



Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 17 January 2019¹

Case C-133/18

Sea Chefs Cruise Services GmbH
v
Ministre de l'Action et des Comptes publics

(Request for a preliminary ruling from the Tribunal administratif de Montreuil (Administrative Court, Montreuil, France))

(Reference for a preliminary ruling — Valued added tax (VAT) — Directive 2006/112/EC — Article 171 — Refund of VAT — Directive 2008/9/EC — Article 20 — Request for additional information by the Member State of refund — Information requested to be provided to the Member State of refund within one month of the date on which the request reaches the person to whom it is addressed — Legal nature of time limit and consequences of failure to comply)

1. Where a taxpayer fails to respond within the one month period stipulated by Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State² to a request for further information from the relevant tax authorities, does this mean that its entitlement to seek a VAT credit is thereby automatically extinguished? This is the essential issue which arises in this request for a preliminary reference.
2. The present request accordingly concerns the interpretation of Article 20(2) of Directive 2008/9. The request for a reference has been made in proceedings before the Tribunal administratif de Montreuil (Administrative Court, Montreuil, France) between Sea Chefs Cruise Services GmbH ('Sea Chefs'), a company established in Germany, and the Ministre de l'Action et des Comptes publics (Minister for Public Action and Accounts, France) concerning the decision of the latter to reject Sea Chefs' claim for the refund of a VAT credit in respect of the period 1 January to 31 December 2014.
3. By its preliminary question, the referring court seeks in essence to ascertain whether the time limit of one month to provide information laid down in Article 20(2) of Directive 2008/9 constitutes a mandatory time limit, that is to say, a time limit non-compliance with which results in forfeiture of the right to a refund or, alternatively, does this provision admit of an interpretation whereby it is possible to regularise a VAT refund application by adducing evidence in the context of an appeal pursuant to Article 23 of that directive.
4. Before considering any of these issues, it is necessary first, however, to set out the relevant legal provisions.

¹ Original language: English.

² OJ 2008 L 44, p. 23.

I. Legal context

A. *European Union law*

1. *Directive 2006/112*

5. Article 169 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,³ as amended by Council Directive 2008/8/EC of 12 February 2008,⁴ provides:

‘In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

- (a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), 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;

...’

6. Article 170 of that directive provides:

‘All taxable persons who, within the meaning of Article 1 of Directive 86/560/EEC, Article 2(1) and Article 3 of Directive 2008/9/EC and Article 171 of this Directive, are not established in the Member State in which they purchase goods and services or import goods subject to VAT shall be entitled to obtain a refund of that VAT insofar as the goods and services are used for the purposes of the following:

- (a) transactions referred to in Article 169;
- (b) transactions for which the tax is solely payable by the customer in accordance with Articles 194 to 197 or Article 199.’

7. Article 171 of that directive provides:

‘1. VAT shall be refunded to taxable persons who are not established in the Member State in which they purchase goods and services or import goods subject to VAT but who are established in another Member State, in accordance with the detailed rules laid down in Directive 2008/9/EC.

...’

2. *Directive 2008/9*

8. Article 7 of Directive 2008/9 provides:

‘To obtain a refund of VAT in the Member State of refund, the taxable person not established in the Member State of refund shall address an electronic refund application to that Member State and submit it to the Member State in which he is established via the electronic portal set up by that Member State.’

³ OJ 2006 L 347, p. 1.

⁴ OJ 2008 L 44, p. 1.

9. Article 8 of Directive 2008/9 provides:

‘1. The refund application shall contain the following information:

- (a) the applicant’s name and full address;
- (b) an address for contact by electronic means;
- (c) a description of the applicant’s business activity for which the goods and services are acquired;
- (d) the refund period covered by the application;
- (e) a declaration by the applicant that he has supplied no goods and services deemed to have been supplied in the Member State of refund during the refund period, with the exception of transactions referred to in points (i) and (ii) of Article 3(b);
- (f) the applicant’s VAT identification number or tax reference number;
- (g) bank account details including IBAN and BIC codes.

