenced the discussions
about introduction of the VAT.\textsuperscript{393}

A Third Directive\textsuperscript{394} extended the deadline for implementation of the First and
Second Directives until 1972. The Belgian value added tax entered into force in
1971. Two additional Directives, the Fourth and Fifth,\textsuperscript{395} extending the time-limit
for Italy, were necessary before the value added tax was eventually introduced in

On 17 May 1977, the Sixth Directive was adopted.\textsuperscript{396} The aim of the Sixth Directive
was to further harmonize the various national laws. From the preamble, one could
conclude that the purpose of the Sixth Directive was to implement the second
stage (as envisaged by the First and Second Directives), namely the abolition of
the imposition of tax on the importation and the abolition of remission of tax on
exportation in the intra-Community commerce, but he Sixth Directive did not
intend to accomplish this at all. Border tax adjustments remained necessary.

Since the adoption of the Sixth Directive, 16 (numbered proposals for) directives
have been submitted by the Commission to the Council of Ministers (during the
period in which the fiscal frontiers had not yet been removed\textsuperscript{397}) and numerous
other directives and decisions. Set forth below is a summary of the numbered
directives.

Ten of the proposed directives have been adopted by the Council:

– the Ninth Directive\textsuperscript{398} extended the time limit for several Member States to
   implement the Sixth Directive; the Fifteenth\textsuperscript{399} and Twenty-first\textsuperscript{400} Directives
   for Greece;

\textsuperscript{392} Idem.
393. See further A. Pedone, “Italy”, p. 208 in M. Aaron (ed), \textit{VAT Experiences of Some European Coun-
397. See also: Communication from the Commission – Programme for the simplification of value
   added tax procedures and formalities in intra-Community trade Programme for the simplification
   of value added tax procedures and formalities in intra-Community trade (Communication from
– the Eighth\(^{401}\) and the Thirteenth\(^{402}\) Directives deal with refunds of VAT to taxable persons not established in the territory of the Member State and to persons not established in EU territory;
– the Tenth Directive\(^{403}\) deals with the rules relating to the place of supply of the hiring-out of movable tangible property;
– the Eleventh Directive\(^{404}\) excludes the French overseas departments from the scope of the Sixth Directive;
– the Seventeenth Directive\(^{405}\) exempts from VAT the temporary importation of goods (other than means of transport) from VAT. It has been withdrawn effective as from 1 January 1993;
– the Eighteenth Directive\(^{406}\) deals with the abolition of certain derogations from the Sixth Directive;
– the Twentieth Directive\(^{407}\) authorizes Germany to compensate farmers for the dismantling of compensatory amounts, using VAT as an instrument.

The remaining six numbered proposals have been withdrawn, namely the Seventh draft Directive, dealing with a common system of VAT to be applied to works of art, collectors’ items, antiques and second-hand goods;\(^{408}\) the proposal for a Twelfth Directive dealing with expenditure not eligible for deduction;\(^{409}\) the proposal for a Fourteenth Directive, proposing compulsory application of the postponed accounting system regarding the VAT payable on importation of goods by taxable persons;\(^{410}\) the proposal for a Sixteenth Directive dealing with the importation of used goods by private persons;\(^{411}\) and the proposal for a Nineteenth Directive clarifying various provisions of the Sixth Directive.\(^{412}\)

The Seventh draft Directive was replaced by a new proposal which was adopted by the Council in December 1994. The proposal for the postponed accounting system and the proposal regarding importation by private persons have been replaced by far-reaching new directives abolishing the fiscal frontiers.

On 16 December 1991, the ECOFIN Council agreed on the text of a Directive on the abolition of fiscal frontiers (91/680/EC),\(^{413}\) introducing transitional

\footnote{408. COM(88) 846 final.}
\footnote{409. COM(82) 870 final and COM(84) 84 final.}
\footnote{410. COM(82) 402 final.}
\footnote{411. COM(86) 163 final.}
\footnote{412. COM(84) 648 final and COM(87) 315 final.}
\footnote{413. OJ 1991, L 376, p. 1.}
arrangements for the taxation of trade between Member States. Even before the implementation date (1 January 1993), a simplification Directive was issued (92/111/EEC), followed in 1995 by a second simplification Directive (95/7/EC). Since the introduction of the transitional arrangements various other directives have been adopted, e.g. regarding the rates, second-hand goods, investment gold, services supplied by electronic means, etc. As we will see below, the directives changed the VAT system within the Community dramatically and require persons liable to pay VAT to comply with new extensive administrative obligations.

The starting point of the Directive amending and supplementing the Sixth Directive with a view to the abolition of fiscal frontiers is that purchases by private individuals are, as a general rule, **taxed exclusively in the country of purchase.** There are, however, two exceptions to this rule during the transitional period with regard to:

1. purchases of new cars and other new means of transport; and
2. distance sales.

The special rules with regard to intra-Community trade in new means of transport are also applicable to taxable persons and non-taxable legal persons. The special rules on distance sales are also applied, up to a certain threshold, to non-taxable legal persons, farmers eligible for the flat-rate scheme and taxable persons not entitled to deduction of VAT.

As a general rule, purchases by taxable persons and by non-taxable legal persons (public bodies, pure holding companies and similar persons) fall under a certain regime, based on taxation in the country of destination while the supply of goods in the country of purchase is exempt with the right to deduction. Even under this regime special rules are applied to supplies, up to a certain threshold, to non-taxable legal persons, farmers eligible for the flat-rate scheme and taxable persons not entitled to deduction of VAT.

With regard to intra-Community trade the concepts of “importation” and “exportation” were abolished. Therefore other concepts (with similar results) have been introduced, namely “intra-Community acquisition” of goods (for consideration) and (exemption for) “intra-Community supplies”.

The concepts are closely linked: a(n exempt) supply to another Member State results in an intra-Community acquisition of goods, similar to the situation under

416. Distance sales are often referred to as mail-order sales; however, distance sales include other types of sales than those ordered though a catalogue, telephone, etc.
417. Often referred to as “zero rating”.

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the original Sixth Directive in which an exempt exportation to another Member State was followed by the taxable event importation into that Member State. The major difference is that from 1 January 1993 fiscal controls at internal frontiers were definitively abolished; the taxable event, i.e. the intra-Community acquisition, must be reported on the domestic VAT return rather than to customs officials at the borders, a method which has a striking similarity to the postponed accounting system on importation, see section 18.2.2.

Certain intra-Community transactions do not fit neatly into a system of supplies followed by intra-Community acquisitions, for example the mere transfer by a taxable person of goods from his undertaking in one Member State to another Member State. Even so, (under the transitional system) it is necessary to know where goods are located in order to prevent fraud and non-taxed consumption. Therefore, certain transactions, such as the example mentioned above, are deemed to be intra-Community supplies for consideration, followed by, equally fictitious, intra-Community acquisitions. (See section 10.3.)

Since the adoption of the Sixth Directive it has been amended more than 25 times. With regard to Directive 2006/112/EC recasting the Sixth VAT Directive as amended, see section 8.2.

8.1.1 Dates of introduction and expiry dates

The Sixth Directive (Article 1) prescribed that the Member States must modify their existing VAT systems in accordance with the Directive by 1 January 1978. For most Member States it was impossible to meet this deadline. The Ninth Directive granted a delay until 1 January 1979.418 The Ninth Directive was adopted on 26 June 1978. In the meantime, almost 6 months had passed during which Member States had failed to implement rules that were sufficiently clear to confer rights directly upon citizens. In various cases the Court of Justice ruled that taxpayers could rely on provisions of the Sixth Directive, in absence of the implementation of that Directive. (See section 5.2.)

With regard to the system introduced by Directive 91/680/EEC, it was the intention of the Commission that the transitional VAT system was to expire on 31 December 1996. However, according to the adopted Directive (Article 28l), when the Council considers “that conditions exist for satisfactory transition to the definitive system”, it must decide on the necessary arrangements for the entry into force of the definitive system before 31 December 1995. The Council has not taken such a decision. Thus, the transitional arrangements are automatically continued until the Council decides differently (see also the present Article 402 of the VAT Directive and the subsequent developments in section 22.2.1).

