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**Stare decisis, legal certainty and the concept of economic activity, regarding the  
VAT treatment of public bodies**

**by**

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## **List of Abbreviations**

AG	Advocate General
ECJ	European Court of Justice
EU	European Union
MS	Member State
VAT Directive	Council Directive 2006/112/EC
Sixth VAT Directive	Sixth Council Directive 77/388/EEC
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VAT	Value Added TAX

## Preface

I would like to thank my parents and siblings for their strength, wisdom and love which has accompanied me throughout this amazing experience at Lund University. Also, to my girlfriend whose love and affection has turned a long winter into a sweet spring.

Additionally, I would like to take this opportunity to extend especial thanks to my professors and classmates in this program, particularly to professor Oskar Henkow, whose invaluable advises were highly important in the culmination of this work.

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# 1. Introduction

## 1.1. Background

*Stare decisis* is the doctrine whereby judges and courts rely on previous cases to support a current decision. This doctrine has been associated with legal reasoning and with positive outcomes such as continuity, stability and predictability of the legal system<sup>1</sup>. In the EU, the ECJ does not strictly adhere to this doctrine, unlike common-law systems. However, this court seldom depart from its case law, developing “building blocks” which gather a coherent *corpus* of decisions in a continuous line of reasoning. Therefore, it can be said that the ECJ operates a rather *de facto stare decisis*<sup>2</sup>. This is in light with doctrinal requirements, whereby judges should enjoy flexibility to not follow its previous judgments. Otherwise, they will be at the risk of stagnating, and so their jurisprudence might be left outdated.

However, the principle of legal certainty requires that legal relationships governed by EU law remain foreseeable. For this to happen, the ECJ should adhere to its pre-established case law, unless there is a reason that excuse departing from it, as well as it should justify their judgements rationally. This is particularly important when the ECJ deals with hard cases, because they, in order to be solved, require a second-order of justification and combination of *logos*, *ethos* and *pathos* arguments, which involve, precisely, reliance on case law and coherency with the law.

An example of hard cases are the judgments that deal with the concept of economic activity. Thereon, the ECJ has developed a “building block” which brought about what I call the *economic-nature* criteria. These are a set of guidelines that aim to “decipher” the essence of the concept of economic activity laid down in the second subparagraph of article 9(1) of the VAT Directive. In particular, the referred criteria assess whether a transaction is of an economic nature. They are of great importance because the economic nature of an activity is what determines whether an activity lies or not within the scope of the VAT Directive<sup>3</sup>.

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<sup>1</sup> Tridimas, Takis. *Precedent and the Court of Justice: A Jurisprudence of Doubt?*, n.p.: Oxford University Press, *Oxford Scholarship Online*, (2012), p. 4.

<sup>2</sup> Payandeh, Mehrdad, "Precedents and Case-based Reasoning in the European Court of Justice." *International Journal of Constitutional Law* 12, no. 3 (2014), p. 832.

<sup>3</sup> Case C-369/04 *Hutchinson*, para 43.

However, in cases regarding the assessment of the concept of economic activity in the light of the VAT treatment of public bodies, the ECJ departed from the referred *economic-nature* criteria. Although, it is not strictly obliged by its case law, not following its case law, without justifying so may jeopardize the very nature of the principle of legal certainty, since legal situations may not be foreseeable.

Therefore, I analyze in-depth in three judgements in which the ECJ needed to decide whether to apply the VAT treatment of public bodies, based on an analysis of the economic nature of certain activities, whether the ECJ fulfill with the requirements to enhance legal certainty. These cases are *Commission v Greece*, *Hutchinson & T-Mobile* and *Commission v Finland*.

## **1.2. Purpose**

This thesis aims to analyze whether the ECJ has respected the principle of legal certainty, when departing from pre-established case law regarding the concept of economic activity, in order to assess the application of the special fiscal treatment for public bodies, laid down in the VAT Directive.

To that end, I first define the doctrine of *stare decisis*, as well as to describe its role in the EU. Next, I discuss whether the ECJ follows this doctrine and, if so, to which extent, and why does it matter that the ECJ observe a doctrine of *stare decisis*. Then, I highlight the relationship between ECJ's case law regarding economic activities and the principle of legal certainty. Afterwards, I examine core aspects of this principle, along with its status as a principle of EU Law, as well as the channels through which the ECJ should circulate in order to enhance legal certainty.

Later, I expose the concept of economic activity as presented by the VAT Directive, together with relevant ECJ's case law in which this concept is addressed. Then, I analyze the criteria for assessing the economic nature of an economic activity. Next, I present the topic of the VAT treatment of public bodies in the VAT Directive. Thereon, I study the criteria whereby a state organ should or not be subject to this fiscal situation.

Finally, I analyze the cases regarding the VAT treatment of public bodies in which the ECJ missed to follow the referred *economic-nature* criteria. These are *Commission v*

*Greece* and *Hutchinson & T-Mobile*. However, I also study a judgment in which the ECJ did adhere to its criteria for determining the economic nature of an activity. This is *Commission v Finland*. By this, I attempt to compare the effect, in terms of the principle of legal certainty, when the ECJ does and when it does not adhere to its case law.

### 1.3. Method and Material

To accomplish the purpose of this work, I pursue a legal dogmatic approach, as described by Aarnio, as the study of the content of the legal norms<sup>4</sup>, which in this case are mainly, the articles 9(1) and 13(1) of the VAT Directive, as well as the case law which derives from them for the purpose of analyzing *stare decisis* and the principle of legal certainty. Also, I assess whether the decisions of the ECJ, in cases regarding the VAT treatment of public bodies, are in light with the principle of legal certainty. In this sense, it will be the principle of legal certainty the parameter to judge the “validity”<sup>5</sup> of ECJ’s judgements.

The material I attempt to use is doctrinal literature regarding *stare decisis*, the principle of legal certainty, the concept of economic activity and VAT treatment of public bodies, together with the relevant provisions of the VAT Directive, as well as the ECJ case law regarding both the concept of economic activity and the VAT treatment of public bodies.

### 1.4. Delimitations

This work centers its attention on the impact on legal certainty when the ECJ departs from its previous case law or does not justify the reasons for doing it. To accomplish that end, four topics will be discussed: *stare decisis*, legal certainty, the concept of economic activity and the VAT treatment of public bodies.

Regarding the former, I focus on the general frame of *stare decisis* and the implications of this doctrine in the ECJ’s case law. Considering the second, I discuss the foreseeable and rational justificatory aspects of legal certainty. I not however discuss the non-

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<sup>4</sup> Aarnio, Aulis, *The rational as reasonable: a treatise on legal justification*. n.p.: Dordrecht: Reidel, cop. (1987), p. 12.

<sup>5</sup> *Ibid.*, p. 13.

retroactivity of legislation, which forbids “the application of a legislative measure to a situation which is fully completed”<sup>6</sup>. This is because it applies to legislative measures, rather than the judiciary procedure. Then, I address the concept of economic activity. Although the scope of this term can be applied to a plethora of fiscal situations, such as the right to deduct VAT and whether a person is taxable or not, I narrow it to discuss, first, the criteria set by the ECJ to determine whether a transaction can be considered of an economic nature. And second, its implications in within the VAT treatment of public bodies. Finally, I join these two aspects to analyze cases in which the ECJ has solved its judgements considering *economic-nature* criteria and, if not, whether it has diminished the principle of legal certainty.

## 1.5. Disposition

This thesis is divided in six sections. The first is the introduction in which I illustrate the general frame of this work, together with the objective and method I employ to answer whether the ECJ has follow the principle of legal certainty when deciding cases regarding the VAT treatment for public bodies, even though it departed from pre-established case law. The second is *stare decisis*. Therein, I expose the generalities of this doctrine, as well as its implications in the EU and for the ECJ. The third part is the explanation of the principle of legal certainty in its two aspects, the foreseeable and the rational justificatory. The fourth part is the description of the concept of economic activity, along with the criteria whereby an activity is deemed to be of an economic nature. The fifth part presents the particularities regarding the VAT treatment of the public bodies. Finally, the sixth part analyzes two cases in which the ECJ departed from its previous case law when discussing the concept of economic activity. And also one judgment in which the ECJ adheres to the *economic-nature* criteria. This comparison serves to understand the principle of legal certainty within the justification of the ECJ’ decisions in its case law.

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<sup>6</sup> Raitio, Juha. *The principle of legal certainty in EC law*. n.p.: Dordrecht; London: Kluwer Academic, cop. (2010), p. 187-188.

## 2. Stare decisis

*Stare decisis* is defined *grosso modo* as the doctrine of precedents<sup>7</sup>. This means that courts base their judgements in cases already decided, when solving a particular legal issue<sup>8</sup>. *Stare decisis* is a doctrine mainly followed by common-law systems<sup>9</sup>. It is argued that this feature gives to common-law and alike systems a desired stability, whilst allowing a certain degree of flexibility<sup>10</sup>. And so, following previous rulings<sup>11</sup>, courts develop a systematic, uniform and predictable application of law<sup>12</sup>.

Likewise, *stare decisis* is considered a technique based on the conception of law as experience developed by reason and reason tested and developed by experience<sup>13</sup>. Following this technique, courts find the grounds of decisions in recorded judicial experience<sup>14</sup> and apply them to like cases, as well as to those, which, however, different in origin, stand, or are considered to stand, upon the same principle<sup>15</sup>.

