OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 20 May 2010 [1]

1. The present infringement action concerns the right of third-country persons established outside the European Union, providing financial and insurance services to customers who are likewise outside the EU, to deduct or refund input VAT on goods and services obtained in the EU.

2. The Commission asks the Court to declare that by denying the recovery of input tax in respect of certain transactions, the United Kingdom has failed to fulfil its obligations under Articles 169, 170 and 171 of the VAT Directive [2] and Article 2(1) of the Thirteenth VAT Directive. [3]

3. All taxable persons are, according to Articles 169 and 170 of the VAT Directive, entitled to deduct or obtain a refund for input tax in the three situations listed in Article 169. [4] Article 169(c) of the VAT Directive [5] relates to financial and insurance transactions when the customer is established outside the EU.

4. However, the detailed implementing rules for obtaining refunds, [6] as contained in the Thirteenth VAT Directive in relation to third-country persons, do not mention a possibility to obtain a refund in the case of financial and insurance transactions. Article 2(1) of that directive states that Member States shall refund any VAT charged in so far as the goods or services are used for the purposes of transactions contained in Article 169(a) and (b) of the VAT Directive, [7] but it does not make an

1 — Original language: English.

2 — Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') (OJ 2006 L 347, p. 1). Replacing Article 17(3) and (4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment ('Sixth VAT Directive'), OJ 1977 L 145, p. 1.

3 — Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ 1986 L 326, p. 40, 'the Thirteenth VAT Directive').

4 — Articles 169 and 170 of the VAT Directive (ex Article 17(3) of the Sixth VAT Directive).

5 — Ex Article 17(3)(c) of the Sixth VAT Directive.

6 — By virtue of Article 171 of the VAT Directive (ex Article 17(4) of the Sixth VAT Directive), which refers to the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes - Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11, 'the Eighth VAT Directive') and Thirteenth VAT Directive.

7 — Ex Article 17(3)(a) and (b) of the Sixth VAT Directive.

express reference to financial and insurance services contained in subparagraph (c).

5. The Commission is of the opinion that financial and insurance transactions should be read into Article 2(1) of the Thirteenth VAT Directive because such an obligation is inherent in the logic of the VAT system.

6. The United Kingdom, on the other hand, submits that its legislation complies with the express wording of Article 2(1) of the Thirteenth VAT Directive, and that it has therefore not infringed EU law.

7. Hence, the Court is faced with a simple but difficult choice between a literal interpretation of the provision and its purposive interpretation, which might fit better with the VAT system as a whole.

I – Legal context

– *European Union Law*

– Sixth VAT Directive and VAT Directive

8. The origin and scope of the right to deduct were first set out in Article 17 of the Sixth VAT Directive.[8] The VAT Directive, in force from 1 January 2007,[9] recast the Sixth VAT Directive but without intending to change its substance.[10] The corresponding provisions of Article 17 of the Sixth VAT Directive are

8 — Article 17(2), (3) and (4) was amended by Article 28f of the Sixth VAT Directive, which was inserted by three directives: Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers(OJ L 376, p.1); Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax - scope of certain exemptions and practical arrangements for implementing them (OJ L 102, p. 18); and Council Directive 2004/66/EC of 26 April 2004 adapting Directives 1999/45/EC, 2002/83/EC, 2003/37/EC and 2003/59/EC of the European Parliament and of the Council and Council Directives 77/388/EEC, 91/414/EEC, 96/26/EC, 2003/48/EC and 2003/49/EC, in the fields of free movement of goods, freedom to provide services, agriculture, transport policy and taxation, by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ L 168, p. 35).

9 — Article 413 of the VAT Directive.

10 — Recitals 1 and 3 of the preamble to the VAT Directive.

now found in Articles 168 to 171 of the VAT Directive. [11]

9. According to Articles 169 and 170 of the VAT Directive, [12] all taxable persons shall 'be entitled to deduct' or 'obtain a refund' for goods and services used for the purposes of the following: [13]

'

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), [14] carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;

(b) …; [15]

(c) transactions which are exempt pursuant to points (a) to (f) of Article 135(1), [16] where the customer is established outside the [EU] or where those transactions relate directly to goods to be exported out of the [EU].'