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418. OJ 1978, L 194, p. 16.
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8.2 The Recast of the Sixth VAT Directive


In order to improve the drafting quality, the text of the Sixth Directive has undergone numerous changes. Although the changes do not affect its substantive content, they do alter the format, with the 53 Articles of the Sixth Directive divided into 414 new Articles.

The Directive entered into force on 1 January 2007. The Member States were given time until 1 January 2008 to comply with some new provisions introduced by the Directive, see section 22.3. Since the adoption of Directive 2006/112/EC the EU legislator has been hyper active in the field of VAT.

On 23 December 2003, the European Commission presented a Proposal for a Council Directive amending the Sixth VAT Directive as regards the place of supply of services. This Proposal was amended in 2005. On 12 January 2008, the so-called VAT package was adopted in the form of Directive 2008/8/EC changing the place of supply of services and Directive 2008/9/EC with new refund rules of VAT incurred by EU businesses in Member States where they are not established.


On 5 May 2009, the VAT Directive was amended by Directive 2009/47/EC granting the Member States the option to apply reduced VAT rates on a permanent basis to the so-called labour-intensive services as well as restaurant services.

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On 25 June 2009, the VAT Directive was amended by Directive 2009/69/EC as regards tax evasion linked to import.

On 22 December 2009, the Council adopted Directive 2009/162/EU amending various technical provisions of the VAT Directive (presented by the Commission on 7 November 2007) concerning the VAT scheme applicable to the supply of natural gas, electricity, heat and/or refrigeration, the tax treatment of joint undertakings set up pursuant to Article 171 of the EC Treaty (now Article 187 TFEU); certain consequences of EU enlargement and the conditions under which the right to deduct input VAT may be exercised when immovable property is used both for private and business purposes.

On 16 March 2010, the ECOFIN Council adopted Directive 2010/23/EU amending the VAT Directive as regards an optional and temporary application of the reverse charge mechanism in relation to trade with emission certificates. Based on a new Article 199a, Member States are allowed to apply, on a temporary basis, a mechanism whereby the obligation to pay VAT shifts onto the person to whom allowances to emit greenhouse gases, as defined in Article 3 of Directive 2003/87/EC, and other units that may be used for compliance with the same Directive, are transferred. Member States must produce an evaluation report on the application of the mechanism so as to enable an assessment of its efficiency.

On 28 January 2009, the Commission published its Communication on the technological developments in the field of e-invoicing and measures aimed at further simplifying, modernizing and harmonizing the VAT invoicing rules. A Proposal amending the conditions for (e-)invoicing accompanied this Communication. On 13 July 2010, the ECOFIN Council adopted Directive 2010/45/EU amending the VAT Directive as regards the rules on invoicing to be implemented as of 1 January 2013.

On 7 December 2010, the Council adopted Directive 2010/88/EU amending the VAT Directive with regard to the duration of the obligation to respect a minimum standard rate. Article 97 of the VAT Directive provides now that from 1 January 2011 until 31 December 2015, the standard rate may not be lower than 15%.


On 22 July 2013, the Council adopted Council Directive 2013/42/EU\textsuperscript{432} introducing a quick reaction mechanism and Directive 2013/43/EU\textsuperscript{433} allowing Member States to apply, on an optional and temporary basis the reverse charge mechanism.

8.3 Subject matter

\textit{[Article 1 of the VAT Directive]}

Article 1 replaces the First Directive (discussed in section 8.1). It provides the following:

1. This Directive establishes the common system of value added tax (VAT).

2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.

Thus, the common VAT system is based on the principle of the universality of VAT. The universality of imposing VAT is manifest both at the personal level (every transaction is taxed independently of the person who carries it out – as long as that transaction is effected in the context of an economic activity in the sense of the VAT Directive) and at the material level (each supply of goods is, in principle, taxed).

8.4 Scope

The VAT Directive distinguishes between the scope, i.e. the field of application, and, under a separate title, the territorial scope; for the latter see section 8.5. For the territorial allocation, generally referred to as the place of supply rules, see chapter 11.

\textit{[Article 2 of the VAT Directive]}

Subject to value added tax are: the supply of goods and services effected for consideration within the territory of a Member State by a taxable person acting as such (Article 2(1)(a) and (c) of the VAT Directive).

Since 1992, the scope has been extended; also subject to value added tax are intra-Community acquisitions of goods for consideration by taxable persons and

\textsuperscript{432} OJ 2013, L 201, p. 1.
\textsuperscript{433} OJ 2013, L 201, p. 4.
by non-taxable legal persons provided certain conditions are fulfilled (Article 2(1)(b) of the VAT Directive) as well as the intra-Community acquisition of new means of transportation by anyone. The new means of transport are defined in Article 2(2) of the VAT Directive. Article 3 of the VAT Directive sums up when intra-Community transactions are not subject to VAT, see further section 10.3..

Furthermore the importation of goods by anyone is subject to VAT (Article 2(1)(d) of the VAT Directive).

In the sections below, the following subjects are discussed regarding the field of application of the VAT:

– illegal transactions (section 8.4.1) (especially carousel fraud and in general the question whether the existence of transactions related to fraud or abuse can be denied, section 8.4.1.1);
– transactions without consideration (section 8.4.2);
– payments without transactions (section 8.4.3);
– transactions for consideration/direct link (section 8.4.4);
– legal relationship (section 8.4.5);
– acting as such (section 8.4.6); and
– tax amnesty (section 8.4.7).

8.4.1 Illegal transactions

Article 2 of the VAT Directive refers to transactions performed by taxable persons. Pursuant to Article 9(1) of the VAT Directive (ex Article 4 of the Sixth Directive), a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

The following cases deal with illegal transactions. As will be seen, illegal transactions fall outside the scope of the VAT only in so far as they concern supplies and import of narcotics or counterfeit currency, which must be regarded as extra commercium.

The first two cases deal with the question whether a debt arises for customs and VAT purposes upon importation of drugs.

Case 240/81 (Senta Einberger I)

Ms Einberger dealt in morphine. From, at that time, West Germany she sold morphine, illegally imported into Germany, to Mr and Ms Winniger in Switzerland. (Different from the usual practice in many countries the names of dealers and users are mentioned by the Court of Justice!) Caught by customs Ms Einberger was invited to pay DEM 10,960, of which 5,712 related to customs duties and 5,248 related to VAT. The German court asked the Court of Justice whether after the introduction of the Common Customs Tariff, a Member State is authorized to charge customs duties on drugs which have been smuggled into and subsequently removed from the customs territory of the Community. The Court of
Justice replied that no customs debt arises upon the importation of drugs otherwise than through economic channels strictly controlled by the competent authorities for the use of medical and scientific purposes.434

Case 294/82 (Senta Einberger II)

Demonstrating a laudable attachment to the reference for a preliminary ruling, as the Advocate General phrased it in his Opinion, the same section of the German court referred a second question to the Court of Justice whether the imposition of VAT is compatible with Article 2(2) of the Sixth VAT Directive (now Article 2(1)(d) of the VAT Directive), if Member States are not permitted to levy customs duties. According to the Court of Justice, the conclusion that it is up to the Member States to decide whether VAT should be levied, since the Sixth Directive does not expressly deal with this subject, is incompatible with the purposes of the Directive, i.e. a far-reaching harmonization and a common basis of assessment. It clearly follows from the context and the purposes of the Directive that VAT on illegally imported drugs is to be excluded. The Court of Justice pointed at the parallel character of import duties and VAT upon importation: for the purpose of both levies, to bring goods in free circulation, a charge is strictly forbidden.

The next case deals with the importation of counterfeit currency.

Case C-343/89 (Witzemann)

The Finanzgericht München referred a question to the Court of Justice for a preliminary ruling on the interpretation of Articles 3, 9 and 12 to 29 of the EEC Treaty435 and Article 2 of the Sixth VAT Directive (now Article 2(1)(d) of the VAT Directive). The question raised in the course of proceedings between the parties concerned the payment of customs duties and VAT on the importation of counterfeit currency notes into the territory of the Federal Republic of Germany.