2. In addition to the information specified in paragraph 1, the refund application shall set out, for each Member State of refund and for each invoice or importation document, the following details:

- (a) name and full address of the supplier;
- (b) except in the case of importation, the VAT identification number or tax reference number of the supplier, as allocated by the Member State of refund in accordance with the provisions of Articles 239 and 240 of Directive 2006/112/EC;
- (c) except in the case of importation, the prefix of the Member State of refund in accordance with Article 215 of Directive 2006/112/EC;
- (d) date and number of the invoice or importation document;
- (e) taxable amount and amount of VAT expressed in the currency of the Member State of refund;
- (f) the amount of deductible VAT calculated in accordance with Article 5 and the second paragraph of Article 6 expressed in the currency of the Member State of refund;
- (g) where applicable, the deductible proportion calculated in accordance with Article 6, expressed as a percentage;
- (h) nature of the goods and services acquired, described according to the codes in Article 9.’

10. Article 15 of Directive 2008/9 provides:

‘The refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11.

...’

11. Article 20 of that directive provides:

‘1. Where the Member State of refund considers that it does not have all the relevant information on which to make a decision in respect of the whole or part of the refund application, it may request, by electronic means, additional information, in particular from the applicant or from the competent authorities of the Member State of establishment, within the four-month period referred to in Article 19(2). Where the additional information is requested from someone other than the applicant or a competent authority of a Member State, the request shall be made by electronic means only if such means are available to the recipient of the request.

If necessary, the Member State of refund may request further additional information.

The information requested in accordance with this paragraph may include the submission of the original or a copy of the relevant invoice or import document where the Member State of refund has reasonable doubts regarding the validity or accuracy of a particular claim. In that case, the thresholds mentioned in Article 10 shall not apply.

2. The Member State of refund shall be provided with the information requested under paragraph 1 within one month of the date on which the request reaches the person to whom it is addressed.’

12. Article 21 of that directive provides:

‘Where the Member State of refund requests additional information, it shall notify the applicant of its decision to approve or refuse the refund application within two months of receiving the requested information or, if it has not received a reply to its request, within two months of expiry of the time limit laid down in Article 20(2). ...

...’

13. Article 23 of that directive provides:

‘1. Where the refund application is refused in whole or in part, the grounds for refusal shall be notified by the Member State of refund to the applicant together with the decision.

2. Appeals against decisions to refuse a refund application may be made by the applicant to the competent authorities of the Member State of refund in the forms and within the time limits laid down for appeals in the case of refund applications from persons who are established in that Member State.

...’

B. National law

14. Article 242-0 W of Annex II to the code general des impôts (General Tax Code), which was included in order to transpose Article 20 of Directive 2008/9 referred to above, provides:

‘1. — the Tax authority may request by electronic means ... additional information, in particular from the applicant or the competent authorities in the Member States of the European Union in which it is established, where it considers that it does not have all the necessary information for deciding all or part of the refund application submitted by the applicant. Where that additional information is requested from someone other than the applicant or the competent authorities of a Member State, the request shall be made by electronic means only if such means are available to the recipient of the request. If it considers it necessary, the Tax authority may request further additional information. In

the context of those applications, the Tax authority may request that the applicant provides the original of an invoice or an importation document where it has reason to doubt the validity or accuracy of a particular claim. The request may cover any of the transactions without regard to their amount.

II. — Any additional information required pursuant to the provisions of I shall be provided within one month of the date on which the request for information is received by the addressee.'

II. The main proceedings and the questions referred for a preliminary ruling

15. On 17 September 2015, Sea Chefs applied to the French tax authorities for the refund of a VAT credit of EUR 40 054.31 for the period 1 January to 31 December 2014. The amount of the claim in the main proceedings is limited to EUR 32 143.47.