Once a substantial and coherent corpus of case law begins to form, solutions to pending disputes could be justified by reference to earlier judgments, thus granting them status of precedents<sup>16</sup> with binding force<sup>17</sup>, i.e., *stare decisis*. However, not all parts of a judgment have precedential value. Only the key factual points or chains of reasoning in a case that drives the final judgment or *ratio decidendi*<sup>18</sup> can have it. As Koopmans says “the

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<sup>7</sup> Precedents understood as cases or issues decided by a court that can be used to help to answer future legal questions, <https://www.law.cornell.edu/wex/precedent> (accessed March 13, 2015).

<sup>8</sup> [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis) (accessed March 13, 2015).

<sup>9</sup> Luanratana, Woraboon & Romano, Alessandro, “Stare Decisis in the WTO: Myth, Dream, or a Siren’s Song?” *Journal of World Trade* 48, no. 4 (2014). p. 775.

<sup>10</sup> Kuzenski, W. F., “Stare Decisis”, *Marquette Law Review*, Vol. 6, Issue 2, Art. 1, (1922), p. 65.

<sup>11</sup> [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis) (accessed March 13, 2015).

<sup>12</sup> Roscoe, Pound, “What of Stare Decisis?”, 10 *Fordham L. Rev.* 1 (1941), p.2.

<sup>13</sup> *Ibid.*, p.5.

<sup>14</sup> *Ibid.*, p. 5.

<sup>15</sup> Kuzenski, W. F., *Op. cit.*, f. n. 10, p. 65.

<sup>16</sup> Tridimas, Takis, *Op. cit.*, f. n. 1, p. 3.

<sup>17</sup> Tjong Tjin Tai, Eric & Karlijn Teuben, “European Precedent Law”, 16 *European Review of Private Law*, Issue 5, (2008), p. 828. The binding force of precedents applies on lower (vertical *stare decisis*) and equal (horizontal *stare decisis*) courts that thanks to certain circumstances they were required to apply the same *ratio decidendi* to subsequent similar cases. See: Luanratana, Woraboon & Romano, Alessandro, *Op. cit.*, f. n. 9, pp. 775-776.

<sup>18</sup> [https://www.law.cornell.edu/wex/ratio\\_decidendi](https://www.law.cornell.edu/wex/ratio_decidendi) (accessed March 13, 2015).

notion of *ratio decidendi* is probably the crux of the doctrine of *stare decisis* [...] the only part of a previous decision which is binding is its reason for deciding”<sup>19</sup>.

The *ratio decidendi* of the ultimate court of review binds all inferior courts of that jurisdiction, as well as the court itself in future cases involving from the legal issue of the decision rendered<sup>20</sup>. Hence, judges should emphasize the *ratio decidendi* of every case<sup>21</sup>. Although, in practice, courts seldom introduce the *ratio* with words like “here comes the ratio”, and so lawyers and subsequent judges should delineate the *ratio* of a previous case<sup>22</sup>.

Unlike common-law systems, in the EU, the ECJ does not follow a formal doctrine of *stare decisis*. This means the ECJ is not strictly bound to its own case law. However, as a matter of practice, the ECJ seldom depart from it<sup>23</sup>. Rather it operates a *de facto stare decisis*. This is confirmed by former AG and judge Slynn, who says:

The Court may never refer to *stare decisis* or the doctrine of precedent, or be strictly bound by its own decisions, yet in general it clearly does follow them ...

There are passages in the judgements where the weights and the number of the previous decisions seen almost to be felt to be such as to make them binding in fact, if not in theory<sup>24</sup>.

Operating a *de facto stare decisis* allows the ECJ to discretionally decide whether it should apply former decisions to the immediate case or not<sup>25</sup>. This is in line with other legal systems, such as in the US where the Supreme Court has said that “*stare decisis* is not a universal and inexorable command”<sup>26</sup>. Also, it appears to be a broad consensus across legal systems that judges (especially courts of last resort) may enjoy flexibility in departing from their own precedents<sup>27</sup>. This is because too much adherence to precedents could result in risk

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<sup>19</sup> Koopmans, T., “Stare Decisis in European Law” in D. O’ Keeffe & H. Schermers (eds.), *Essays in European Law and Integration*, Deventer, Kluwer, (1982), p. 22.

<sup>20</sup> Roscoe Pound, *Op. cit.*, f. n. 12, p. 6.

<sup>21</sup> Luanratana, Woraboon & Romano, Alessandro, *Op. cit.*, f. n. 9, p. 775

<sup>22</sup> Beck, Gunnar, *The legal reasoning of the Court of Justice of the EU*. n.p.: Oxford: Hart, (2012). p. 242.

<sup>23</sup> *Ibid.*, p. 234. In this regard, Beck also shows that “in 2011 the Court handed down 314 judgments which are available in English. Of those, the Court referred at least once to its own previous decision in 303 cases, i.e., in around 96.5 per cent of all cases decided [...]. It may be an indication of the canonical status of the Court’s case law”. See: *Ibid.*, p. 239.

<sup>24</sup> *Ibid.* p. 238.

<sup>25</sup> Luanratana, Woraboon & Romano, Alessandro, *Op. cit.*, f. n. 9, p. 775.

<sup>26</sup> U.S. Supreme Court, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (Nos. 91-744, 91-902), p. 955.

<sup>27</sup> Tridimas, Takis, *Op. cit.*, f. n. 1, p. 5.

of stagnation<sup>28</sup>, particularly when the decision was correct at the time it was delivered, yet it became outdated due to changes in the values of the society, in the world, or an improvement in quality of information<sup>29</sup>.

In this sense, it must be said that ECJ's case law bears a declaratory character; namely its judgments are seen as determining best interpretation of the EU Law<sup>30</sup>. They are not sources of law as premises from which norms derive their validity, because they are interpretative rather than normative in nature<sup>31</sup>. The lack of a formal doctrine of *stare decisis* in Union Law causes that no meaningful distinction can be drawn between the *ratio decidendi* and the *obiter dicta*<sup>32</sup> of the ECJ's judgments<sup>33</sup>. In practical terms, this means that every statement in a sentence has, in principle, the same persuasive value<sup>34</sup>.

Notwithstanding, when courts does not follow previous *ratio decidendi*, they must have either a special justification or a cogent reason to do so<sup>35</sup>. This is in the best interest of legal certainty and of the orderly development of the ECJ's case law<sup>36</sup>. In this sense, it is worth to recall what the European Court of Human Rights has stated:

It is true that, [...] the Court is not bound by its previous judgments. [...] However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so<sup>37</sup>.

In the same vein, Tridimas stresses that “sticking to precedent is a value in itself and there must be an interest outweighing that value to persuade the court to overrule”<sup>38</sup>. This is

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<sup>28</sup> Ibid., p. 5.

<sup>29</sup> Luanratana, Woraboon & Romano, Alessandro, *Op. cit.*, f. n. 9, p. 10.

<sup>30</sup> Tridimas, Takis, *Op. cit.*, f. n. 1, p. 3.

<sup>31</sup> Ibid., p. 3.

<sup>32</sup> *Obiter dicta* may be defined as: Remarks of a judge which are not necessary to reaching a decision, but are made as comments, illustrations, or thoughts. See [https://www.law.cornell.edu/wex/obiter\\_dicta](https://www.law.cornell.edu/wex/obiter_dicta) Definition from Nolo's Plain-English Law Dictionary (accessed March 13, 2015).

<sup>33</sup> Beck, Gunnar, *Op. cit.*, f. n. 22., p.242

<sup>34</sup> Ibid., p.242.

<sup>35</sup> Tridimas, Takis, *Op. cit.*, f. n. 1, p. 5.

<sup>36</sup> Ibid., p. 5.

<sup>37</sup> European Court of Human Rights, *Cossey v. The United Kingdom*, application no. 10843/84, para 35.

<sup>38</sup> Tridimas, Takis, *Op. cit.*, f. n. 1, p. 5.

because reliance on precedents enhances predictability, foreseeability, and fairness of law, which are elements promoting legal certainty<sup>39</sup>.

To sum up, *stare decisis* is a doctrine or technique whereby judges rely on their previous decisions, so that to solve a legal controversy. In the EU, unlike common-law systems, the ECJ is not bound by its precedents. Nonetheless, the ECJ rarely does not follow its previous cases, operating a *de facto stare decisis*. However, in order to respect the principle of legal certainty, it is desirable that the ECJ stick to them, unless there is a reason which justifies departing from them.

In the next section, I discuss precisely the principle of legal certainty. First, I point out its character as a general principle of the EU Law. Second, I define its scope of application in the EU Law. Third, I present the two aspects of this principle, i.e., foreseeable and rational-justificatory. Finally, I show the interaction between these aspects of legal certainty and hard cases.

### 3. Principle of legal certainty

Legal certainty is a recognized general principle of the EU Law<sup>40</sup>. It is, therefore, a source of EU Law in the sense of a rule upon which ECJ can base its legal reasoning<sup>41</sup>. As a general principle of EU Law, legal certainty is given a hierarchical level of primary law<sup>42</sup>, which means that it binds upon EU institutions and Member States, because primary law

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<sup>39</sup> Tridimas, Takis, *Op. cit.*, f. n. 1, p. 4 and 14; and E. Paunio, "Beyond Predictability –Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order" 10 *German Law Journal*, (2009), p. 1492.