By judgment of the Landgericht München, Mr Witzemann was sentenced in 1982 to a term of imprisonment for currency forgery. In that judgment, which had the force of res judicata, it was found that in 1981 Mr Witzemann had brought a consignment of forged US dollar notes into the territory of the Federal Republic. He had taken delivery of the currency in Italy.

On the basis of that finding, the Hauptzollamt demanded payment of customs duties and VAT on importation by Mr Witzemann in respect of the counterfeit currency. The customs duties were apparently charged due to the fact that the Community origin of the goods was not established.

The Court of Justice referred to the Einberger I case in which it held that the introduction of the Common Customs Tariff, provided for in Article 3(b) of the

434. This judgment has resulted in a similar provision in Article 83 of the Union Customs Code.
435. Now Articles 8, 28 and 30 to 32 TFEU.
Treaty (see now Article 31 TFEU), falls within the scope of the objectives assigned to the Community and the guidelines laid down in Article 29 of the Treaty for the operation of the Customs Union (now Article 30 TFEU). The importation of drugs into the Community, which can give rise only to penalties under the criminal law, fall wholly outside those objectives and guidelines. (At the hearing the Commission admitted that if anyone had thought of it, counterfeit currency would have been included in the change of the Regulation on customs debt excluding the importation of drugs, which apparently after Einberger I was deemed to be necessary in order to create certainty that national legislations would respect a prohibition of a customs charge on illegal drugs.)

That approach is all the more appropriate in the case of counterfeit currency. Counterfeit currency is also covered by an international convention, the International Convention for the Suppression of Counterfeiting Currency, to which all the Member States with the exception of the Grand-Duchy of Luxembourg were parties, and Article 3 of which requires the contracting parties to punish as ordinary crimes any fraudulent making or altering of currency, the fraudulent uttering of counterfeit currency, and the introduction into a country, or the receiving or obtaining, of counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit. Furthermore, the making, possession, importation and marketing of counterfeit currency, whether national or foreign, are prohibited in all the Member States. It follows that there is an absolute prohibition, in all the Member States, on the importation or bringing into circulation of counterfeit currency, whereas trade in drugs and their use are permitted for medical and scientific purposes. Community law must be interpreted as meaning that no customs debt can arise upon the importation of counterfeit currency into the customs territory of the Community. Referring to the parallel nature of VAT on importation the Court of Justice’s considerations concerning the illegal importation of drugs apply a fortiori to the importation of counterfeit currency.

The question arises, where is the borderline? Also other transactions are “strictly forbidden”, such as smuggling weapons, children pornography, trade in counterfeit products, illegal gambling, etc. Can one invoke the illegality of one’s own transactions in order to avoid taxation?

In this respect, the Opinion of AG Mancini in Einberger II is interesting. He admits that the argument (in favour of taxation) that the underground economy is encouraged if huge trade transfers of wealth linked with the market in drugs escape turnover tax, has undeniable attractions. But from an ethical and political point of view it is rejected by many experts in tax law and finance. Personally Mancini follows the school of thought which distinguishes between transactions which are prohibited by civil law (prostitution, for example) and those which are prohibited by criminal law – the latter should be considered irrelevant from the point of view of VAT.
The Court of Justice does not make this distinction. As may be derived from the following cases, taxation is only excluded for strictly forbidden transactions in illegal drugs and counterfeit currency. All other transactions are apparently “less strictly” forbidden and fall within the scope of VAT, which, as we will see, does not necessarily result in taxation.

The following three cases deal with the domestic sale of drugs.

Case 289/86 (Happy Family) and 269/86 (Mol)

Happy Family was a social and cultural association which ran a youth centre. Among other things on offer to visitors was the opportunity to buy hashish from a “house dealer”. Although the sale of hashish was illegal in the Netherlands, the Dutch law enforcement authorities gave a low priority to the investigation of small-scale offences and, in practice, the Dutch police would take no action against minor offenders unless their activities were publicized or carried out in a provocative manner. The Dutch revenue authorities assessed Happy Family for VAT due on the sale of hashish in the club.

Mr Mol dealt in amphetamines. The preliminary question in this case concentrated on the VAT on domestic supplies, since so far the Court of Justice had only decided on the (not-permitted) VAT on importation.

In the Mol case the Court of Justice repeated its point of view expressed in the Einberger cases. In the Happy Family case the Netherlands, France and Germany intervened. They argued that different from the situation of importation of drugs, in which a parallel exists between import duties and VAT upon importation, such a parallel is absent when tax is levied on domestic transactions for consideration. Non-taxation would prejudice against legal transactions and distort fiscal neutrality.

The Court of Justice admitted that, in principle, fiscal neutrality excludes a different treatment between legal and illegal transactions. However, this is not true with regard to products subject to a total prohibition to be put into circulation in all the Member States.

The Court of Justice held that – unless the supply of drugs was purely for medical or scientific purposes and was strictly controlled by the competent authorities – the illegal sale of drugs could not fall within the scope of VAT. This applied even in cases where a Member State’s authorities operated a selective prosecution policy, which effectively ignored small-scale offences.

The Dutch drug saga is continued with the following case.

Case C-158/98 (Coffeeshop Siberië)

Coffeeshop Siberië is an establishment in Amsterdam where customers can buy and consume soft drugs. The coffeeshop was owned by a partnership, which
rented a table to a cannabis dealer. Customers who enquired at the bar about the purchase of drugs were directed to the drug dealer’s table.

The Dutch authorities assessed the partnership for VAT due on the amounts received in respect of the table-hire. The partners appealed contending that, by providing the table and informing customers that drugs could be purchased there, they had effectively colluded in drug dealing which was an illegal activity (albeit that the Dutch police would generally not seek to prosecute). Thus, under the *Happy Family* principles, the renting of the table should not fall within the scope of VAT.

The Court of Justice disagreed. It was not possible to transpose directly the reasoning in *Happy Family* to this case, as the facts were materially different: in the *Happy Family* case, the activity in question was the sale of drugs; whereas, in this case, the activity was the *making available of facilities* for the sale of drugs.

In this instance, the renting of a table was, in principle, an economic activity and therefore within the scope of VAT. The fact that the activities conducted at the table were illegal – which might, as a consequence, make the renting of the table illegal – was irrelevant. VAT should apply to the renting of the table since to do otherwise would lead to distortions between tables rented legally and those rented illegally, which would undermine the principle of fiscal neutrality.

The following case deals with the question whether the exemption of exports may be refused where such exports are made in breach of national provisions requiring prior authorization for exports.

**Case C-111/92 (Wilfried Lange)**

Mr Lange exported information systems to (former east-block) countries in respect of which the Community had imposed an export ban on such exports. Mr Lange had obtained export permits to Pakistan and Israel. The German authorities discovered that the systems were supplied to Russia and Bulgaria and sought to impose VAT. Mr Lange appealed, contending that the exports were exempt under Article 15 of the Sixth Directive, now Article 146 of the VAT Directive. The case was referred to the Court of Justice, which upheld Mr Lange’s contention, holding that Article 15(1) of the Sixth Directive is to be interpreted as meaning that the exemption of exports provided for therein may not be refused where such exports are made in breach of national provisions requiring prior authorization for exports to States for which, as a result of national provisions imposing an embargo, no authorization could have been issued in any of the Member States of the European Communities.

The Court of Justice added that this finding is entirely without prejudice to the powers of Member States to impose appropriate penalties, including those with financial consequences, for contraventions of their legislation requiring export permits for certain non-member countries. (See, however, Case C-285/09
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(Criminal proceedings against R) reported in section 15.3 below, in which the Court of Justice held that in circumstances in which an intra-Community supply of goods has actually taken place, but when, at the time of that supply, the supplier concealed the identity of the true purchaser in order to enable the latter to evade payment of VAT, the Member State of departure of the intra-Community supply may refuse to allow an exemption in respect of that transaction.)