16. By decision of 29 January 2016, Sea Chefs' claim was dismissed in its entirety due to its failure to reply to a request for additional information sent to it by the French tax authorities by email on 14 December 2015.

17. By an application and a document, registered on 7 April 2016 and 2 January 2017, Sea Chefs asked the Tribunal administratif de Montreuil (Administrative Court, Montreuil) to order, *inter alia*, the refund of a VAT tax credit of EUR 32 143.47 for the relevant period.

18. By documents, lodged on 24 October 2016 and 28 December 2017, the Director of the Directorate for taxes of non-residents submitted that the claim be dismissed as inadmissible on the ground that the time for reply of one month pursuant to Article 20(2) of Directive 2008/9 and transposed in the last paragraph of Article 242-0 W of Annex II to the General Tax Code was not complied with. According to the Director in question, failure to comply with the one month time limit rendered the request time-barred. The Director also claimed that it is impossible to regularise a VAT refund application by adducing evidence before the tax court establishing a right to a refund.

19. By judgment of 27 June 2017, the Tribunal administratif de Montreuil (Administrative Court, Montreuil) stayed the proceedings relating to the claim by Sea Chefs, transmitted the case file to the Conseil d'État (Council of State, France) in accordance with Article L. 113-1 of the code de justice administrative (Administrative Justice Code) and submitted a number of questions to the Council of State.

20. The Council of State ruled on those questions by an avis contentieux (opinion in contentious proceedings) No 412053 of 18 October 2017.

21. The Tribunal administratif de Montreuil (Administrative Court, Montreuil), considers *inter alia*, that where the French tax authorities do not have all the information available to them to enable them to ensure that the taxable person which is not established in France satisfies the conditions for a refund of the VAT in respect of goods or services supplied to it in France, the authorities may request such information from the taxable person by electronic means. The taxable person has one month, from receipt of the request, to provide the information.

22. That court also considers that in order to guarantee the effectiveness of the VAT system, Directive 2008/9 establishes time limits that ensure the rapid treatment of refund applications and applicants must comply with them. However, the Tribunal administratif de Montreuil (Administrative Court, Montreuil), notes that neither Directive 2008/9 nor any national provision sets out the consequences

for the right to a VAT refund where the time limit to reply is not respected. In particular, according to that court none of the legislative texts establish in a clear manner whether the taxable person has the possibility of regularising its application before the tax court or whether its application is time-barred.

23. Sea Chefs argued before the Tribunal administratif de Montreuil (Administrative Court, Montreuil) that in the context of an action pursuant to Article 23 of Directive 2008/9, it is contrary to the principle of VAT neutrality guaranteed by EU law to make it impossible for it to regularise its situation. VAT neutrality is ensured by a right to complete deduction, which is a fundamental principle of VAT and includes the right to judicial redress.

24. Sea Chefs also claimed that the lack of a possibility to regularise its request for a VAT refund before a court is contrary to the principle of proportionality of VAT. According to Sea Chefs, while the tax authorities must ensure that a taxable person fulfils its obligations to declare and pay VAT and may impose other obligations for the correct collection of VAT and the prevention of fraud, those authorities must not go further than what is necessary to achieve those objectives.

25. According to the Tribunal administratif de Montreuil (Administrative Court, Montreuil), the question whether the limitation rule in question is compatible with the principles of neutrality and proportionality is decisive for the resolution of the dispute upon which that court must adjudicate and presents serious difficulty.

26. In those circumstances the Tribunal administratif de Montreuil (Administrative Court, Montreuil), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 20(2) of Council Directive 2008/9/EC of 12 February 2008 be interpreted as meaning that it creates a limitation rule which has the effect that a taxable person of a Member State which applies for a refund of value added tax from a Member State in which it is not established is not able to regularise its refund application before a tax court if it has not complied with the time limit for replying to a request for information made by the administration in accordance with the provisions of the first paragraph of that article, or, on the contrary, as meaning that that taxable person may, in the context of the right of appeal laid down in Article 23 of the directive, and having regard to the principles of neutrality and proportionality of VAT, regularise its application before the tax court?’