<sup>40</sup> Portuese, Aurelien (et. al.), "The Principle of Legal Certainty as a Principle of Economic Efficiency", Research Paper No. 13-13, *University of Westminster School of Law*, p. 3. See also Juha Raitio, *Op. cit.* f. n. 6, p. 103. In some jurisdictions, however, such as in the UK there seems to be a preference to call this principle as rule of law. See: Juha Raitio, *Op. cit.* f. n. 6, 83. Also, general principles of EU Law embody grounds for judicial review that provides the framework within which courts exercise their powers. See: Raitio, Juha, *Op. cit.*, f. n. 6, p. 109. General principles of EU Law may be defined as general propositions for interpretation, thanks to which the ECJ resolve a case by deducing from the existing rules a rule which is in conformity with the objectives of the EU Law. See: Tridimas, Takis. *The general principles of EU law*. n.p.: Oxford: Oxford University Press, (2006), p. 26. See also article 2 of the TEU.

<sup>41</sup> Semmelmann, C. "General Principles in EU Law between a Compensatory Role and an Intrinsic Value." *European Law Journal* 19, no. 4 (2013): p 469.

<sup>42</sup> Wimmer, Michael. "Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality, *European Public Law* no. 2 (2014): p. 333.

delimit the EU's legal framework of action<sup>43</sup>. However, it is not clear whether it can enforce the ECJ in the same terms<sup>44</sup>, inasmuch as this principle derives from ECJ's case law<sup>45</sup>, which, as it has been shown, does not formally oblige the ECJ, yet I would argue that its observance is at least desirable, in order to safeguard its legal status in the EU Law, otherwise its very nature as source of law may be jeopardized<sup>46</sup>.

In the EU, the principle of legal certainty ensures that situations and legal relationships governed by Community Law remain foreseeable<sup>47</sup>, as to that legal effects of the application of law must be predictable<sup>48</sup>. In the words of Tridimas, this expresses that those subject to the EU Law must know what the law is, so that they will be able to plan their actions accordingly<sup>49</sup>. Legal certainty encompasses also the principle of legitimate expectations, which provides that "those who act reasonably and in good faith on the basis of the law as it is or at least seems to be should not suffer from disappointment of those expectations"<sup>50</sup>. In this sense, legitimate expectations protect an individual citizen's legal status<sup>51</sup>, against authorities which have created a situation, for a considerable period of time, on which citizens can rely<sup>52</sup>. This is particularly relevant, for instance, for taxpayers, because, for them to ascertain unequivocally their rights and obligations, legal effects must be clear and precise<sup>53</sup>.

In the same vein, Aarnio sets forth that legal certainty covers two substantial elements. First, the demands that arbitrariness be avoided, and, second, that the decisions be proper<sup>54</sup>. Regarding the former, courts' judgements should be foreseeable in the way that citizens are

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<sup>43</sup> Craig, Paul & Gráinne De Búrca. *EU law: text, cases, and materials*. n.p.: Oxford: Oxford Univ. Press, (2011). p. 109. See also: Raitio, Juha, *Op. cit.*, f. n. 6, p. 83.

<sup>44</sup> Raitio, Juha, *Op. cit.*, f. n. 6, p. 86

<sup>45</sup> As Raitio points out "the case law of the ECJ is an important source of law as far as legal certainty is concerned, because the principle has not been defined in the EC Treaty or in secondary legislation" See: Raitio, Juha, *Op. cit.*, f. n. 6, pp. 86. However,

<sup>46</sup> *Ibid.*, pp. 86-87.

<sup>47</sup> Case 13/61 *Bosch* p. 52, Case C- 239/86 *Ireland v Commission*, para 17, and Joined cases C-9/97 and C-118/97 *Jokela & Pitkäranta*, para 48.

<sup>48</sup> Raitio, Juha, *Op. cit.*, f. n. 6, p. 128

<sup>49</sup> Tridimas, Takis, *Op. cit.*, f. n. 40, p. 242.

<sup>50</sup> Raitio, Juha, *Op. cit.*, f. n. 6, p. 200.

<sup>51</sup> *Ibid.*, p. 200.

<sup>52</sup> *Ibid.*, p. 204.

<sup>53</sup> Case T-115/94 *Opel Austria v Council*, para 17.

<sup>54</sup> Aarnio, Aulis, *Op. cit.*, f. n. 4, p.3

able to plan their own activities on a rational basis<sup>55</sup>. Considering the later, it is expected that courts expose argumentative vehicles<sup>56</sup>, rationally justifying their judgments<sup>57</sup>.

In this regard, the ECJ should elaborate its precedents with a minimum of consistency<sup>58</sup>, but enjoying so much flexibility as they need to avoid any risk of stagnation, so that cases would not be ruled in an outdated way. In this sense, consistency safeguards the principle of legal certainty, leading to the foreseeability of the law, so that persons can plan their activities more careful for achieving a better outcome in the future (foreseeable aspect of legal certainty)<sup>59</sup>. On the other hand, rational justification enhances the rational acceptability of the audience to which the judgments are addressed<sup>60</sup>, in such a way that the majority of recipients of courts' legal reasoning reach a state of maximum consensus as to agree on that is right an offered interpretation (rational-justificatory aspect of legal certainty)<sup>61</sup>. This is because rational acceptability, as Aarnio refers, is a kind of rationality which is the basis of human understanding and the basis of acceptability<sup>62</sup>, creating the credibility on which citizens' confidence rest<sup>63</sup>, because, as Koopmans refers, if ECJ does not respect legal certainty, predictability of law will diminish<sup>64</sup>.

Likewise, the foreseeable and the rational-justificatory aspects of legal certainty converge as vehicles for enhancing legal certainty in cases in which *lex non clara est*. These cases are called 'hard cases'<sup>65</sup>, because the solution to their legal controversy at hand depends upon finding the rational interpretation of a norm, whose meaning may not be clear due to

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<sup>55</sup> Aarnio, Aulis, *Op. cit.*, f. n. 4, p.4. In this regard, Dewey also says that judicial decisions should possess the maximum possible regularity in order to enable persons to plan their conduct and to foresee the legal importance of their acts. See: Dewey, John, "Logical Method and Law" in MacCormick, Neil, and Aulis Aarnio. *Legal reasoning*. n.p.: Aldershot: Dartmouth, Vol. II, cop. (1992), p. 49.

<sup>56</sup> Wroblewski, Jerzy, "Legal Language and Legal Interpretation", in MacCormick, Neil, and Aulis Aarnio, *Legal reasoning*. n.p.: Aldershot: Dartmouth, Vol. II, cop. (1992), p. 407.

<sup>57</sup> Alexy, Robert, *A theory of legal argumentation: the theory of rational discourse as theory of legal justification*. n.p.: Oxford: Oxford University Press; (2010). p. 191. Thereon, Alexy points out that anybody who makes an assertions implicitly claims that what is being said can be justified. In this sense, those who assert something must give reasons for what he or she asserts when asked to do so, unless he or she can cite reasons which justify a refusal to provide a justification. See: *Ibid.*, pp. 191-192.

<sup>58</sup> Koopmans, T., *Op. cit.*, f. n. 19, p. 27.

<sup>59</sup> Tridimas, Takis, *Op. cit.*, f. n. 40, p. 242.

<sup>60</sup> Aarnio, Aulis, *Op. cit.*, f. n. 4, p. 188.

<sup>61</sup> *Ibid.*, p. 221 et seq.

<sup>62</sup> *Ibid.*, p. 189.

<sup>63</sup> *Ibid.*, pp. 6-7.

<sup>64</sup> Koopmans, T., *Op. cit.*, f. n. 19, p. 27. See also in this regard Tridimas, Takis, *Op. cit.*, f. n. 1, p. 4.

<sup>65</sup> Bengoetxea, Joxerramon. *The legal reasoning of the European Court of Justice: towards a European jurisprudence*. n.p.: Oxford: University Press, (1993). p. 171.

polysemy, vagueness, generality and ambiguity of its terms<sup>66</sup>. To decide hard cases, judges are required to elaborate arguments beyond the purely analytic and deductive reasoning in the form of syllogism<sup>67</sup>. This is, in terms of Bengoetxea, a justification of second-order, which involve elements of foreseeability and rationality. These are<sup>68</sup>:

- Consistency of the decision with pre-established law<sup>69</sup>;
- Coherence with established law; and
- Consequentialist reasonings.

Considering the former, it is to conceive that the ECJ will not incur in contradictions with established case law<sup>70</sup>, unless there is a cogent reason to do so<sup>71</sup>. With respect to the second, the ECJ should show that its ruling follows law as it stands in a way in which it exhibits acceptable balance or fits with relevant principles<sup>72</sup>. Last but not least, regarding the third, ECJ's decisions ought to display that decisions took in the ruling are preferable to any alternative<sup>73</sup>.

However, as I referred above, rational justification is meant to convince an audience about the rightness of a particular interpretation. And so, due to the peculiarities of the audience in the EU<sup>74</sup>, the ECJ should solve hard cases not only with the aforementioned elements, but also complement them with a combination of *logos*, *ethos* and *pathos* arguments<sup>75</sup>, so that to enhance legal certainty. The first kind of argument aims to convince

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<sup>66</sup> Bengoetxea, Joxerramon, *Op. cit.*, f. n. 65, p. 168. Bengoetxea mention another reasons for considering a case as hard, for instance: conflict of norms (antinomies); the case cannot be subsumed under any of the existing valid norms and yet it seems to be a legally relevant case; and it may be that the decisions adoptable does not seem to fit with existing law, and yet the solution appears to be just r acceptable to the legal community. However, I focus on hard cases as those who aim to interpret norms whose meaning is wide as it is the case of the concept of economic activity under the second subparagraph of article 9(1) of the VAT Directive.