The following case deals with unlawful games of chance.

Case C-283/95 (Fisher)

Karl Heinz Fisher operated a form of roulette without official authorization. He was assessed to VAT and appealed. The case was referred to the Court of Justice, which held that the unlawful operation of games of chance was within the scope of the Sixth Directive, referring to the principle of tax neutrality precluding a generalized distinction between lawful and unlawful transactions, as held in Lange. The Court of Justice also held that the exemption of Article 13B(f) (now Article 132(1)(f) of the VAT Directive) could not be restricted solely to lawful games of chance. The German government contended that the conditions in which lawful games take place are not comparable to those pertaining in the case of unlawful games on the ground that licensed casinos are subject to a levy calculated on the basis of their profits. According to the Court of Justice, the common system of VAT would be distorted if Member States could adjust its application on the basis that there are other, unharmonized, taxes. Secondly, there is nothing to prevent levies of the same kind as those payable by licensed casinos from also being imposed on organizers of unlawful games of chance.

The next case deals with the question whether the supply of counterfeit perfume products falls within the scope VAT.

Case C-3/97 (Goodwin and Unstead)

The facts were as follows. Mr Goodwin and Mr Unstead were both convicted of the offence of being knowingly concerned in the taking of steps with a view to the fraudulent evasion of VAT. Mr Goodwin was accused of having purchased counterfeit perfume products and of having sold them when he was not registered for VAT, ensuring thereby that he did not have to pay any VAT. Mr Unstead was accused of having participated in the manufacture, production, distribution and sale of such products through a business organization which he ran together with other persons, and which was not registered for VAT and therefore did not pay VAT. Mr Goodwin and Mr Unstead appealed against their convictions to the Court of Appeal. Without denying that they had carried out the transactions as charged, they submitted that, on a proper construction of the Sixth Directive, supplies of counterfeit perfume products are not subject to VAT. While agreeing with the Inner Crown Court that, on the facts, VAT was payable, the Court of Appeal considered that it would be helpful to obtain a preliminary ruling on this point.
In his Opinion AG Léger notes that the argument put forward by the appellants, whereby they seek to have the transactions at issue brought within the exceptional category of “goods which, by reason of their special characteristics, may not be marketed or incorporated into economic channels”, on the ground that they undermine the functioning of the common market and therefore can only be “alien” to the Sixth Directive, “first of all creates a sense of unease which is hard to dispel. In flagrant disregard of the principle ‘nemo auditur turpitudinem propriam allegans’, the appellants are seeking to rely on the unhealthy, and even dangerous, nature, from an economic point of view, of their activities, in order to prove that they are not liable to pay VAT”.

According to the Court of Justice, the prohibition on counterfeit products, which stems from the fact that they infringe intellectual property rights, is conditional, not absolute as in the case of narcotics or counterfeit currency. That prohibition is not sufficient, therefore, to place trade in such products outside the scope of the Sixth Directive. Furthermore the possibility of competition between counterfeit products and goods which are lawfully traded cannot be ruled out in a case such as that before the national court, in so far as there is a lawful market in perfume products on which counterfeit goods have a specific impact. Accordingly, such goods cannot, like narcotics or counterfeit currency, be regarded as extra commercium.

The following case deals with unlawfully imported alcohol – some already bottled, while the remainder was bottled in Finland in a former stable and under unhygienic conditions.

Case C-455/98 (Salumets)

The Finnish Tampere District Court asked for a preliminary ruling on the interpretation of the Sixth VAT Directive, the horizontal Excise Directive, Directive 98/83/EEC on the structures of excises on alcohol and alcoholic beverages and the Community Customs Code. Salumets and accomplices were caught smuggling about 100,000 litres of ethyl alcohol from Estonia into Finland. Part of the alcohol was bottled; the rest was kept in containers in a former stable under unhygienic conditions. They were ordered to pay approximately FIM 38 million. On appeal the Finnish Court was uncertain whether ethyl alcohol (as such not intended for human consumption and the importation is subject to a system of authorizations) ought not to be treated in the same way as the unlawful supply of narcotic drugs and the importation of counterfeit currency. Obviously, Salumets c.s. supported this view!

The Court of Justice held that, in contrast to narcotic drugs, ethyl alcohol can be lawfully marketed and introduced into economic channels. The circumstances in which the goods were imported in the present case cannot alter that assessment. An intrinsically lawful product such as ethyl alcohol may not be equalled with a narcotic drug for reasons connected with its origin, quality or purity.
8.4.1.1 Carousel fraud/denial of transactions

A carousel fraud may operate in the following way:

- Company A in a Member State sells goods to company B in another Member State.
- Company B, which is the defaulting trader, that is to say, a trader who incurs liability to VAT but goes missing without discharging that liability with the tax authorities, or the trader using a hijacked VAT number, that is to say, a trader using a VAT number belonging to someone else, sells the goods at a discount to another company (C), a buffer company, in the other Member State. Further sales can thereby be made at a profit. Company B incurs liability to VAT on the purchase of the goods, but, having used the goods for taxed transactions: it is also entitled to deduct that VAT as input VAT. On the other hand, it incurs liability for the output VAT it has charged to company C, but goes missing before discharging that liability to the tax authorities.
- In turn, Company C sells the goods to another buffer company (D) in the other Member State, paying the tax authorities the output VAT charged after having deducted the input VAT paid, and so on until a company in the other Member State “exports” the goods to another Member State. Exports are exempt from VAT, but the exporting company is entitled to claim a refund of the input VAT paid on the purchase of the goods. When the purchaser in the last Member State is Company A, there is a true carousel fraud.
- The process can be repeated.

Are transactions forming part of a carousel fraud by definition not economic activities? That was the question to be answered in the next joined cases.

Joined Cases C-354/03 (Optigen), C-355/03 (Fulcrum) and C-484/03 (Bond House Systems)

Optigen, Fulcrum and Bond House essentially are in the business of buying computer chips from companies established in the United Kingdom and selling them to purchasers established in another Member State. The companies claimed various net balances of refundable VAT which the Commissioners to a large extent disallowed.

The transactions in question formed part of a chain of supply involving a defaulting trader or a trader using a hijacked VAT number and, according to the Commissioners, there was a carousel fraud.

The High Court of Justice (England and Wales), Chancery Division referred questions to the Court of Justice for a preliminary ruling on whether transactions entered into by an innocent party, but which form links in a carousel fraud by others can be excluded from the VAT.
On 12 January 2006, the Court of Justice decided the cases. The Court started with an analysis of the definitions of taxable person and economic activities showing that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see section 9.1.2 below). That analysis and that of the definitions of “supply of goods” and “taxable person acting as such” show, according to the Court of Justice, that those terms, which define taxable transactions under the Sixth Directive, are all objective in nature and apply without regard to the purpose or results of the transactions concerned.

The Court of Justice then referred to its judgment in Case C-4/94 (BLP), see section 17.4, where it held that an obligation on the tax authorities to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating application of VAT by having regard, save in exceptional cases, to the objective character of the transaction in question. An obligation on the tax authorities to take account, in order to determine whether a given transaction constitutes a supply by a taxable person acting as such and an economic activity, of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge, would a fortiori be contrary to those objectives. According to the Court of Justice, each transaction must therefore be regarded on its own merits and the character of a particular transaction in the chain cannot be altered by earlier or subsequent events.

As regards the case law relied on by the United Kingdom government according to which a taxable person acquires that status definitively only if he made the declaration of intention to begin the envisaged economic activities in good faith, see section 9.3, the Court of Justice observed that this case law concerns the intention to commence and thus engage in economic activities and not the intended purpose of the economic activities themselves.