III. Procedure before the Court

27. Written observations were submitted by Sea Chefs, the French and Spanish Governments and the European Commission. At the end of the written part of the procedure, the Court considered that it had sufficient information to give a ruling without a hearing in accordance with Article 76(2) of the Rules of Procedure of the Court of Justice.

IV. Analysis

28. In accordance with Article 1 of Directive 2008/9, the purpose of that directive is to define the rules for the refund of VAT, provided for in Article 170 of Directive 2006/112, to taxable persons not established in the Member State of refund, who meet the conditions laid down in Article 3 of Directive 2008/9. The right of a taxable person established in a Member State to obtain the refund of VAT paid in another Member State, in the manner governed by Directive 2008/9, is the counterpart of such a person’s right established by Directive 2006/112 to deduct input VAT in his own Member State.⁵

⁵ Judgment of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraphs 34 and 36 and the case-law cited).

29. According to settled case-law of the Court, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation. The deduction system, and accordingly the refund system, is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his or her economic activities. The common system of VAT therefore ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that these activities are themselves, in principle, subject to VAT. The right to deduct VAT is, however, subject to compliance with both substantive and formal requirements or conditions.⁶

30. Despite the parallels that have been drawn in the case-law of the Court between the right to deduct VAT and the right to a refund of VAT, the rules in Directive 2008/9 on the information which a refund application must contain⁷ and the time limits for the submission of a refund application⁸ are much more detailed than those in respect of the deduction of VAT contained in Directive 2006/112.⁹

31. For example, Directive 2006/112 does not contain any time limit in which VAT must be deducted. Yet in its judgment of 28 July 2016, *Astone*,¹⁰ the Court nonetheless held that Articles 167, 168, 178, the first paragraph of Article 179, and Articles 180 and 182 of Directive 2006/112 must be interpreted as meaning that they do not preclude national legislation which provides for a limitation period in respect of the exercise of the right to deduct, provided that the principles of equivalence and effectiveness are observed, which the Court held was for the referring court to ascertain. Moreover, in its judgments of 8 May 2008, *Ecotrade*,¹¹ and of 12 July 2012, *EMS-Bulgaria Transport*,¹² the Court held that the possibility of exercising the right to deduct without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his or her rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely.

32. By contrast, Directive 2008/9 lays down a series of time limits in respect of the procedure for submitting an application and for the grant of a VAT refund. In that regard, the Court found in its judgment of 21 June 2012, *Elsacom*,¹³ that the first sentence of Article 15(1) of Directive 2008/9 established a mandatory time limit for the submission of a VAT refund application and that non-compliance with that time limit would lead to forfeiture of the right to a refund.

33. The Court thus considered that the use of the terms ‘no later than’ (au plus tard) in the first subparagraph of Article 7(1) of Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonization 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 country¹⁴ and ‘at the latest’ (au plus tard) in the first sentence of Article 15(1) of Directive 2008/9 rendered the specified time limits mandatory and that it is no longer possible to submit an application for a VAT refund after the dates in question.

⁶ Judgment of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraphs 37 to 40 and the case-law cited).

⁷ See Article 8 of Directive 2008/9. It would appear from the file before the Court that Sea Chefs VAT refund application was submitted on time in accordance with Article 15(1) of that directive. Moreover, subject to verification by the referring court, there is nothing in the file before the Court to indicate that Sea Chefs failed to comply with the national provisions transposing Article 8 of Directive 2008/9, so that it had thus submitted a valid and complete VAT refund application. In addition, there is no suggestion that any question of fraud or abuse of rights has arisen.

⁸ See Article 15(1) of Directive 2008/9.

⁹ See Article 178 of Directive 2006/112 on the conditions governing the right to deduct VAT.

¹⁰ C-332/15, EU:C:2016:614, paragraph 39.