<sup>67</sup> *Ibid.*, p. 169.

<sup>68</sup> Although Bengoetxea here refers to binding law in the sense of enforceable. I consider that this can also apply to precedents, since they are also source of law, even in the EU, despite its interpretative character. See: *Ibid.*, p. 171.

<sup>69</sup> Despite Bengoetxea refers to consistency to binding law, I consider that consistency also applies to the non-binding ECJ's case law, because, as it was argued, ECJ's system of precedents enhances the principle of legal certainty.

<sup>70</sup> *Ibid.*, p. 171

<sup>71</sup> As it is seen here, the second-order of justification in its consistency sphere converges with the foreseeable aspect of legal certainty. Therefore, it can be said that the foreseeable aspect complements to the rational acceptability of courts decisions.

<sup>72</sup> Bengoetxea, Joxerramon. *Op. cit.*, f. n. 65, p. 171

<sup>73</sup> *Ibid.*, p. 171.

<sup>74</sup> E. Paunio, *Op. cit.*, f. n., 39, p. 1484.

<sup>75</sup> *Ibid.*, p. 1488. I would like to clarify that although Bengoetxea argues that the aforementioned justification can be reached following Wróblewski's formula for second-order of justification, which targets to fully

an audience of the factuality, accuracy and logic of meaningful reasons in support of a decision; namely that conclusions follow from precise assumptions and factual information<sup>76</sup>. The second kind of argument attempts to persuade the audience based on the court's authority, i.e., through the analogical use of precedents<sup>77</sup>. Yet authoritative use of precedents should be avoided. Therefore, courts should explain why they use or not a particular case as precedent<sup>78</sup>. The third kind of argument is meant to influence the audience by appealing to emotions or values<sup>79</sup>. The combination of these arguments is especially important when the task of a court is not only to rationally establish an acceptable decision, but also to succeed in persuading its audience appealing to emotions or political reasons, as it is for the ECJ<sup>80</sup>. This is because *logos* arguments alone might not be sufficient to convince a diverse (culturally and linguistically) audience<sup>81</sup>, as well as a decision based only on a mixture of just *ethos* and *pathos* arguments would not establish a connection between them and the factual situation to which they are applied<sup>82</sup>.

In the EU Law, the ECJ should convince an audience that is both multicultural and multilingual<sup>83</sup> of the rightness of its interpretation, so that cultural prejudices for understanding and interpreting legal texts can be avoided<sup>84</sup>, and a rational consensus can be achieved<sup>85</sup>.

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undertake all aspects to solve a hard case, among others: the analysis of empirical and legal rules of evidence, evaluations of evidence and of consequences, directives for the choice of consequences and evaluations of consequences. (Ibid., p. 171), this work will not consider this formula, unlike the elements for a justification of second-order exposed by Bengoetxea, since the formula is not applicable for the purpose of identifying the guidelines in the ECJ's case law of the concept of economic and the reasons why the ECJ should follow them. Therefore, in the analysis of the elements for a second-order of justification, which enhance legal certainty, I rather consider the examination set forth by Paunio, since her approach is based on the presumption that the ECJ can, by way of argumentation, assure more legal certainty. See E. Paunio, *Op. cit.*, f. n., 39, p. 1470.

<sup>76</sup> E. Paunio, *Op. cit.*, f. n., 39, p. 1487. *Logos* in this sense are also part of the rational justificatory aspect.

<sup>77</sup> Ibid., p. 1486.

<sup>78</sup> Ibid., p. 1486.

<sup>79</sup> Ibid., p. 1486.

<sup>80</sup> Ibid., p. 1487-1488.

<sup>81</sup> Ibid., p. 1487.

<sup>82</sup> Ibid., p. 1488.

<sup>83</sup> Ibid., p. 1488. This could be classified in terms of Aarnio as a particular audience. A particular and at the same time concrete audience is composed of those persons who fulfill the characteristics set for the audience to whom a standpoint on a certain problem in the interpretation of law has been presented. The elements are:

- a) The members of the audience are bound to the rules of rational discourse.
- b) The members have adopted common values.
- c) The audience is tied to a certain form of life

See Aarnio, Aulis, *Op. cit.*, f. n. 4, p. 223.

<sup>84</sup> E. Paunio, *Op. cit.*, f. n., 39, p. 1488.

<sup>85</sup> Aarnio, Aulis, *Op. cit.*, f. n. 4, p. 226.

The ECJ's audience is composed by:

- Institutions, bodies, offices or agencies of the EU<sup>86</sup>.
- National courts of MS under the *acte clair/acte éclairé* doctrine<sup>87</sup>
- EU persons which are entitled to rely on the vertical direct effect of EU Law<sup>88</sup>

ECJ's judgments are addressed to one or to a combination of the aforementioned bodies. And, since the ECJ has jurisdiction to ensure that the interpretation and application of the Union Law be observed<sup>89</sup>, all bodies listed above are bound by ECJ's interpretation on the EU Law, and, consequently, have a particular interest that ECJ's judgments fulfill the requirements of legal certainty, so that to reach foreseeability and rational acceptability of a legal decision-making<sup>90</sup>. This will happen if the ECJ:

- Decide hard cases in accordance with the second-order of justification elements, and
- Considers *logos*, *ethos* and *pathos* arguments, when elaborating its decisions.

In this regard, following the foreseeable and the rational-justificatory aspects of legal certainty, ECJ decisions will not seem to be arbitrary dicta. This will enable persons to plan better their conducts considering the legal consequences of their acts; it will reduce economical costs like collecting information; and EU's audience will reach a state of maximum consensus as to agree on that is right an offered interpretation.

However, as Beck argues, although the ECJ seldom depart from its case law, from time to time it does not steadily follows them in a structured manner<sup>91</sup> (foreseeability aspect of legal certainty). This is either because, as I aforementioned, the ECJ is not bound to its own case law, or because of its high level of discretion<sup>92</sup>, or because of a lack of discursive

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<sup>86</sup> Article 267 of the TFEU.

<sup>87</sup> National courts and MS are constrained to adhere to ECJ's case law. Therefore, they have the duty to interpret national law in conformity with EU Law. This can be traced in case *Da Costa*, where the ECJ determined that the obligation for national courts or tribunals of last instance to request for preliminary rulings may be deprived when the ECJ has already given an interpretation on the issue to be asked (Joined Cases 28, 29 and 30/62 *Da Costa, Venlo, and Hoechst-Holland N.V.*). This is known as the *acte clair* doctrine. This was further confirmed in case *CILFIT*, where the ECJ affirmed that when a materially identical question has already been the subject of a similar case, there is no obligation for domestic courts to request for a preliminary ruling (Case C- 283/81 *CILFIT*, paras 13-14. This is called *acte éclairé* doctrine. See more on this in Ilija, Vukčević, 'CILFIT Criteria for the Acte Clair/Acte Éclairé Doctrine in Direct Tax Cases of the CJEU', 40 *Intertax*, Issue 12, (2012), pp. 654–665.

<sup>88</sup> Craig, Paul & Gráinne De Búrca, *Op. cit.*, f. n. 43, p. 106.

<sup>89</sup> Articles 19 and 267 of the TFEU.

<sup>90</sup> E. Paunio, *Op. cit.*, f. n. 39, p. 1469.

<sup>91</sup> Beck, Gunnar, *Op. cit.*, f. n. 22, p. 249.

<sup>92</sup> *Ibid.*, p. 250.

reasoning<sup>93</sup> (rational-justificatory aspect of legal certainty), which, however legally justified, could diminish legal certainty. Also, the ECJ structures its own case law through “building blocks”<sup>94</sup>. This means that the ECJ elaborates its precedents referring and citing relevant paragraphs from previous decisions, while summarizing relevant arguments of them, yet it, in some occasions, does not provide *ethos* arguments, which distinguish the reasons whereby the ECJ decided to refer a particular judgment<sup>95</sup>, which might be also considered as a lack of *logos* argumentation, together with an authoritative use of *ethos* arguments.

Accordingly, if ECJ does not justify its decisions, sticking to a line of case law or not reasoning exposing its discourse, a potential harm towards achieving legal certainty might arise, which, in turn, would make hard for individuals to rely on ECJ’ decisions with a high degree of confidence. However, I cannot think that persons be able to invoke a breach of this principle by the ECJ in order to claim for damages, inasmuch as the case law of ECJ is not a source of law for the ECJ, since it is not bound by its precedents, as, for example, when other authority of the EU acts against general principles of law<sup>96</sup>.

In the next section, I proceed to analyze the general guidelines for determining whether an economic activity, as described under the second subparagraph of article 9(1) of the VAT Directive, is of an economic nature. Thereon, the ECJ has elaborated a “building block” of continuity which allows to determine the economic nature of an activity. Nonetheless, there have been cases in the field of the VAT regime applicable to public bodies, in which the ECJ has not stuck to such guidelines without providing a cogent reason for doing so. This cannot be seen as an illegal act by the ECJ, but rather, an area in which flexibility and discretion enjoyed by the ECJ collides with the principle of legal certainty. To that end, I recall the cases which, in my opinion, illustrate best the referred guidelines, so that to bring a clear image of the role of this concept in the VAT Directive.

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<sup>93</sup> Yet, in some cases, the ECJ does engage in detailed examination of earlier judgments and this makes a more transparent and persuasive judicial law making. See: Tridimas, Takis, *Op. cit.*, f. n. 1, p. 7.