Also the suggestion that unlawful transactions fall outside the scope of VAT was rejected. The mere fact that conduct amounts to an offence is not sufficient to justify exemption from VAT, see section 8.4.1 above. That exemption applies only in specific situations where, owing to the special characteristics of certain products or certain services, any competition between a lawful economic sector and an unlawful sector is precluded. This is not the case with the computer chips at issue.
As to the question whether the VAT on the earlier or later sale of the goods concerned to the end-user has or has not been paid to the public purse, the Court of Justice pointed out that it is irrelevant to the right of the taxable person to deduct input VAT.\textsuperscript{436} The Court held that transactions such as those at issue, which are not themselves vitiated by VAT fraud, constitute supplies of goods or services effected by a taxable person acting as such and an economic activity within the meaning of Articles 2(1), 4 and 5(1) of the Sixth Directive (now Articles 2(1), 9(1) and 14(1) of the VAT Directive), where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge. The right to deduct input VAT of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing.

It seems to us that the Member States, deprived of the (draconic) method to treat purchases and sales as devoid of economic substance, are left with the joint and several liabilities as the method to combat fraud. See Case C-384/04 (\textit{Federation of Technological Industries}) and the Commission’s Proposal in section 18.2.1.

The following joined cases introduce the so-called “knowledge test”.

\textbf{Joined Cases C-439/04 (\textit{Axel Kittel}) and C-440/04 (\textit{Recolta Recycling})}

In Case C-440/04, Mr Aillaud sold to Recolta Recycling 16 luxury cars, on which he charged VAT, cars he had previously purchased from Auto Mail.

Immediately afterwards Recolta sold those cars to Automail to be distributed in other Member States, a transaction which according to the previous Article 43 of the Belgian Code de la TVA was exempt.

In reality the cars never left Belgium but entered various circuits specifically aimed at avoiding payment of VAT. Mr Aillaud and Auto Mail thus cooperated in order to avoid having to pay in the invoiced VAT.

The Belgian tax authorities refused Recolta deduction of the input tax which resulted in the following questions for a preliminary ruling by the Belgian \textit{Cour de Cassation} (Court of Cassation):

1. Where the recipient of a supply of goods is a taxable person who has entered into a contract in good faith without knowledge of a fraud committed by the seller, does the

\textsuperscript{436} See, to that effect also, the Order of the Court of Justice in Case C-395/02 (\textit{NV Transport Service}), paragraph 26, in section 10.3.1.
principle of fiscal neutrality in respect of value added tax mean that the fact that the contract of sale is void, by reason of a rule of domestic civil law which renders the contract incurably void as contrary to public policy on the ground of illegal basis of the contract attributable to the seller, cannot cause that taxable person to lose his right to deduct that tax?

2. Is the answer different where the contract is incurably void for fraudulent evasion of VAT itself?

In Case C-439/04, a company, Computime Belgium, at the time of the case in bankruptcy and represented by Axel Kittel, was a wholesaler in computer components which it purchased in Belgium in order to export them to other EU Member States, in particular to Luxembourg.

The recipient in Luxembourg sent the components to a third party who was also established in Luxembourg who subsequently sent the components back to Belgium to the supplier of Computime.

This supplier never paid in the VAT which had been invoiced to Computime while systematically deducting the VAT he had incurred. Computime was aware of this manoeuvre. This case resulted in two questions for a preliminary ruling by the Belgian Cour de Cassation identical to those in Case C-440/04 (Recolta), followed by a third question:

3. Is the answer different where the unlawful basis of the contract of sale which renders it incurably void under domestic law is a fraudulent evasion of value added tax known to both parties to the contract?

In its judgment of 6 July 2006, the Court of Justice gave an affirmative answer to the question whether, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was part of a fraud committed by the seller, Article 17 of the Sixth Directive (now Article 167 of the VAT Directive) must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders the contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose his right to deduct that tax. The Court of Justice mainly referred to its findings in Optigen and Others. The Court of Justice continued, referring to Case C-255/02 (Halifax), see section 2.4.3, by noting that the objective criteria which form the basis of the concepts of “supply of goods effected by a taxable person acting as such” and “economic activity” are not met where tax is evaded by the taxable person himself. The Court repeated that preventing tax evasion, avoidance and abuse is an objective recognized and encouraged by the Sixth Directive and that EU law cannot be relied on for abusive or fraudulent ends.
The Court then went back as far as the *Rompelman* case to recall that where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively\(^\text{437}\) and that it is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that this right is being relied on for fraudulent ends.

According to the Court of Justice (our emphasis):

... in the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, *irrespective of whether or not he profited by the resale of the goods*. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.

After having introduced the so-called “knowledge test” (if the tax administration can prove that the customer knew or should have known that he was participating in a transaction linked to VAT evasion, the tax administration can refuse the right to deduct to that taxable person) the Court of Justice concluded that it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of “supply of goods effected by a taxable person acting as such” and “economic activity”.

It seems to us that this judgment tightens the rules with regard to evasion. One could get the impression from *Halifax* (see section 2.4.3) that the Court of Justice had “softened” its findings with regard to abuse by referring to legal certainty and the fact that the application of Community legislation must be foreseeable. In the present case the Court takes a firm stance: EU law cannot be relied upon for fraudulent ends. This is not only the case where a taxable person actively participates in the fraud and gains advantages unlawfully, but also where a taxable person is aware of fraud but stands aloof without gaining any advantage.

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\(^{437}\) See, inter alia, Case 268/83 (*Rompelman*), Case C-110/94 (*INZO*) and Joined Cases C-110/98 to C-147/98 (*Gabalfrisa*), see section 9.3.
Apparently, in the fight against fraud there is no room for “disloyalty” to the Revenue.438

It remains to be seen to what extent doctrines developed in customs law will enter the field of VAT, such as “when is a person aware” or “should reasonably have been aware of unlawful transactions” and to what extent the degree of care and/or professional experience will play a role when deciding that entitlement to the right to deduct should be refused.439 See also the Joined Cases C-80/11 and Case C-142/11 (Mahagében and Dávid) and Case C-324/11 (Töth) in section 18.4.10.

The next case deals with the knowledge test and the effect of fraud downstream or upstream in the transaction carried out by a taxable person.

Case C-285/11 (Bonik)

Bonik is a company which was the subject of a tax investigation relating to the months of February and March 2009. Following that investigation, the Bulgarian tax authorities found that there was no evidence of the intra-Community supplies of wheat and sunflower declared by Bonik as having been carried out for Agrisco, a company governed by Romanian law, and that, in view of the fact that, according to Bonik’s accounts, the quantities of wheat and sunflower quoted on the invoices issued by Bonik had been taken out of its stock and were not there at the time of the investigation, taxable supplies of those quantities of wheat and sunflower had been made on Bulgarian territory.

The tax authorities also carried out checks in connection with wheat purchases which, according to Bonik’s tax return, it had made, in relation to which VAT had been deducted. Bonik had in its possession invoices relating to those purchases. However, in order to check that those purchases had been genuine, the Bulgarian

438. See for the borderline the case of “Bulves” AD v. Bulgaria (Application No. 3991/03) in which the ECtHR held (our emphasis):

“71. Considering the timely and full discharge by the applicant company of its VAT reporting obligations, its inability to secure compliance by its supplier with its VAT reporting obligations and the fact that there was no fraud in relation to the VAT system of which the applicant company had knowledge or the means to obtain such knowledge, the Court finds that the latter should not have been required to bear the full consequences of its supplier’s failure to discharge its VAT reporting obligations in timely fashion, by being refused the right to deduct the input VAT and, as a result, being ordered to pay the VAT a second time, plus interest. The Court considers that this amounted to an excessive individual burden on the applicant company which upset the fair balance that must be maintained between the demands of the general interest of the community and the requirements of the protection of the right of property. There has accordingly been a violation of Article 1 of Protocol No. 1.”