¹¹ C-95/07 and C-96/07, EU:C:2008:267, paragraph 44.

¹² C-284/11, EU:C:2012:458, paragraph 48.

¹³ C-294/11, EU:C:2012:382, paragraphs 26 and 33.

¹⁴ OJ 1979 L 331, p. 11.

34. In passing, however, I would note that the Court in its judgment of 21 June 2012, *Elsacom*,¹⁵ did not attribute any weight to the imperative sense used in the provisions in question.

35. Unlike the time limit provided by the first sentence of Article 15(1) of Directive 2008/9, it is not clear from the wording itself of Article 20(2) of that directive whether the time limit of one month laid down therein is mandatory, as terms such as ‘no later than’ or ‘at the latest’ are absent from the latter provision. Article 20(2) of the directive admittedly utilises the term ‘shall’, but in the circumstances I do not regard the use of this word as dispositive of the issue.

36. On the contrary, for my part I consider that the absence of such terms as ‘no later than’ in Article 20(2) of Directive 2008/9, in contrast to Article 15(1) of that directive, as of importance and not simply as mere happenstance. This omission clearly suggests that the European legislator did not seek to lay down a mandatory time limit in the former provision.¹⁶ Given the fundamental nature of the right to a VAT refund in the context of the common system of VAT and the principle of neutrality which is central to that system, the establishment of mandatory time limits leading to the forfeiture of that right must of necessity be done in a clear and unequivocal manner by explicit language contained in the directive itself.

37. I would also note that, in accordance with Article 20(1) of Directive 2008/9, the Member State dealing with the refund request may request additional information either from the applicant or from the competent authorities of the Member State of establishment or, for that matter, from a third party. Article 20(2) of Directive 2008/9 nonetheless establishes a uniform one month time limit for the provision of the information requested, independently of the identity of the addressee of the request.

38. This fact alone to my mind strongly indicates that the interpretation of this provision adopted by the French tax authorities¹⁷ cannot be correct. Although the right to deduct is a fundamental aspect of the entire VAT system, if this interpretation were correct it would mean that the taxpayer’s entitlement in this regard was entirely vulnerable to the actions of third parties, not all of whom would be in a position to respond to such a request within that relatively short time limit. It would, accordingly, be plainly unfair if the failure on the part of a third party — such as, for example, the tax authorities of the Member State of establishment — to provide requested information within the time period specified in Article 20(2) of that directive, could result in forfeiture of a taxpayer’s right to a refund.

39. This conclusion is also underscored by a consideration of the settled case-law of this Court stressing the importance of the right of every person to good administration¹⁸ and the right of an effective remedy as guaranteed by Article 47 of the Charter.¹⁹ In this context I consider that an essential aspect of the right of every person to good administration and the right to an effective remedy is that a substantive right guaranteed by Union law cannot be defeated or extinguished by the application of a time limit that is liable to be applied in an unfair or arbitrary fashion. Yet that would be the situation here if, for example, the taxpayer’s right to deduct was automatically time-barred by reason of the failure of *another party* to respond to the request for information within the one month period.

¹⁵ C-294/11, EU:C:2012:382, paragraphs 26 and 33.

¹⁶ Such an approach would also accord with the European legislator’s approach to the procedures governing the right to deduct VAT and the absence in Directive 2006/112 of any specific time limit for the submission of an application for deduction.

¹⁷ See point 18 above.

¹⁸ See by analogy Article 41 of the Charter of Fundamental Rights of the European Union (‘the Charter’) which is binding on, inter alia, the institutions of the Union. While the authorities of the Member State are not bound by Article 41 of the Charter, they are subject to the obligation of good administration as enshrined in that article of the Charter when implementing EU law as that provision reflects a general principle of EU law. See judgment of 8 May 2014, *N.*, (C-604/12, EU:C:2014:302, paragraphs 49 and 50).