<sup>94</sup> Beck, Gunnar, *Op. cit.*, f. n. 22, p. 245.

<sup>95</sup> *Ibid.*, p. 245.

<sup>96</sup> Raitio, Juha, *Op. cit.*, f. n. 6, p. 102.

## 4. The concept of economic activity

Economic activity is a concept defined under the second subparagraph of article 9(1) of the VAT Directive, which reads:

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as ‘economic activity’. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

This definition should be understood considering two other inter-connected concepts. These are taxable transaction and taxable person<sup>97</sup>. The former displays the transactions within the scope of the EU VAT System, i.e., supply of goods or of services, as well as the intra-Community acquisition of goods effected for consideration, and the importation of goods<sup>98</sup>. The second defines those who carry on the transactions subject to VAT, provided that they execute them independently<sup>99</sup>.

In this sense, the concept of economic activity is crucial in the EU VAT system. Therefore, its importance lies, for example, when determining whether a person is a taxable person<sup>100</sup>, or whether his transactions fall on the VAT scope, or whether a taxable person has a right to deduct input VAT.

Furthermore, this concept encompasses all transactions in the form of supply of goods or services, or exploitation of property. That is why it is possible to think it as comprising all transactions performed by a taxable person, which lie within the VAT Directive scope. This is because this concept is very wide and it is applied whatever the legal form of the activity<sup>101</sup>, for its character is objective, in the sense that the activity is considered *per se* and without regard to its purpose or results<sup>102</sup>. Consequently, even activities whose sole purpose is to

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<sup>97</sup> Case C-408/97 *Commission v Netherlands*, paras 23-25.

<sup>98</sup> Article 2(1) of the VAT Directive.

<sup>99</sup> Article 9(1) of the VAT Directive.

<sup>100</sup> Joined Cases C-180/10 and C-181/10 *Slaby*, para 43. In this regard the ECJ said “It is the existence of such an activity [economic] which establishes the status of ‘taxable person’”. *Ibid.*, para 43.

<sup>101</sup> Terra, Ben & Kajus Julie, *Introduction to European VAT (recast)*, IBFD, (2014), p.292.

<sup>102</sup> Case 235/85 *Commission v Netherlands*, para 8. See also, Case C-408/97 *Commission v Netherlands*, para 25 and Case C-223/03 *University of Huddersfield*, para 47.

obtain a tax advantage<sup>103</sup>, or supplies by thieves and fences<sup>104</sup> may be considered as economic activities.

However, only if the activities are of an economic nature, they are enshrined in the scope of the VAT Directive<sup>105</sup>. For this matter, it must be examined whether the activity meets with the following criteria:

- Whether the activity has a sufficient degree of permanence, in the sense that is carried out for the purpose of obtaining income therefrom on a continuing basis<sup>106</sup>;
- Whether the activity is carried out in return for consideration<sup>107</sup>;
- Whether the activity has a direct link between the supply provided and the consideration received<sup>108</sup>;

I call these guidelines the *economic-nature* criteria, in as much as they serve as parameters to determine the economic substance of a particular transaction. Also, these criteria were abstracted from hard cases<sup>109</sup>, as defined above, in which the interpretation of

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<sup>103</sup> Case C-255/02 *Halifax*, para 59.

<sup>104</sup> *Terra, Ben*, *Op. cit.*, f. n. 101, p. 314.

<sup>105</sup> In this regard AG Maduro said “in principle even unlawful transactions fall within the scope of the Sixth Directive and are subject to VAT. The only exception is when an activity falls completely outside the lawful economic sector. But that exception relates only to trade in goods or services which are subject to a total prohibition in the Community and which, by their very nature and because of their special characteristics, cannot be fully marketed or introduced into economic channels.” see. AG Opinion Case C-255/02 *Halifax*, para 45. See also: Case C-306/94. *Régie Dauphinoise* para 15; AG Opinion Case C-246/08 *Commission v Finland* f.n. 51; and Case C-284/04 *T-Mobile*, para 34.

<sup>106</sup> Case 235/85 *Commission v Netherlands*, para 9, Case 408/06 *Götz*, para 18, Case C-246/08 *Commission v Finland* paras 40-41, and Joined Cases C- 180/10 and C- 181/10 *Slaby*, para 45.

<sup>107</sup> Case 89/81 *Hong Kong* para 10, Case C-77/01 *EDM* para 49, Case 408/06 *Götz*, para 18. Therein, the ECJ stated that, “if the national court finds that both criteria for an economic activity, namely its permanence and the receipt of remuneration in consideration for the activity, have not been met, then the activity [...] should not be regarded as an economic activity and, consequently, would not be covered by the Sixth Directive”, see Case C-408/06 *Götz*, para 22.

<sup>108</sup> Case C-154/80 *Coöperative* para 12, Case C- 102/86 *Apple & Pear*, paras 11-12, and Case C-16/93 *Tolsma*, para 13.

<sup>109</sup> Likewise, I would like to underline two important aspects about these criteria. First, they are neither immutable, nor applied in absolute terms; for instance, regarding the criterion of the degree of permanence, article 12 of the VAT Directive mentions that MS may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) thereof. In the same vein, supplies carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business, in terms of article 16 and 26 of the VAT Directive, shall be deemed as supplies for consideration. Second, these are not the only parameters which determine whether an activity is of an economic nature. There are *additional* criteria, which depending on the particular circumstances of each case, should *also* be taken into account, but, in any case the referred *economic-nature* criteria should also be present, among of which I can list:

- Whether a taxable person has acquired goods or has used property for the purposes of his economic activities, see Case C-230/94 *Renate Enkler*, paras 26-27.

the concept of economic activity, laid down in the second subparagraph of article 9(1)<sup>110</sup> of the VAT Directive, was the key element for solving the legal issue. In this sense, if a particular activity does not meet one or more of the aforementioned criteria, it will not be regarded as an activity of economic nature<sup>111</sup>. This is because supplies which are sporadically, free of charge or lacking of a link between the supply and the payment are considered as not subject to the scope of the VAT Directive<sup>112</sup>.

However, I consider these criteria can be better illustrated in the context of the cases in which they were pronounced. Therefore, I proceed to examine them<sup>113</sup>.

#### **4.1. Whether the activity has a sufficient degree of permanence, in the sense that is carried out for the purpose of obtaining income therefrom on a continuing basis**

The ECJ has referred to this criterion in the context of, among other cases, *Commission v Netherlands*<sup>114</sup>, *Götz*<sup>115</sup> and *Slaby & Kuć*<sup>116</sup>.

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- Whether the transaction constitutes the mere exercise of the right of ownership by its holder, see Case C-155/94 *Wellcome Trust*, para 32.
  - Whether the purpose of the activity is not solely to acquire holdings in other undertakings, without the taxable person involving itself directly or indirectly in the management of those undertakings, Case C-60/90, *Polysar*, para 17.
  - Whether the activity satisfies the objective criteria on which it is based, even if it is carried out with the sole aim of obtaining a tax advantage, without any other economic objective, see Case C-255/02 *Halifax*, para 58.
  - Whether preparatory acts, such as the acquisition of assets must themselves be treated as constituting economic activity, provided that it is specifically suited to commercial exploitation, see Case C-268/83 *Rompelman*, paras 22-25.

In any case, in terms of the ECJ, as a general rule, an activity is categorized as economic if it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity. See Case C- 246/08 *Commission v Finland*, para 37.

<sup>110</sup> Although in the context of the cases listed herewith, it is referred to Article 4(2) Of The Sixth Vat Directive

<sup>111</sup> Case C- 246/08 *Commission v Finland*, para 37

<sup>112</sup> Case C- 89/81 *Hong Kong* para 10. Likewise, illegal transactions fall outside the scope of the VAT, such as the importation and supply of drugs, even when such sales are not systematically prosecuted in a Member State, and the importation of counterfeit currency notes. See: Terra, Ben, *Op. cit.*, f. n. 102, p. 314.

<sup>113</sup> I would like to clarify that since this is not an examination of a particular controversy, and the criteria listed above has been referred by the ECJ in numerous cases, I would only refer to those judgements which I consider are more relevant for explaining the particular criterion I explain.

<sup>114</sup> Case C-235/85 *Commission v Netherlands*.

<sup>115</sup> Case C-408/06 *Götz*.

<sup>116</sup> Joined Cases C 180/10 and C 181/10 *Slaby*.

#### 4.1.1. *Commission v Netherlands*

The dispute on the first case concerns the issue of whether the official services performed by notaries and bailiffs are subject to VAT<sup>117</sup>. Thereon, the Commission maintained that notaries and bailiffs in the Netherlands should have been subject to VAT within Article 4(1) of the Sixth VAT Directive<sup>118</sup>, inasmuch as they carried out their activities free from any relationship of subordination, in a permanent way and for consideration<sup>119</sup>. However, the Netherlands Government argued that they did not carry out activities governed by normal economic laws but, in return for remuneration fixed by a statute, and, also, that the services provided were concerning reasons of public interest<sup>120</sup>. The ECJ solved that notaries and bailiffs executed their activities on a permanent basis and in return for remuneration, thus those transactions were deemed as economic activities<sup>121</sup> under article 4(2) of the Sixth VAT Directive<sup>122</sup>. Yet, this single criterion was not sufficient for considering those as taxable persons. That is why it was analyzed whether they carried out their activities independently. In this regard, the ECJ confirmed that, since notaries and bailiffs are neither bound to the public authorities as employees, nor integrated into the public administration, they executed their activities on their own account and on their own responsibility<sup>123</sup>. This, in turn, excludes the possibility of considering that notaries and bailiffs exercised their powers as public authorizes, and so they could not enjoy the exemption for public bodies<sup>124</sup> of article 4(5) of the Sixth VAT Directive<sup>125</sup>. Therefore, the ECJ concluded that notaries and bailiffs engaged in economic activities, which should have been subject to VAT, so that the Netherlands had failed to fulfil its obligations under the VAT Directive<sup>126</sup>.