439. See Case C-454/10 (Oliver Jestel) in which the Court held that a person who, without being directly involved in the introduction of goods, participated in the introduction as intermediary in the conclusion of contracts of sale relating to those goods must be considered to be a debtor of a customs debt incurred through the unlawful introduction of goods into the customs territory of the European Union where that person was aware, or should reasonably have been aware, that that introduction was unlawful, which is a matter for the national court to determine.
tax authorities carried out additional checks with Bonik’s suppliers and with their suppliers. As it was not possible through those checks to establish that the latter had actually supplied goods to the suppliers to Bonik, the Bulgarian tax authorities concluded that those suppliers did not have a sufficient quantity of goods to make the supplies to Bonik and that no actual supplies had been made from those companies to Bonik. The Bulgarian tax authorities accordingly refused Bonik the right to deduct, in the form of a ‘tax credit’, the VAT relating to the supplies of wheat.

The ensuing dispute resulted in ten extensive questions by the Varna Administrative Court which in essence asked whether Directive 2006/112 and the principles of proportionality, equal treatment and legal certainty must be interpreted as meaning that, in circumstances such as those of the present case, a taxable person may not be refused the right to deduct VAT in relation to a supply of goods on the ground that, in view of factors relating to transactions upstream of that supply, the supply is considered not to have actually taken place.

In its judgment of 6 December 2012, the Court of Justice recalled that the right to deduct is a fundamental principle of the common system of VAT and that the question whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT.

According to the Court, in order to be able to conclude that there is a right of deduction, as relied upon by Bonik on the basis of the supplies of goods, it is necessary to check whether those supplies have actually been carried out and whether the goods in question were used by Bonik for the purposes of its taxed transactions. If the assessment by the national court discloses that the supplies of goods at issue have actually been carried out and that those goods were used by Bonik for the purposes of its own taxed output transactions, Bonik cannot, in principle, be refused the right of deduction.

In that regard, the Varna Administrative Court has stated that the Bulgarian tax authorities do not claim that Bonik acquired the goods in question from suppliers other than those referred to above, and that there is some evidence that direct supplies were carried out. It also noted that the tax authorities do not dispute that Bonik carried out subsequent supplies of goods of the same type as those in question and in the same quantity. That being so, the Court recalled that it must also be borne in mind that the prevention of tax evasion, avoidance and abuse is an objective recognized and encouraged by Directive 2006/112 and that it has held that EU law cannot be relied on for abusive or fraudulent ends.

According to the Court, it is therefore for the national courts and judicial authorities to refuse the right of deduction, if it is shown, in the light of objective factors, that this right is being relied on for fraudulent or abusive ends. That is the position where a tax fraud is committed by the taxable person himself. In such a case, the
objective criteria which form the basis of the concepts of ‘supply of goods or services effected by a taxable person acting as such’ and ‘economic activity’ are not met. By the same token, a taxable person who knew, or should have known, that, by his purchase, he was taking part in a transaction connected with VAT fraud must, for the purposes of Directive 2006/112, be regarded as a participant in that fraud, whether or not he profits from the resale of the goods or the use of the services in the context of the taxable transactions subsequently carried out by him, see the Axel Kittel case, reported above. A taxable person can only be refused the right of deduction if it is established on the basis of objective factors that this taxable person – to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made – knew or should have known that, through the acquisition of those goods or services, he was participating in a transaction connected with VAT fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services.

On the other hand, the Court made clear that it is incompatible with the rules governing the right of deduction under Directive 2006/112 to impose a penalty, in the form of refusal of that right, on a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier or that another transaction forming part of the chain of supply, downstream or upstream of the transaction carried out by the taxable person, was vitiated by VAT fraud. The establishment of a system of strict liability would go beyond what is necessary to preserve the public exchequer’s rights.

Since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, the Court indicated (referring to the Mahagében and Dávid cases, see section 18.4.3) that it is incumbent upon the competent tax authorities to establish, to the requisite legal standard, the objective evidence needed to substantiate the conclusion that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply.

Thus, if the Varna Administrative Court were to find that the supplies of goods at issue in the case before it had actually been carried out and that Bonik had subsequently used those goods for the purposes of its taxed transactions, it would be for that court subsequently to determine whether the tax authorities concerned had established the existence of objective evidence to the effect described above.

The following case deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and a claim for damages in respect of involvement in a carousel fraud by a third party not subject to VAT.
The applicant in the action before the Østre Landsret (the referring court) is the Commissioners for her Majesty's Revenue and Customs ("HMRC"), the tax authority of the United Kingdom. Its action is directed, inter alia, against the companies Sunico ApS, Sunico Holdings ApS and M&B Holding ApS, which are established in Denmark, and against two private persons resident in Denmark.

The subject-matter of the proceedings is a claim for damages of GBP 40,391,100.01 by reason of the fact that the defendants allegedly took part in what, under English law, is a tortious conspiracy to defraud by withholding value added tax in the United Kingdom in 719 cases in which goods were sold through a transaction chain of companies in the United Kingdom, but the British companies omitted to pay to the applicant the value added tax collected on the sales.

On 17 May 2010, HMRC accordingly brought proceedings for damages before the High Court of Justice (England & Wales) in regard to the loss it had incurred. The defendants in that action are the above-mentioned parties, none of which is liable for value added tax in the United Kingdom. HMRC has not brought any claim against the companies involved in the transaction chain which exported the goods out of the United Kingdom and obtained reimbursement of value added tax. The claim made rests on that part of the English law on damages in tort which relates to unlawful means conspiracy. The proceedings before the High Court of Justice were still pending when the reference for a preliminary ruling was lodged. It is common ground between the parties that the High Court of Justice has international jurisdiction to deal with the case.

Before commencing proceedings in Denmark, HMRC asked the Danish tax authorities for information on the defendants, which was provided to it under Council Regulation No. 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax.

Subsequently, as security for the claim for damages it had brought, the applicant applied to the Fogedret i København or an attachment of the defendants' assets. That attachment was granted on 18 May 2010 and, following an appeal by the defendants, was upheld by the Østre Landsret on 2 July 2010.

HMRC then duly, within 1 week, initiated proceedings on the claim before the Københavns Byret on 25 May 2010, pursuant to paragraph 634(1) of the Code of Civil Procedure and during those proceedings again applied for payment by the defendants of GBP 40,391,100.01. On 8 September 2010, the Københavns Byret referred the case to the Østre Landsret, which now has to rule on the claim for payment and the lawfulness of the attachment order.

Thus, when the reference for a preliminary ruling was lodged at the Registry of the Court, two sets of proceedings were dependent on the claim for damages: one
before the High Court of Justice in the United Kingdom and one before the Østre Landsret in Denmark.

This situation is governed by paragraph 634(5) of the Code of Civil Procedure, which provides that, if a case relating to the claim in question is pending before a foreign court the ruling of which is expected to have binding effect in Denmark, proceedings pending under paragraph 634(1) (in the present case the proceedings before the Østre Landsret) are to be stayed.

The Østre Landsret therefore decided to rule first on the question whether the case pending before it should be stayed pending a final decision from the High Court of Justice on the claim under paragraph 634(5). That would be the case if the decision of the High Court of Justice could have binding effect in Denmark. This would be so if the proceedings in the United Kingdom fell within the scope of the Brussels I Regulation. Under the national law of Denmark, recognition of the judgment of the High Court of Justice does not appear to be possible.

The Østre Landsret therefore stayed the proceedings by order of 18 January 2012, received at the Court on 2 February 2012, and referred the following question to the Court for a preliminary ruling:

Must Article 1 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters be interpreted as meaning that its scope extends to cover a case in which the authorities of a Member State bring a claim for damages against undertakings and natural persons resident in another Member State on the basis of an allegation – made pursuant to the national law of the first Member State – of a tortious conspiracy to defraud consisting in involvement in the withholding of VAT due to the first Member State?

On 12 September 2013, the Court decided the case. The Court recalled that the scope of Regulation (EC) No. 44/2001 is, like that of the Brussels Convention, limited to 'civil and commercial matters' and that that scope is defined essentially by the elements which characterize the nature of the legal relationships between the parties to the dispute or the subject-matter thereof. Thus, although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No. 44/2001, it is otherwise where the public authority is acting in the exercise of its public powers.

In order to determine whether that is the case in the present dispute the Court examined the basis of, and the detailed rules applicable to, the action brought by the Commissioners, in the United Kingdom, before the High Court of Justice.