10. Article 171 of the VAT Directive [17] states that 'VAT shall be refunded … in accordance with the detailed implementing rules laid down in' the Eighth VAT Directive (in relation to persons established in the EU), and the Thirteenth VAT Directive (in relation to persons established outside the EU).

11 — According to Annex XII of the VAT Directive, entitled 'Correlation Table', Article 28f(1) of the Sixth VAT Directive, replacing Article 17(3)(a), (b) and (c) of the Sixth VAT Directive, corresponds to Articles 169(a), (b) and (c) and Article 170(a) and (b) of the VAT Directive. Article 28(1) of the Sixth VAT Directive replacing Article 17(4) of the Sixth VAT Directive corresponds to Article 171 of the VAT Directive.

12 — Ex Article 17(3) of the Sixth VAT Directive.

13 — It is interesting to note that whereas the Sixth VAT Directive referred to the 'right' to deduct or obtain a refund, the VAT Directive talks about the 'entitlement' to deduct or obtain a refund. I do not, however, take this to make a substantive difference to the content of those provisions, since such change has not been expressly indicated by the legislator.

14 — That provision defines as an economic activity any activity of producers, traders or persons supplying services including mining and agricultural activities and activities of the professions, including the exploitation of intangible property for the purposes of obtaining income.

15 — This subparagraph is not relevant for our purposes. It deals with exemptions: related to the intra-Community supply of goods; for certain transport services and international transport; on importation; relating to certain transactions treated as exports; for supply of services by intermediaries; for transactions relating to international trade.

16 — Ex Article 13B(a) and (d) of the Sixth VAT Directive, that is, financial and insurance transactions.

17 — Ex Article 17(4) of the Sixth VAT Directive.

– Eighth VAT Directive

11. Article 2 states:

'Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of [the Sixth VAT Directive] and of the provision of services referred to in Article 1(b).'

— Thirteenth VAT Directive

12. Article 2(1) of the Thirteenth VAT Directive is worded in a similar way. It states:

'1. Without prejudice to Articles 3 and 4, each Member State shall refund to any taxable person not established in the territory of the Community, subject to the conditions set out below, any value added tax charged in respect of services rendered or movable property supplied to him in the territory or the country by other taxable persons or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of [the Sixth VAT Directive] or of the provision of services referred to in point 1(b) of Article 1 of this Directive.'

13. The wording of the Thirteenth Directive still refers to the provisions of the Sixth Directive, that is to Article 17(3)(a) and (b) thereof, despite the subsequent entry into force of the VAT Directive.

— *National law*

14. As a result of sections 26 and 39 of the Value Added Tax Act 1994, Article 3 of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 and Regulation 190 of the Value Added Tax (amendment) (No. 4)

Regulations 2004, traders not established in the EU are not entitled to recover input tax charged on the transactions referred to in Article 169(c) of the VAT Directive.

II – Pre-litigation procedure

15. The United Kingdom amended its legislation in 2004 as a result of a judgment of the Court of Appeal of England and Wales, which held that, since the transactions referred to in Article 17(3)(c) of the Sixth VAT Directive were not referred to in Article 2(1) of the Thirteenth VAT Directive, there was no entitlement to deduct input tax. [18]

16. Due to the change, the Commission sent a letter of formal notice to the United Kingdom questioning the compatibility of the United Kingdom's new legislation with EU law. Since it was not satisfied with the United Kingdom's responses to its letter of formal notice and subsequent reasoned opinion, it brought the present action under Article 226 EC. [19]

III – Analysis

A – *The temporal scope of application*

17. The United Kingdom submits that the Commission's action for a failure to fulfil its obligations relates to the period from 1 January 2007, the date that the VAT Directive came into force, because the reasoned opinion only mentions Articles 169, 170 and 171 of the VAT Directive, and not Article 17(3) and (4) of the Sixth VAT Directive. Article 17(3) and (4) is only mentioned in the letter of formal notice, which was sent to the United Kingdom before the VAT Directive came into force.