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<sup>117</sup> Case C-235/85 *Commission v Netherlands*, para 3

<sup>118</sup> Article 9(1) of the VAT Directive

<sup>119</sup> Case C-235/85 *Commission v Netherlands*, para 4.

<sup>120</sup> *Ibid.*, para 5.

<sup>121</sup> *Ibid.*, para 9.

<sup>122</sup> The second subparagraph of Article 9(1) of the VAT Directive.

<sup>123</sup> Case C-235/85 *Commission v Netherlands*, para 14.

<sup>124</sup> *Ibid.*, para 22.

<sup>125</sup> Article 13(1) of the VAT Directive.

<sup>126</sup> Case C-235/85 *Commission v Netherlands*, para 23.

#### 4.1.2. *Götz*

The second case concerns a controversy related with the issuance of an invoice, related to the sale of a delivery reference quantity of cow's milk, without a separate statement of the VAT<sup>127</sup>. The issue arose when the *Landesanstalt* (regional body responsible for food of Bavaria) centralized the applications of different milk producers in order to establish those who wanted to sell delivery reference quantities and those who wanted to buy them, so that surpluses of cow's milk could be reduced<sup>128</sup>. Mr. Götz, a milk producer, purchased a delivery reference quantity to the *Landesanstalt*, which issued an invoice, yet it did not show the VAT separately from the selling price<sup>129</sup>. Therefore, Mr. Götz lodged an administrative objection to the *Landesanstalt* asking for an invoice in which VAT was shown<sup>130</sup>. However, the authority dismissed that objection on the grounds of its status as a public authority and its role as a mere intermediary<sup>131</sup>. Given these circumstances, the *Bundesfinanzhof* (Federal Finance Court) decided to stay the proceedings and to refer several questions to the ECJ for a preliminary ruling. The first question was whether a milk-quota sales point is an agricultural intervention agency, or a staff shop<sup>132</sup> under Article 4(5) of the Sixth Directive, read in conjunction with point 7 and 12 of Annex D thereto<sup>133</sup>. The second question was whether the VAT treatment of the *Landesanstalt* as a non-taxable person would lead to significant distortions of competition<sup>134</sup> within the second subparagraph of Article 4(5) of the Sixth Directive<sup>135</sup>. However, before entering into the discussion of the questions, the ECJ analyzed whether the activity of the *Landesanstalt* was covered by the VAT Directive, as to whether it constituted an economic activity under article 4(2) of the Sixth VAT Directive<sup>136</sup>. In this regard, the ECJ determined that if the national court found that the activity at issue was carried on permanent (for the purpose of obtaining income therefrom on a continuing

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<sup>127</sup> Case C-408/06 *Götz*, para 2.

<sup>128</sup> *Ibid.*, para 10.

<sup>129</sup> *Ibid.*, para 12.

<sup>130</sup> *Ibid.*, para 12.

<sup>131</sup> *Ibid.*, para 12.

<sup>132</sup> *Ibid.*, para 24.

<sup>133</sup> Third subparagraph of article 13(1), read in conjunction with Annex I, point 7 and 12 of the VAT Directive.

<sup>134</sup> Case C-408/06 *Götz* para 35

<sup>135</sup> Second subparagraph of article 13(1) of the VAT Directive.

<sup>136</sup> The second subparagraph of Article 9(1) of the VAT Directive

basis)<sup>137</sup> and in return for remuneration, then it should be regarded as an economic activity<sup>138</sup>. And so, the answer to the questions were as follows: With regard the first question, a milk-quota sales point is neither an agricultural intervention agency, nor a staff shop<sup>139</sup>. Considering the second question, the treatment of a milk-quota sales point as a non-taxable person cannot give rise to significant distortions of competition. This is because the *Landesanstalt* did not face any competition with private operators<sup>140</sup>.

#### 4.1.3. *Ślaby & Kuć*

The third case deals with the issue of whether the disposal of several plots of land designated for development must be subject to VAT<sup>141</sup>. However, this case encompasses two separate circumstances that, however, were jointly analyzed by the ECJ. The first one deals with Mr. Ślaby who, as a natural person, did not carry out an economic activity, but purchased land designated for agricultural purposes<sup>142</sup>. Then, the urban management plan was changed (henceforth earmarked for a holiday home development) and Mr. Ślaby divided the land into 64 plots, which he gradually began to sell to natural persons<sup>143</sup>. Afterwards, the Minister *Finansów* pointed out that those transactions constituted an economic activity under article under article 4(2) of the Sixth VAT Directive<sup>144</sup>. This was for two reasons, first because a farmer is a taxable person, and, second because the scale and scope of the planned transactions, as well as the division of the land, indicated Mr. Ślaby's intention to make repeated sales<sup>145</sup>. Mr. Ślaby brought an action against that interpretation. And so, the Naczelny Sąd Administracyjny (Supreme administrative Court) decided to stay the proceedings before ECJ<sup>146</sup>.

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<sup>137</sup> Case C-408/06 *Götz* para 18. In this regard, the ECJ formulated that the permanent nature of the activity and the income which is obtained from it applies not only to the exploitation of property, but to all of the activities referred to in Article 4(2) of the Sixth Directive (now the second subparagraph of article 9(1) of the VAT Directive).

<sup>138</sup> Case C-408/06 *Götz* para 22.

<sup>139</sup> *Ibid.*, para 34.

<sup>140</sup> *Ibid.*, para 46.

<sup>141</sup> Joined Cases C 180/10 and C 181/10 *Ślaby*, para 2.

<sup>142</sup> *Ibid.*, para 12.

<sup>143</sup> *Ibid.*, para 13.

<sup>144</sup> The second subparagraph of Article 9(1) of the VAT Directive.

<sup>145</sup> Joined Cases C 180/10 and C 181/10 *Ślaby*, para 15.

<sup>146</sup> *Ibid.*, para 18.

The second circumstance concerns Mr. and Mrs. Kuć, who were owners of an agricultural undertaking purchased as agricultural land not permitted for development<sup>147</sup>. Nevertheless, after a change to the urban management plan (henceforth earmarked for residential and service development), they began to sell, on an occasional and non-organized basis, certain parts of their undertaking. Those supplies were subject to VAT<sup>148</sup>. Yet, Mr. and Mrs. Kuć claimed that those supplies should not have been subject to VAT, since they concern their personal property<sup>149</sup>. And so, they requested a written interpretation on this point. Thereon, the head of that tax office confirmed that the sale of that land constituted a supply of goods for consideration and subject to VAT<sup>150</sup>. In those circumstances, the *Naczelny Sąd Administracyjny* decided to stay the proceedings before the ECJ for a preliminary ruling.

As explained above, the ECJ decided to examine together the question referred by the *Naczelny Sąd Administracyjny*. This was whether a person, who carried out an agricultural activity on land purchased VAT-free that, afterwards, was reclassified as land designated for development, must be regarded as a taxable person for VAT under article 4(1) of the Sixth VAT Directive<sup>151</sup>, when he begins to sell that land<sup>152</sup>. In this regard, the ECJ stated that the division of land into plots is not decisive, nor is the period over which those transactions take place, for considering whether the transactions lie within the scope of VAT Directive, since all those circumstances could fall within the scope of the management of the personal property<sup>153</sup>. Rather, when a person takes active steps in management by mobilizing resources similar to those deployed by a producer, a trader or a person supplying services<sup>154</sup>, he must be regarded as carrying out an economic activity<sup>155</sup>. This is the case when a person executes the preparatory work to make supply of land designated for development through proven marketing measures<sup>156</sup>; namely taking initiatives that do not normally fall within the scope

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<sup>147</sup> Joined Cases C 180/10 and C 181/10 *Slaby*, para 19.

<sup>148</sup> *Ibid.*, para 21.

<sup>149</sup> *Ibid.*, para 22.

<sup>150</sup> *Ibid.*, para 22.

<sup>151</sup> Article 9(1) of the VAT Directive.

<sup>152</sup> Joined Cases C 180/10 and C 181/10 *Słaby* para 26.

<sup>153</sup> *Ibid.*, para 38.

<sup>154</sup> *Ibid.*, para 39.

<sup>155</sup> *Ibid.*, para 51. This criterion was further confirmed in Case C-263/11 *Rēdlihs*, para 36.

<sup>156</sup> *Ibid.*, para 40.

of the management of personal property<sup>157</sup>. This is because the mere sale of an asset cannot amount to its exploitation, aiming to produce income on a continuing basis<sup>158</sup>. And so, ECJ concluded that the supply of land designated for development must be regarded as subject to VAT, to the extent that that transaction does not constitute the mere exercise of the right of ownership by its holder<sup>159</sup>.

#### **4.1.4. Final remarks of this criterion**

The criterion of sufficient degree of permanence requires the activity is carried out for the purpose of obtaining income therefrom on a continuing basis. Therefore, there should be an intention to repeat the economic activity taking active steps by mobilizing resources through proven marketing measures. In this sense the mere sale of an asset cannot amount to exploitation on a continuing basis, because the notion of permanence does not account for activities performed on an isolated way.