In that regard, the Court noted that the factual basis of the claim before that court is the alleged fraudulent conduct of Sunico and the other non-residents sued in that court, who are alleged to have been involved on the territory of the United Kingdom in a chain of transactions involving the sale of goods with the aim of setting up a 'VAT carousel' type tax evasion mechanism, which enabled output tax
payable by a taxable person in that Member State to be evaded, and thus to have been the real beneficiaries of the sums obtained by means of that tax evasion.

So far as the legal basis of the Commissioners’ claim is concerned, their action against Sunico is based not on UK VAT law, but on Sunico’s alleged involvement in a conspiracy to defraud, which comes under the law of tort of that Member State.

Likewise, the Court found it clear that Sunico and the other non-residents sued in the High Court of Justice are not subject to VAT in the United Kingdom and are therefore not liable to pay VAT under the laws of that Member State. According to the Court in the context of that legal relationship, the Commissioners do not exercise any exceptional powers by comparison with the rules applicable to relationships between persons governed by private law. In particular, the Commissioners cannot, as they are generally able to do in the exercise of their powers as a public authority, themselves issue the enforceable document that would enable them to recover their debt, but, in order to do so in a context such as that of the main proceedings, must proceed through the normal legal channels.

The Court concluded that the legal relationship between the Commissioners and Sunico is not a legal relationship based on public law, in this instance tax law, involving the exercise of powers of a public authority. The Court admitted, however, that the amount of the damages claimed by the Commissioners corresponds to the amount of output VAT payable by a taxable person in the United Kingdom. However, the fact that the extent of Sunico’s tortious liability towards the Commissioners and the amount of the Commissioners’ tax claim against a taxable person are the same cannot be regarded as proof that the Commissioners’ action before the High Court of Justice involves the exercise by them of public authority vis-à-vis Sunico, since it is common ground that the legal relationship between the Commissioners and Sunico is not governed by UK VAT law but by the law of tort of that Member State.

Last, as to whether the request for information which the Commissioners addressed to the Danish authorities on the basis of Regulation (EC) No. 1798/2003 before bringing proceedings before the High Court of Justice affects the nature of the legal relationship between the Commissioners and Sunico, the Court observed that it is not apparent from the documents in the file before the Court that in the proceedings pending before the High Court of Justice the Commissioners used evidence obtained in the exercise of their powers as a public authority. (It is for the referring court to ascertain whether that was the case and, if appropriate, whether the Commissioners were in the same position as a person governed by private law in their action against Sunico and the other non-residents sued in the High Court of Justice.)

The Court ruled that the concept of ‘civil and commercial matters’ within the meaning of Article 1(1) of Regulation (EC) No. 44/2001 must be interpreted as meaning that it covers an action whereby a public authority of one Member State
claims, as against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit VAT fraud in the first Member State.

8.4.2 Transactions without consideration

Article 2(1) of the VAT Directive (ex Article 2 Sixth Directive) requires supplies of goods and services to be effected “for consideration”. The following case deals with this requirement.

Case 89/81 (Hong Kong Trade Development Council)

The Hong Kong Trade Development council, established in Amsterdam, was a trade organization founded to promote trade between Hong Kong and other countries by providing information and advice about the country free of charge. The cost of this activity was financed partly by a grant from the Hong Kong government and partly from a levy on products imported into and exported from Hong Kong. The Court of Justice was asked to rule whether the council could be regarded as a taxable person. Based on a contextual interpretation the Court concluded that Article 2(1) of the Sixth Directive (now Article 2(1)(a) of the VAT Directive) excludes from the scope of VAT any person who habitually provides services free of charge, since “services provided free of charge are different in character from taxable transactions which, within the framework of the value added tax system, presuppose the stipulation of a price or consideration”. The Hong Kong Trade Council was assimilated to an end user.

A few aspects of this case are noteworthy:

1) The Court of Justice explicitly mentions that the stipulation of a price or consideration is required. This was precisely the subject of the Tolsma case, to be discussed in section 8.4.5, dealing with a Dutch organ grinder. Are the donations he receives from passers-by to be treated as consideration for a service, since the payments are not stipulated?

2) The case does not deal with the fact that the Hong Kong government is financing the activities. Is this not consideration after all? It seems to us that Mohr answers this question – see section 13.2.3.

3) The case does not clarify the situation when services are rendered partially free of charge. It should be noted that at least certain activities free of charge are deemed to be supplies for consideration (see Articles 5(6) and 6(3) of the Sixth Directive, now Articles 16 and 27 of the VAT Directive, in section 10.2.1.5). It should also be noted that some services rendered free of charge are absorbed in the cost price of a product (e.g. gift wrapping in a department store) or treated as overhead for taxable activities (e.g. making available of bus shelters by a transportation company).

4) It is also possible that supplies are made against a symbolic payment, not related to actual cost of the supply of goods or services, however, not free of
charge as in Hong Kong. In Hong Kong the Court of Justice emphasizes the value added tax system, requiring a turnover which can be taxed. Since also a low or even too low turnover is turnover, we submit that also (too) low consideration falls within the scope of VAT. As we will see in section 8.4.4, the Court emphasizes the relevance of a subjective consideration; in a VAT there is in principle no room for a value assessed according to objective criteria. This is only different in two situations:

(i) where a low price “necessarily must be regarded as involving a concession and not as constituting an economic activity”; see Case 50/87 (Commission v. France), in such situations the activities fall beyond the scope of VAT (see further sections 16.3 and 17.6); and

(ii) in the context of combating tax avoidance and evasion Member States may apply only in specified circumstances an objective value of supplies, see section 13.2.9.

(5) Finally, it is noted that the Court of Justice only dealt with the question of the VAT consequences when a person performs activities, but does not receive payment. The other side of the coin is the question of the VAT consequences when a person is inactive, but nevertheless receives payment – see the next section.

8.4.3 Payments without transactions

As mentioned in section 8.4.2 above, in Hong Kong the Court of Justice exclusively dealt with the situation of a person performing activities without receiving a consideration. What is the effect of a situation in which a person does not perform activities, e.g. merely possesses interests in a company, and receives payment?

Case C-60/90 (Polysar)

Polysar, a Dutch holding company, forms part of the worldwide Polysar group. It holds shares in various foreign companies, receives dividends each year and regularly pays out dividends to the Canadian Polysar Holding Ltd, which holds 100% of Polysar BV’s capital. Polysar BV deducted its input VAT. The Dutch tax inspector assessed Polysar for recovery of the amount refunded. Polysar appealed and the case was referred to the Court of Justice, which held that a holding company the sole purpose of which was to hold shares in other undertakings was not a taxable person and has no right to reclaim input tax. According to the Court of Justice:

14. It is otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company as shareholder.

This sentence has led to extensive scholarly writings and speculations. We return to the treatment of shares and dividends in section 17.7. At this place we merely
note that transactions free of charge fall outside the scope of the VAT and that the lack of transactions (the mere holding of shares) equally falls outside the scope, notwithstanding the fact that dividends are received which seems to us to be the ultimate consequence of VAT being a tax on consumption. A tax on consumption does not tax savings, since savings do not constitute consumption. Similarly the pure redistribution of wealth, such as gifts, dividends and emission of shares, are not taxed since this is neither consumption nor production, which the Court of Justice has also found in Satam, EDM and Kretztechnik (see section 17.7). In order not to tax savings and pure redistribution of wealth, passive financial investment activities must fall outside the scope of VAT. If they do not, VAT will in reality tax not only consumption but also pure redistribution of wealth, that is, VAT turns into a tax on income. See further Case C-496/11 (Portugal Telecom) in section 17.7.

In the following case it was decided that a partnership admitting a partner against a contribution in cash does not make a supply of services for consideration.