18. The Commission, on the other hand, observes that this does not affect the present action, since the wording of the articles of the two directives does not differ in any significant way.

19. The Court's case-law has consistently held that an action for infringement may be based only on the arguments and pleas in law already set out in the reasoned opinion. [20]

18 — *WHA Limited and others* v *HM Commissioners of Customs and Excise* [2004] STC 1081, paragraphs 123 to 125.

19 — Now Article 258 of the Treaty on the Functioning of the European Union (OJ 2008 C 115, p. 47).

20 — Case C-210/91 *Commission* v *Greece* [1992] ECR I-6735, paragraph 10 and case-law cited.

20. However that does not, in my view, relate to situations such as in the present case. The aim of such a rule is to ensure the Member State's right to defence is observed, and that it knows the case stated against it. [21]

21. In the present case there is no danger of infringing those rights. The arguments and pleas in law are the same in the letter of formal notice as in the reasoned opinion. The United Kingdom's attempt to limit the action cannot, in my view, succeed since the intention of the VAT Directive was to recast the Sixth VAT Directive without changing the substance. [22] Furthermore, the article identified by the Commission in the letter of formal notice is expressly equated to the articles identified in the reasoned opinion. [23] Had the Council intended to alter the legislative regime that preceded the VAT Directive it would have identified Articles 169 to 171 as provisions that introduced changes in the pre-existing regime. [24] It has not done so.

22. Therefore the action should not be limited to the time frame submitted by the United Kingdom.

B – *Do Member States have an obligation to refund third-country persons carrying out financial and insurance transactions?*

23. In the context of an infringement procedure it is up to the Commission to demonstrate that the Member State has failed to fulfil its obligations based on the Treaty.

24. That onus is difficult to satisfy in this case since, in the light of clear and unambiguous wording of a provision, extraordinary reasons would be needed in order to interpret the provision in a different manner. [25]

1. The wording of Article 2(1) of the Thirteenth VAT Directive

25. The literal interpretation of Article 2(1) of the Thirteenth VAT Directive does not allow for refunds to third-country persons carrying out financial and insurance transactions.

21 — Case 51/83 *Commission* v *Italy* [1984] ECR 2793, paragraph 4; see more recently: Case C-274/07 *Commission* v *Lithuania* [2008] ECR I-7117, paragraph 20.

22 — Recital 3 in the preamble to the VAT Directive.

23 — Annex XII of the VAT Directive, under the section on Article 28f, point (1) replacing Article 17(2), (3) and (4) of the Sixth VAT Directive.

24 — The last sentence of recital 3 in the preamble to the VAT Directive.

25 — Case C-263/06 *Carboni e derivati* [2008] ECR I-1077, paragraph 48; Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, paragraph 44.

26. The interpretation adopted by the Court should not be too far removed from the actual wording used in the provision. If a provision expressly states that it applies to subparagraphs (a) and (b), it cannot be interpreted as applying to subparagraph (c) without departing from the meaning of the language used in that provision.

27. However, the literal interpretation and the clear meaning may not be synonymous [26] as the literal meaning of a provision may be ambiguous.

28. Where the express wording of the provision is ambiguous or contradictory, the Court may reject a literal interpretation in favour of another which is more compatible with the objectives of the legislation in question.

29. On the one hand the meaning of Article 2(1) of the Thirteenth VAT Directive is not ambiguous: as the United Kingdom pointed out, the text refers to two of the three subparagraphs of the Sixth VAT Directive by using numbers and letters, that is, symbols and not words. Such symbols, unlike words, cannot be ambiguous, so there is, at first sight, no need to explore their meaning.

30. However, there is an incoherence between Article 2(1) of the Thirteenth VAT Directive and Article 169 of the VAT Directive.