## **4.2. Whether the activity is carried out in return for consideration**

The ECJ has referred to this criterion in the context of case *Hong Kong*<sup>160</sup>.

### **4.2.1. *Hong Kong***<sup>161</sup>

The controversy in this judgment arose when the Netherlands Authorities stopped to consider the Hong Kong Trade Council, who habitually provided services free of charge, as

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<sup>157</sup> Joined Cases C 180/10 and C 181/10 *Slaby*, para 41.

<sup>158</sup> *Ibid.*, para 45. The ECJ assimilated the criterion of “exploitation of an asset intended to produce income on a continuing basis” to the degree of permanence of an activity in Case C-408/06 *Götz* para 18. Thereon, the ECJ pointed out that “The latter criteria [exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis], relating to the permanent nature of the activity and the income which is obtained from it, have been treated by the case-law as applying not only to the exploitation of property, but to all of the activities referred to in Article 4(2) of the Sixth Directive [now second subparagraph of article 9(1) of the VAT Directive]”.

<sup>159</sup> *Ibid.*, para 53.

<sup>160</sup> This criterion was addressed also in *Coöperatieve* and *Tolsma*. However, I discuss these two cases in when I proceed to analyze the criterion regarding the direct link between the supply provided and the consideration received in the latter two.

<sup>161</sup> Case 89/81 *Hong Kong*.

a taxable person under article 4(1) of the Sixth VAT Directive<sup>162</sup>. And so, the tax authorities claimed the amount which had been improperly refunded<sup>163</sup>. In those circumstances the *Hoge Raad* (Supreme Court of the Netherlands) referred the following question to the ECJ: can a person who habitually provides services for traders be regarded as a taxable person in the event of those services being provided free of charge?<sup>164</sup> Thereon, the ECJ concluded that when a person's activity comprises only the supply of services for no direct consideration, there is no basis of assessment, and so the free services are not subject to VAT<sup>165</sup>. This is because, in those circumstances, the person providing services becomes the final consumer, inasmuch as he is at the final stage of the production and distribution chain<sup>166</sup>. And so, services provided free of charge are to be considered as diverse in character from taxable transactions which, assume the stipulation of a price or consideration<sup>167</sup>. Consequently, the Hong Kong Trade Council was not regarded as a taxable person<sup>168</sup>.

#### **4.2.2. Final remarks of this criterion**

The criterion of consideration here examined assumes the stipulation of a price. Therefore, a supply of services free of charge does not bring about any consideration<sup>169</sup>, since there is no basis of assessment. This is in light with article 73 of the VAT Directive which states that the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply. This idea appears clearer in the next two cases, which pictures the concept of consideration within notion of the direct link between the supply and the consideration.

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<sup>162</sup> Article 9(1) of the VAT Directive.

<sup>163</sup> Case 89/81 *Hong Kong*, para 3.

<sup>164</sup> *Ibid.*, para 3.

<sup>165</sup> *Ibid.*, para 10.

<sup>166</sup> *Ibid.*, para 10.

<sup>167</sup> *Ibid.*, para 10.

<sup>168</sup> *Ibid.*, para 13.

<sup>169</sup> This is assuming that the supply of services is carried out for business purposes.

### 4.3. Whether there is a direct link between the supply provided and the consideration received

The ECJ has referred to this criterion in the context of case *Coöperatieve*<sup>170</sup> and *Tolsma*<sup>171</sup>.

#### 4.3.1. *Coöperatieve*

The controversy arose when an agricultural cooperative association, which ran a potato warehouse, considered that, since its services were provided free of charge, they should not be subject to VAT<sup>172</sup>. Conversely, the tax authorities claimed that the cooperative, indeed, had charged to its members something in return of the warehousing; namely the reduction in the value of their shares as a result of the non-collection of the storage charges<sup>173</sup>. In order to solve the dispute, the Supreme Court of the Netherlands asked to the ECJ for the correct interpretation of the term consideration in the VAT Directive<sup>174</sup>. Thereon, the ECJ noticed that that term encompasses everything received in return for the provision of the service which makes up the consideration for the supply<sup>175</sup>. This is not only the cash of the amounts charged, but also the value of the goods received in exchange<sup>176</sup>. Likewise, there must also be a direct link between the service provided and the consideration received<sup>177</sup>. This does not happen when the consideration consists of an unascertained reduction in the value of shares possessed by the members of the cooperative, which may not be deemed as a payment in exchange of the service<sup>178</sup>. Furthermore, the consideration for the provision of a service must be capable of being expressed in money<sup>179</sup>. Also, that consideration should represent a subjective value. This is because the basis of assessment for the provision of services is the payment actually received and not a value assessed according to objective

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<sup>170</sup> Case C-154/80 *Coöperatieve*.

<sup>171</sup> Case C- 16/93 *Tolsma*.

<sup>172</sup> Case C-154/80 *Coöperatieve* para 2.

<sup>173</sup> *Ibid.*, para 3.

<sup>174</sup> *Ibid.*, para 7.

<sup>175</sup> *Ibid.*, paras 10, 12, 13.

<sup>176</sup> *Ibid.*, para 10.

<sup>177</sup> *Ibid.*, para 12.

<sup>178</sup> *Ibid.*, para 12.

<sup>179</sup> *Ibid.*, para 13.

criteria<sup>180</sup>. And so, the ECJ determined that in the case at hand there is no consideration, as long as the cooperative does not impose any storage charge on its members for the service provided<sup>181</sup>.

#### **4.3.2. *Tolsma***

The legal issue arose when Mr. Tolsma received an assessment of VAT from the Inspector of Turnover Taxes<sup>182</sup>. He claimed Mr. Tolsma did not account VAT for his performance as a barrel organ on the public highway in the Netherlands, whereby Mr. Tolsma collected donations from passers-by, despite Mr. Tolsma not being able to claim any remuneration by right<sup>183</sup>. In this regard, Mr. Tolsma argued that the sums he received were not subject to VAT, inasmuch as there was no obligation whatsoever on passers-by to give him donations, whose amount, moreover, they determined themselves<sup>184</sup>. Conversely, the Inspector maintained that there was a direct link between Mr. Tolsma's activity and the payments from the passers-by, regardless he was not entitled to a remuneration<sup>185</sup>. In those circumstances, the Regional Court of Appeal asked, in essence, to the ECJ whether a service, for which no payment is stipulated but payment is nevertheless received, can be regarded as a supply of services effected for consideration<sup>186</sup>. In this regard, the ECJ determined, firstly, that a supply of services is realized for consideration only if there is a legal relationship between the provider of the service and the recipient, pursuant to which there is reciprocal performance<sup>187</sup>. Also, that the remuneration received by the provider constitutes the value actually given in return for the service supplied<sup>188</sup>. Secondly, the ECJ affirmed the donations from passers-by cannot should not be deemed as the consideration for a service supplied, because there is no legal agreement between the parties, since passers-by freely make a donation, whose amount they determine as they wish<sup>189</sup>. Last but not least, the ECJ pointed

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<sup>180</sup> Case C-154/80 *Coöperatieve*, para 13.

<sup>181</sup> *Ibid.*, para 15.

<sup>182</sup> Case C- 16/93 *Tolsma* para 4.

<sup>183</sup> *Ibid.*, para 3.

<sup>184</sup> *Ibid.*, para 6.

<sup>185</sup> *Ibid.*, para 7.

<sup>186</sup> *Ibid.*, para 8.

<sup>187</sup> *Ibid.*, para 14.

<sup>188</sup> *Ibid.*, para 14.

<sup>189</sup> *Ibid.*, para 17.

out that there was no link between the musical service and the payments, inasmuch as the passers-by did not ask for Mr. Tolsma to play for them; rather, the sums they paid depended not on the musical service but on their subjective motives<sup>190</sup>. Therefore, the ECJ concluded that supply of services effected for consideration does not comprise an activity consisting in playing music on the public highway, for which no remuneration is stipulated<sup>191</sup>.

#### **4.3.3. Final remarks of this criterion**

As I *supra* referred, *Coöperatieve* and *Tolsma* help to better understand the concept of consideration. Therefore, it is worth to recall what the ECJ set forth in these cases as to that consideration is everything received in return for the provision of the service which makes up the payment for the supply. Regarding the direct link, the first to be said is that the consideration must be ascertained and be capable of being expressed in money, as well as to represent a subjective value, in the sense of the payment actually received and not a value assessed according to objective criteria<sup>192</sup>. Finally, there have to be a legal relationship between the provider and the recipient, pursuant to which there is reciprocal performance, which characterizes the link in itself.

#### **4.4. Final remarks of the guidelines to assess the concept of economic activity**

As seen, the ECJ has employed the *economic-nature* criteria to determine both whether a particular activity is of an economic nature, and, therefore, whether the activity falls within VAT scope. Likewise, the ECJ stressed the importance of the concept of economic activity when determining whether an activity is subject to VAT, whether the activity is taxable, as well as whether a person is taxable and has a right to deduct VAT.

The application of the VAT exemption for public bodies under article 13 of the VAT Directive is another example of the importance of determining the economic nature of a particular activity. As the ECJ has already affirmed, it is required a prior finding that an

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<sup>190</sup> Case C- 16/93 *Tolsma*, para 17.

<sup>191</sup> *Ibid.*, para 20.