Case C-442/01 (KapHag Renditefonds)

KapHag is a partnership (Gesellschaft bürgerlichen Rechts) governed by German civil law. KapHag’s object was to acquire a development right (Erbbaurecht) in respect of a plot of land in Berlin, to erect thereon buildings forming part of a shopping centre, to exploit those buildings by leasing or managing them and to maintain them. This development right was acquired by LOGOS 1 and LOGOS 2, within KapHag. On 2 August 1991, Dr Moegelin and Dr Tiemann became partners in KapHag. On 12 November 1991, Dr Mehnert announced his intention to join KapHag and to contribute a total amount of DEM 38,402,000. KapHag was invoiced for legal services with regard to the formation of the partnership. KapHag deducted the VAT charged to it which the Finanzamt disallowed. KapHag lodged an objection and then an appeal, both of which were rejected. KapHag then appealed to the Bundesfinanzhof on a point of law.

The Bundesfinanzhof referred the following two questions to the Court of Justice for a preliminary ruling:

1. Where a partnership admits a partner on payment of a capital contribution in cash, does it effect a supply to him for consideration within the meaning of Article 2(1) of the Sixth Directive?
2. If so, is it an incidental transaction for the purposes of the second sentence of Article 19(2) of the Sixth Directive, and is the taxable person entitled to rely on that provision, according to which such incidental transactions do not exclude deduction of input tax?

On 26 June 2003, the Court of Justice decided the case. It held that the admission of a new partner into a partnership does not constitute a supply of services to him. The Court observed that Article 4 of the Sixth Directive confers a very wide scope on VAT and that the concept of exploitation within the meaning of Article 4(2) (now Article 9(1) second subparagraph of the VAT Directive) refers, in accordance with
the requirements of the principle of neutrality of the system of VAT, to all transactions, whatever their legal form, by which it is sought to obtain income from the property in question on a continuing basis. However, it has also specified that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property (see above Polysar). It follows that the entry of a new partner into a partnership in consideration for a contribution in cash, in circumstances such as those of KapHag, does not constitute an economic activity, within the meaning of the Sixth Directive, on the part of the partner. If the taking of shares does not in itself constitute an economic activity within the meaning of the Sixth Directive, the same must be true of activities consisting of the transfer of such shares.\(^{440}\) Thus, the admission of a new partner into a partnership does not therefore constitute a supply of services to him.\(^{441}\)

The Court of Justice ruled that the answer to the first question must be that a partnership which admits a partner in consideration of payment of a contribution in cash does not effect towards that person a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive (now Article 2(1) of the VAT Directive).

In view of the answer given to the first question, it was unnecessary to answer the second question regarding the incidental transactions.

This case is a repetition of the Court of Justice’s findings in Polysar and Wellcome Trust (see section 8.4.6). If we understand it correctly, the Court of Justice considers KapHag to be outside the scope of VAT, by referring to the mere acquisition and holding of shares. One may wonder whether the position might be different in a situation of direct or indirect involvement in the management of the company in which the investment is made. It seems to us that such involvement, however, cannot result solely from the acquisition or exercise of the status of partner. It would be necessary in that regard for the partnership to carry out additional activities (or at least involvement against payment), which presumably was not the position in the KapHag case. In our view, even a partnership directly or indirectly involved in the management of the company in which investments are made which admits a partner in consideration of payment of a contribution in cash

\(^{440}\) Case C-155/94 (Wellcome Trust), paragraph 33. See section 8.4.6.

\(^{441}\) In that context, it is irrelevant whether the admission of the new partner must be regarded as the act of the partnership itself or as that of the other partners (the viewpoint of civil law which made the Bundesfinanzhof ask the question), since the admission of a new partner does not in any event constitute a supply of services for consideration for the purposes of the directive.
does not effect towards that person a supply of services for consideration either, but is in a situation similar to Kretztechnik and Securenta. Costs related to that admission should then, in our view, be treated as overhead costs, see further section 17.7.

The Court of Justice’s decision in KapHag tacitly accepted the Advocate General’s Opinion that the same principles would apply whether the contribution consisted of cash or other assets. Whatever the nature of the assets comprising the contribution, there is no reciprocal supply from the partnership. However, where the assets are not cash, the making of the partnership contribution may have other VAT consequences. The AG was satisfied that there was “no doubt that the new partner is effecting an act of disposal of his assets, for which the admission to the partnership is not the consideration” (Paragraph 33 of the Opinion).

At this place we merely note that KapHag has created a mer à boire of questions. What happens if the admitted partner contributes in kind (services, e.g. trademarks or goods, e.g. immovable property)? If such a contribution does not constitute an economic activity, as the Court of Justice held in circumstances of those of KapHag, but the admitted partner has used the services or goods in the conduct of his (previous) business do the goods and services then leave the scope of VAT which may result in the requirement to adjust previously deducted VAT or in a self-supply? Presumably that is the case. Conversely, when such contributions are made to a partnership which is a taxable person, should that be treated as a transfer of a going concern (see section 10.2.2.5)? Matters then can become more complicated if the partnership also receives dividends which fall outside the scope, since the Directive allows Member States to take measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax. How is one to deal with transfers outside the partnership – suppose the earlier admitted partner leaves the partnership and is paid in kind? If the partnership is a taxable person one may assume that the “no supply rule” of a transfer of a going concern applies. However, if the partnership is not a taxable person neither the transfer of a going concern rules nor the adjustment rules apply.

We submit that any taxable person, not being a natural person with the dual capacity of a taxable person and a private consumer, should be treated as performing activities entirely subservient to its economic activities inside the scope of VAT; this would take away the rather muddled allocation between inside and outside the scope of VAT in cases of spherical changes and in cases where expenditure cannot (yet) be attributed to economic activities. (See further section 9.5 and section 17.7.)

In Case C-93/10 (GFKL) the Court ruled that an operator who, at his own risk, purchases defaulted debts at a price below their face value does not effect a supply of services for consideration within the meaning of Article 2(1) and does not carry out an economic activity falling within the scope of that directive when the difference between the face value of those debts and their purchase price reflects
the actual economic value of the debts at the time of their assignment. In view of this answer, there was no need to answer the other questions. (See further section 13.2.5.)

8.4.4 Transactions for consideration/direct link

Also under the Second Directive the supply of goods or services should be effected for consideration to fall within the scope of VAT. The English version mentioned “against payment”, which was replaced by the words “for consideration” in the Sixth Directive. The wording of the Dutch, French, German and Italian versions remained unchanged.

The following case deals with the question to which extent consideration for a supply for VAT purposes must have a link with the services supplied and whether it must be capable of being expressed in money.

Case 154/80 (Coöperatieve Aardappelenbewaarplaats)

A Dutch cooperative operated a cold store for the benefit of its members, who paid a storage charge, fixed annually. In 1975 and 1976 the cooperative levied no charges on its members. The Dutch authorities raised a VAT assessment on the basis that the members had received a benefit as a consequence of the failure to make a charge. The cooperative appealed and the case was referred to the Court of Justice. The Court held that there was no consideration for the supply of the storage services. Consideration for a supply for VAT purposes must have a direct link with the services supplied and must be capable of being expressed in money. Such consideration is a subjective value since the basis of assessment is the consideration actually received and not a value assessed according to objective criteria. Consequently, a provision of services for which no definite subjective consideration is received does not constitute a provision of services “against payment”.

In Case C-93/10 (GFKL), reported in section 13.2.5, AG Jääskinen observed the following. In Aardappelenbewaarplaats the Court held there was no direct link between a service provided and the consideration received in a situation where consideration was held to be an unascertained reduction in the value of shares. In that case a cooperative association running a potato storage depot charged members for storage, as well as giving them shares, in return for the members storing their potatoes. One year the cooperative decided not to charge for storage, but instead reduced members’ share value. The Court held that there was no reciprocity in such a case. The fact that the Court in Astra Zeneca (see section 10.4.1) held that there was a direct link between the provision of retail vouchers by Astra Zeneca to its employees (the service) and the reduction in employees’ wages (the consideration) is not necessarily in contradiction with the decision in Aardappelenbewaarplaats. In Aardappelenbewaarplaats the reduction in shares was unascertained. Although the Court did not elaborate on this point, in my view