31. It is therefore necessary to analyse the objectives of Article 169 of the VAT Directive, and of Article 2(1) of the Thirteenth VAT Directive. The preamble to the directives does not refer to the objectives of those provisions. In those circumstances it is useful to analyse the *travaux préparatoires* relating to those provisions.

2. On the interpretation of Article 2(1) of the Thirteenth VAT Directive

32. The reasons for the adoption of Article 169(c) of the VAT Directive or Article 17(3) of the Sixth VAT Directive have not been clearly stated in any document. However, some commentators have suggested that the possibility to deduct or refund was granted in order to ensure the competitive neutrality of EU financial and insurance service providers on international financial markets by introducing a possibility to alleviate tax cascading, that is, a non-recoverable hidden input VAT on purchases of goods and services burdening their cost-structure. [27]

26 — Opinion of Advocate General Mayras in Case 67/79 *Fellinger* [1980] ECR 535, at 550.

27 — Henkow, O., *Financial Activities in European VAT*, Kluwer Law International, 2008, p. 286.

33. In the EU, financial and insurance services are exempt from VAT, [28] implying that there should be no right to deduct input tax since exempt services are not subject to output tax. [29] Without a possibility to deduct or of a corresponding refund, taxable persons established in the EU and carrying out financial and insurance transactions will be forced to absorb non-deductible input tax in their dealings with non-EU customers. Since they will pass on the inability to deduct input VAT to their customers through higher costs, those EU taxable persons will be at a competitive disadvantage compared to taxable persons from other jurisdictions whose cost structure does not include hidden VAT.

34. Thus, a possibility to deduct or refund appears desirable in order to maintain the international competitiveness of the EU financial sector.

35. Nevertheless, this policy choice does not entail that similar possibilities should be awarded to third-country persons carrying out financial and insurance transactions.

36. Whilst it is true that all taxable persons, including those established outside the EU, have the possibility of obtaining refunds because the definition of 'taxable person' under the EU VAT system is a global one, [30] persons not established in the EU were not given an unconditional right to claim refunds on the basis of Article 17(3) of the Sixth VAT Directive. Article 17(4) of that directive originally permitted Member States to refuse refunds or to impose supplementary conditions for persons not established in the EU. Article 17(4) of the Sixth VAT Directive was later replaced to include references to, at first, the Eighth VAT Directive, and then also to the Thirteenth VAT Directive. In the Thirteenth VAT Directive certain limitations in relation to the granting of a refund are still possible: Member States can make refunds conditional upon the granting of comparable advantages by third States, [31] and Member States may require the appointment of a tax representative. [32]

37. The Thirteenth VAT Directive was adopted only after a lengthy discussion within the Council, made necessary in particular by the fact that no agreement could be reached on a list of expenditures ineligible for refund. [33]

38. Its preamble states that the Thirteenth VAT Directive aimed to develop harmonious trading relations with third countries. [34]

28 — Pursuant to Article 135 of the VAT Directive (ex Article 13 of the Sixth VAT Directive).

29 — Case C-4/94 *BLP* [1995] ECR I-983, paragraph 28; see also Case C-302/93 *Debouche* [1996] ECR I-4495, paragraph 16.

30 — Article 9 of the VAT Directive.

31 — Article 2(2) of the Thirteenth VAT Directive.

32 — Article 2(3) of the Thirteenth VAT Directive.

33 — Terra, B. and Kajus, J., *A guide to the European VAT directives*, IBFD, 2004-, 11.6.4 'The Thirteenth VAT Directive.'

34 — Recital 2 in the preamble to the Thirteenth VAT Directive.

39. According to the Explanatory Memorandum to the proposal for a Thirteenth VAT Directive, the aim of the directive was also to eliminate the differential treatment of non-EU established traders by Member States, since such differences were causing a deflection of trade within the EU. [35]

40. Furthermore, the Explanatory Memorandum to the proposal for a Thirteenth VAT Directive expressly referred to the regime and discussions leading up to the adoption of the Eighth VAT Directive. [36] Reading those two Explanatory Memoranda together, it is clear that the Thirteenth VAT Directive's aim was to extend the treatment accorded to EU traders, to those established outside the EU.