¹⁹ See, by analogy, the judgment of 19 September 2018, *C.E. and N.E.*, C-325/18 PPU and C-375/18 PPU, EU:C:2018:739, paragraph 82. As regards the right to appeal pursuant to Article 23(2) of Directive 2008/9, see points 44 to 46 below.

40. It should also be recalled that the first paragraph of Article 21 of Directive 2008/9 establishes a time limit for the Member State of refund to notify the applicant of its decision to approve or refuse its refund application after receiving the information requested pursuant to Article 20(1) of that directive or in the event that it did not receive a reply to its request. It may be thus said that Article 21 of Directive 2008/9 does not, therefore, exclude the possibility of the Member State approving a VAT refund despite the fact that the applicant did not reply to a request for additional information. This constitutes further evidence that the time limit laid down in Article 20(2) was not intended to be mandatory in the sense that non-compliance automatically extinguished the right to deduct.

41. In addition, in accordance with the second paragraph of Article 26 of Directive 2008/9, if the applicant does not submit additional information requested by the Member State of refund within the specified time limit, interest is not due to the applicant by the Member State in question on the amount of the refund to be paid pursuant to the time limit established by Article 22(1) of Directive 2008/9. The second paragraph of Article 26 of Directive 2008/9 is thus clearly based on the premiss that failure to comply with the time limit to provide additional information pursuant to Article 20(2) does not entail the forfeiture of the right to a VAT refund.

42. For all of these reasons, therefore, I find myself obliged to conclude that the time limit prescribed by Article 20(2) of Directive 2008/9 is not mandatory in the sense in which it has been applied by the French tax authorities in the present case. Despite the fact, however, that the time limit laid down in Article 20(2) of Directive 2008/9 is not mandatory, it may nonetheless be observed that failure to comply with that time-limit is not without consequences.

43. First, in accordance with the first paragraph of Article 21 of Directive 2008/9, where the Member State of refund has not received a reply to its request for additional information it must notify the applicant of its decision to approve or refuse the refund application within two months of the expiry of the time limit laid down in Article 20(2) of that directive. Failure to reply thus, in principle, triggers the adoption of a decision in respect of a refund application which may in turn be appealed by the applicant pursuant to Article 23(2) of Directive 2008/9.

44. Article 23(2) of Directive 2008/9 does not lay down detailed rules on the right to appeal contained therein. In the absence of any indication or limitation, subject to the twin requirements of equivalence and effectiveness, the scope of the appeal is a matter of national procedural law. It follows, therefore, that in principle at least appeals may take place before an administrative body and/or a judicial body and be taken on points of law and fact.

45. Given that I consider that the time limit contained in Article 20(2) is not mandatory and that the applicant has not forfeited its right to a VAT refund due to failure to comply with a request for further information within the time limit specified, the applicant may submit the additional information previously by the Member State of refund in the context of the appeal proceedings with a view to regularise its refund application.

46. In order to ensure that this faculty is not used systematically and that the time limit established by Article 20(2) of Directive 2008/9 is nonetheless respected, I consider that provided again that the principles of effectiveness and equivalence are complied with, the Member State of refund may — but is not obliged to — order that the costs of the appeal proceedings resulting from the applicant's failure to provide additional information within the time limit laid down in that provision be paid by it.

47. Second, as indicated in paragraph 41 above, the failure to reply on time to the request for additional information may have implications under Article 26 of Directive 2008/9 in terms of the interest due to the applicant if the VAT refund is paid late.

V. Conclusion

48. In the light of the foregoing considerations, I propose that the Court answer the question asked by the Tribunal administratif de Montreuil (Administrative Court, Montreuil, France) as follows:

Article 20(2) of Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State must be interpreted as meaning that it does not create a mandatory time limit, non-compliance with which results in the automatic forfeiture of the right to a refund of value added tax (VAT) from a Member State. A taxable person may thus regularise its VAT refund application by adducing evidence in the context of an appeal pursuant to Article 23 of that directive.