41. To that end the *travaux préparatoires* to the Eighth VAT Directive indicate that the Eighth VAT Directive was considered no more than a first measure implementing the principle of the refunding of VAT to all non-resident taxable persons, which would eventually be followed with proposals for settling the problem of refunding taxable persons resident in third countries. [37] Indeed, the European Parliament also considered the distinction between taxable persons established in the Community and those not established in the Community to be unsatisfactory since this introduced an element of accumulation in the levying of the tax, which was contrary to the principle of the VAT system. [38]

42. Thus, the Thirteenth VAT Directive was addressing some of the same problems as the Eighth VAT Directive: the avoidance of the deflection of trade within the EU as a result of differing refund rules applied by Member States.

43. The Commission takes this to mean that these two directives should be interpreted in the same way. According to it, it is not possible to hold that financial and insurance services are included in one directive but not in the other.

44. Whether the interpretation given to a similarly worded provision in another directive can be transposed by analogy must be

35 — Paragraphs 3 and 4 of the Explanatory Memorandum to the Proposal for a Thirteenth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory ('Explanatory Memorandum to the proposal for a Thirteenth VAT Directive'), COM(82) 443.

36 — Paragraph 4 of the Explanatory Memorandum to the proposal for a Thirteenth VAT Directive, ibid.

37 — Paragraph 3 of the European Parliament Resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for an Eighth Directive on the harmonisation of the laws of the Member States relating to turnover taxes – arrangements for the refund of value added tax to taxable persons not established in the territory of the country ('European Parliament Resolution') (OJ 1979 C 39, p. 14).

38 — European Parliament Resolution, ibid., paragraph 4.

determined in light of the objectives of the two directives. [39]

45. In the present case, despite the partly overlapping aims of the Eighth and Thirteenth VAT Directives, I do not think that they should be interpreted in the same way since the Eighth VAT Directive deals with taxable persons established in the EU, while the Thirteenth VAT Directive deals with those established in third countries.

46. The United Kingdom justifies treating taxable persons carrying out financial and insurance transactions who fall under the Eighth VAT Directive differently to those that are covered by the Thirteenth VAT Directive because the general principles of equal treatment and non-discrimination found in the Treaties will apply to the former, but not the latter.

47. This approach is consistent with the case-law according to which any provision is to be interpreted in the light of higher legal norms and the interpretation that is compatible with those higher legal norms is to be preferred. [40] Thus, the treatment of taxable persons established in the EU may lead to different results than the treatment accorded to those that are not.

48. The *travaux préparatoires* do not expressly say anything about the treatment of financial and insurance services. However it is, to my mind, not insignificant that the original proposal of the Eighth VAT Directive made a reference to Article 17(3) of the Sixth VAT Directive in its general form, while the directive finally adopted makes reference only to subparagraphs (a) and (b) of that article. That indicates that the legislator deliberately chose not to include financial and insurance services since this consequence must clearly have been noticed when amending the original Commission proposal.

49. The Commission submits in the present case that the omission as to subparagraph (c) in the Eighth VAT Directive was a mistake. They refer to the Explanatory Memorandum to the proposal for the Eighth VAT Directive for support, where the Commission explains that situations falling under subparagraph (c) will probably be covered by subparagraph (a). The Commission now accepts that this view is almost certainly erroneous.

50. I am not persuaded by the argument that the omission was a mistake. Even if it were true, that has, in my view, no legal relevance. I find it implausible that the mistake would not have been corrected by now, three decades after the Eighth VAT Directive was drafted, especially since Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for

39 — Case 270/80 *Polydor and RSO* [1982] ECR 329, paragraphs 14 to 18. See most recently Case C-351/08 *Grimme* [2009] ECR I-10777, paragraph 29.

40 — Case 218/82 *Commission* v *Council* [1983] ECR 4063, paragraph 15. See, more recently, Case C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I-8075, paragraph 22.

in [the VAT Directive], to taxable persons not established in the Member State of refund but established in another Member State ('Directive 2008/9'), [41] which came into force in 2008, has preserved the alleged mistake.

51. Therefore, in my view it cannot clearly be ascertained from the purpose or legislative history of Article 2(1) of the Thirteenth VAT Directive that Article 169(c) of the VAT Directive should be read into that provision.

3. Are there compelling reasons to deviate from the literal meaning?

52. In my opinion, the only way for the Commission to succeed in this case is to demonstrate that there are compelling reasons to interpret Article 2(1) of the Thirteenth VAT Directive against its wording. That would, to my mind, require that the Thirteenth VAT Directive or Article 169(c) of the VAT Directive would be deprived of meaning or effectiveness unless a tacit reference to that provision would be read into Article 2 of the Thirteenth VAT Directive.

41 — OJ 2008 L 44, p. 23.

53. An interpretation consistent with the principle underlying the text to be construed will be preferred over one that would render the principle ineffective or nugatory. [42]

54. However, in the present case neither the Thirteenth Directive nor Article 169(c) of the VAT Directive would be deprived of meaning or effectiveness if the express wording of Article 2(1) of the Thirteenth VAT Directive was retained by the Court: Article 169(c) of the VAT Directive will still apply to persons established in the Member State concerned, and the Thirteenth VAT Directive will still be applicable for refunds in relation to persons not established in the EU to whom the two other subparagraphs of Article 169 of the VAT Directive apply.

55. The Commission further submits that the Thirteenth VAT Directive is merely an implementing measure and so, in case of conflict, the entitlement to deduct and a refund provided for in the VAT Directive should prevail.

56. The wording of Article 171 of the VAT Directive expressly refers to the Eighth and Thirteenth VAT Directives as 'detailed implementing rules'. On this basis they could

42 — Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 10; Case 187/87 *Land de Sarre and Others* [1988] ECR 5013, paragraph 19. See more recently C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 20.

be considered as secondary to the VAT Directive.

57. The Sixth and Thirteenth VAT Directives as well as the VAT Directive are, of course, equal in the hierarchy of norms since they are all Council directives adopted on the basis of the same Treaty provisions. Thus the application of the *lex superior* principle between them is precluded. There is a difference as to the relative normative rank of these directives between themselves and between them and the Treaties.

58. In principle that means that the detailed implementing rules found in the Thirteenth VAT Directive can deviate from the provisions found in the Sixth VAT Directive. It is conceivable that the legislature, while implementing a prior legislative act, decides to leave some of its provisions unimplemented and thereby makes a tacit amendment of the act or at least leaves the implementation of those provisions subject to later decisions. [43]

59. It is, however, reasonable to proceed on the assumption that where there is room for interpretation of a provision in the implementing act, the interpretation should strive for harmony with the original act.

60. Indeed, the Court has held that the aim of the Eighth VAT Directive is not to undermine the Sixth VAT Directive, but rather to harmonise the right to refund as provided for in Article 17(3) of the Sixth VAT Directive. [44] Following that logic, Article 2 of the Eighth VAT Directive must be seen as reinforcing Article 17(3) of the Sixth VAT Directive, and the same is true of Article 2(1) of the Thirteenth VAT Directive.

4. Conclusion on the existence of an obligation to refund third-country persons carrying out financial and insurance transactions

61. As such, in my view there is, at this stage of development of EU law, no obligation for Member States to refund taxable persons mentioned in Article 169(c) of the VAT Directive who are not established in the EU.

62. In my view, the various rules concerning deductions and refunds in the VAT system reflect choices of fiscal policy rather than logical or legal necessities. Historical examples show that the legislator may sometimes opt for regulative choices in the field of VAT that

43 — It should be added that this is possible only as to acts of the same normative level. An EU implementing measure of a lower normative hierarchical rank or a national implementing or transposing measure may not change the scope or meaning of the provisions of the act to be implemented.

44 — *Debouche*, cited in footnote 29, paragraph 18; Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 25.

are incoherent or even dysfunctional from an economic or fiscal policy point of view. [45]

63. Even if the reading of Article 2 of the Thirteenth VAT Directive proposed by the Commission might fit better with the current VAT scheme from the fiscal policy point of view, that reading does not reflect the text of that provision, especially since the legislator has consciously decided to remain silent on this issue. [46] It is therefore up to the legislator to fix the omission. [47]

64. The United Kingdom position is based on the express and unambiguous text of a provision of the VAT Directive that it is required to transpose and to apply. Legal certainty precludes reading Article 169(c) of the VAT Directive into Article 2(1) of the Thirteenth VAT Directive when such an interpretation does not follow from the words used. [48] The United Kingdom can invoke this principle, which is especially important in the field of fiscal law where both the taxable persons and the tax authorities have to be able to rely on the text of EU legislation, as support of its position.

65. I also find the Commission's position problematic from a constitutional and institutional point of view. If the Commission really contends that there is a mistaken omission in the text of the Eighth and Thirteenth VAT Directives, it is unreasonable that it does not use its right of legislative initiative to remedy the situation. It does just the opposite: it simultaneously repeats the alleged mistake in its proposal for the new Directive 2008/9, and starts infringement proceedings against a Member State that is relying on the literal meaning of the text of the relevant provision.

66. Finally, the Commission also invokes two practical problems of not reading Article 169(c) of the VAT Directive into Article 2(1) of the Thirteenth VAT Directive. Firstly, the fact that the interpretation of the Eighth VAT Directive would become uncertain because of the similar wording of Article 2 in the Eighth and Thirteenth VAT Directives, and secondly that the majority of Member States would be in breach of the Thirteenth VAT Directive since they currently allow refunds to persons not established in

45 — Historically there was a need to manipulate the VAT system, primarily in the field of deductions, so that the imposition of substantially higher rates than were charged under the cumulative turnover tax system could be avoided. Such interferences with a 'pure' VAT system are still present today. For example, the 'butoir', or 'buffer rule' was introduced, which restricted the right to deduct the amount of VAT due in a tax period, with the remainder being carried over to the next period. This rule is still permitted under Article 183 of the VAT Directive (ex Article 18(4) of the Sixth VAT Directive). See Terra, B., 'Developments in VAT – the deduction of input tax', *VAT monitor*, Vol 7, no 2, March/April, 1996, p. 52.

46 — As Professor Kaarle Makkonen has put it: the legislator can be capricious. See Makkonen, K., *Zur Problematik der juridischen Entscheidung, Eine strukturanalytische Studie*, Annales Universitatis Turkuensis Ser. B Humaniora 93, Turku 1965, p. 203.

47 — Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraphs 16 and 17. See also the last point of Advocate General Slynn's Opinion in that case, at p. 1949. See most recently Case C-170/08 *Nijemeisland* [2009] ECR I-5127, paragraph 44.

48 — Case C-247/08 *Gaz de France - Berliner Investissement* [2009] ECR I-9225, paragraph 38. It is interesting to note that in that case even though the provision in question had been amended by the legislature in a subsequent directive, the Court rejected an interpretation based on the objectives and scheme of the legislation in favour of the express wording of the provision.

the EU and carrying out the transactions contained in Article 169(c) of the VAT Directive.

67. In my opinion, neither of these practical considerations are valid legal reasons for reading Article 169(c) of the VAT Directive into Article 2(1) of the Thirteenth VAT Directive.

68. Furthermore, such difficulties can be remedied by adopting appropriate legislative provisions to clarify the scope of the entitlement to refunds by persons not established in the EU and carrying out financial and insurance transactions if that is seen as necessary after the outcome of this case.

IV – Conclusion

69. In light of the foregoing I conclude that the Commission has not been successful in showing that the United Kingdom has infringed Articles 169 to 171 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, or Article 2(1) of Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory. I therefore suggest that the Court of Justice dismiss the action.