<sup>192</sup> See also Case C-40/09 *Astra Zeneca*, para 28 and Case C-549/11 *Orfey* para 44.

activity pursued by a public body is considered to be of an economic nature for applying this fiscal treatment<sup>193</sup>. However, in certain cases on this matter, when dealing with the referred *economic-nature* criteria, the ECJ has either departed from or solved not following the referred criteria. This has been either because of a lack of consistency with its previous case law, or because of authoritative use of precedents, in the sense of not providing a cogent reason for not following previous judgements. Either way harming the principle of legal certainty, since, first, it does not enable persons to plan their conducts considering the legal consequences of their acts. Second, it increases economical costs like collecting information. Third, it does not convince the EU audience about the rightness of a particular interpretation<sup>194</sup>.

In the next section, I introduce the general aspects of the article 13 of the VAT Directive, regarding the VAT treatment of entities governed by public law as public bodies, which will help to understand the context under which the cases *Commission v Greece*, *Hutchinson & T-Mobile* and *Commission v Finland* were formulated.

## 5. VAT Treatment of Public Bodies

In the EU, as a general rule states, regional and local government authorities, as well as any other public body are not regarded as taxable persons in respect of the activities or transactions in which they engage<sup>195</sup>. Nonetheless, for this exemption to happen (besides the prior finding that the activity pursued by the body is considered to be of an economic nature, as above referred) three criteria, regarding public bodies' transactions, should be analysed, all of which laid down in article 13(1) of the VAT Directive.

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<sup>193</sup> Case C-369-04 *Hutchinson*, para 42 and Case C-284/04 *T-Mobile* para 48.

<sup>194</sup> As it is was discussed in point 3 of this work.

<sup>195</sup> This exemption, as any other one, is a violation to the fundamentals of VAT, because they infringe upon the characteristics of VAT as a consumption-type VAT. See Henkow, Oskar, *The VAT/GST Treatment of Public Bodies*, Kluwer Law International, UK, (2013), p.9.

## 5.1. Whether the public body carried out the activity as public authority, governed by public law<sup>196</sup>

This criterion lies on the first subparagraph of article 13(1) of the VAT Directive, which states that:

States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

Thereon, the ECJ has set forth that VAT exemption for public bodies applies when two conditions are fulfilled. Firstly, activities must be carried out by a body governed by public law, in the sense that such bodies must execute their activities under a special legal regime applicable only to them, and not under the same legal conditions as those that apply to private economic operators<sup>197</sup>. Secondly, activities must be performed by those bodies acting as public authorities<sup>198</sup>. This is the case, for instance, when the realization of the activity involves the use of public powers<sup>199</sup>; when the activity lies within the core responsibilities that can never be delegated to private bodies<sup>200</sup>; when the person that performs the activity is part of the public administration<sup>201</sup>, or when State and citizens are in a relationship of superiority/subordination<sup>202</sup>. Thus, the subject-matter of the activity engaged

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<sup>196</sup> It is important to highlight that if this criterion is not fulfilled no further examination is required for determining the application of the VAT exemption to public bodies (assuming that before entering on the discussion of this fiscal treatment for public bodies, the activity was found to be of an economic nature). See, for example, Case C-235/85 *Commission v Netherlands*, para 22.

<sup>197</sup> Case C-446/98 *Camara Municipal do Porto*, para 17. However, De la Feria considers that, when public bodies engage in activities under a special legal regime, it is to be regarded rather as a public body acting as a public authority, see De la Feria, Rita, “The EU VAT Treatment of Public Sector Bodies: Slowly Moving in the Wrong Direction”, The Netherlands, *INTERTAX*, Kluwer Law International BV, Volume 37, Issue 3, (2009), p. 150. On the other hand, I deem that this criterion fits under the aspect of body governed by public law, since public law governs relations between individuals and the state, as well as between individuals that are of direct concern to the state, see Jonathan Law & Elizabeth A. Martin, *A Dictionary of Law*, 7 ed., Oxford University Press Published online, 2014.

<sup>198</sup> Case C-446/98 *Camara Municipal do Porto*, para 15.

<sup>199</sup> *Ibid.*, para 22

<sup>200</sup> Case C-359/97 *Commission v UK*, para 37.

<sup>201</sup> Case C-359/97 *Commission v UK*, para 55.

<sup>202</sup> AG Opinion Case C-369/04 *Hutchison*, para 109 and AG Opinion Case C-284/04 *T-Mobile*, para 119.

in is not relevant for the purpose of assessing this criterion<sup>203</sup>. Rather it is the way in which the persons execute the activities, i.e., as a public a public or as a private person<sup>204</sup>.

## **5.2. Whether public body's activity lies under the Annex I of the VAT Directive**

This criterion is enshrined in the third subparagraph of article 13(1) of the VAT Directive which reads:

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.

This means that if an economic activity is performed by a public body, it should be analyzed whether the activity is one of those listed in Annex I of the VAT Directive. In case the activity lies therein, the public body will be considered as a taxable person, provided that such body does not carried out the activity in such a small scale as to be deemed negligible<sup>205</sup>. Whether the activities are performed in a negligible extent is a matter MS are able to decide, for they are free to adopt the parameters to determine the degree negligibility of the activities performed by their public bodies<sup>206</sup>. Therefore, MS may treat as non-taxable persons public bodies carrying out activities listed in Annex I, as long as the activities are executed in a negligible scale, yet, according to the ECJ, they are not required to do so<sup>207</sup>.

## **5.3. Whether the treatment as a non-taxable person of the public body leads to significant distortions of competition**

This criterion is presented in the second subparagraph of article 13(1) of the VAT Directive, which points out:

However, when [public bodies] engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions

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<sup>203</sup> Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, para 13.

<sup>204</sup> Henkow, Oskar, *Op. cit.*, f. n. 195, p. 41.

<sup>205</sup> C-446/98 *Camara Municipal do Porto*, para 32.

<sup>206</sup> Such parameters, nonetheless, should be reviewed by the national courts. See: *Ibid.*, para 35.

<sup>207</sup> *Ibid.*, para 27.

where their treatment as non-taxable persons would lead to significant distortions of competition

This criterion attempts to examine whether treating public bodies as a non-taxable person affects the decision-making process of the consumer<sup>208</sup>, as to whether such fiscal situation risks competition in the market. Because in case this tax treatment jeopardizes competition, public bodies shall be regarded as a taxable persons according to the second subparagraph of 13(1) of the VAT Directive.

Notwithstanding, for this criterion to apply, first, it should be analyzed whether the activity could be performed not only by public bodies but also by private persons<sup>209</sup>, or, however different in form, whether the activities are similar in nature as those performed by commercial operators<sup>210</sup>. Second, it has to be examined whether there is a risk of distorting competition, either actual or potential. An actual risk is present when, at the time the public body executed its transactions, private-sector suppliers could also bring into the market the same of similar transactions<sup>211</sup>. A potential risk means that at the time the public body performed its activities, it was possible to foresee that incoming private competitors will enter into the market<sup>212</sup>. Moreover, “it is sufficient that there is a glimpse of a future distortion of competition”<sup>213</sup>, provided that the potential risk be real and not purely hypothetical<sup>214</sup>. Finally, it must be determined whether the treatment of those bodies as non-taxable persons would lead to *significant* distortions of competition, in the sense that distortions should be more than negligible<sup>215</sup>. This is the case when such treatment would provoke a situation in which a significant number of private operators, carrying out similar or identical transactions

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<sup>208</sup> AG Opinion Case C- 246/08 *Commission v Finland*, para 76.

<sup>209</sup> AG Opinion Case C-369/04 *Hutchison*, para 121, AG Opinion Case C-284/04 *T-Mobile*, para 125, and Joined cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, para 24.

<sup>210</sup> Case C-369/04 *Hutchison*, para 37 and Case C-284/04 *T-Mobile*, para 43. This last parameter is in compliance with the requirements that the common system of VAT should be neutral, to all similar transactions, whatever their legal form. See Case C-77/01 *EDM*, para 47, and Case C-288/07 *Isle of Wight*, para 44.

<sup>211</sup> AG Opinion Case C-369/04 *Hutchison*, para 139 and AG Opinion Case C-284/04 *T-Mobile*, para 142.

<sup>212</sup> AG opinion Case C-369/04 *Hutchison*, para 128 and AG opinion Case C-284/04 *T-Mobile*, para 129.

<sup>213</sup> AG Opinion Case C- 246/08 *Commission v Finland*, p 73.

<sup>214</sup> Case C-288/07 *Isle of Wight*, paras 64-65.

<sup>215</sup> Case C 288/07 *Isle of Wight Council*, paragraph 79. The ECJ explains that the negligible criterion employed to ascertain whether there are significant distortions of competitions is extracted from the negligible criterion enshrined on the third subparagraph of article 13(1) of the VAT Directive, since both parameters are closely linked; they pursue the same objective; and they are subject to the same logic. Case C- 288/07 *Isle of Wight*, paragraph 76.

as those performed by the public bodies, would receive a different treatment in respect of the levying of VAT<sup>216</sup>.

#### **5.4. Final remarks of the VAT treatment of public bodies**

To recapitulate, these guidelines shape the sphere of application of the VAT exemption of public bodies. The first criterion aims to determine whether the activity is carried out as a public a public or as a private person. If determined that it is as a public person, then the second criterion comes into action, which targets to analyze whether the activity lies under the Annex I of the VAT Directive. If the activity is encompassed therein, then it should be examined whether it is executed in an extension greater than negligible. Otherwise it should be tested the third criterion, which analyzes whether the treatment of the public body as a non-taxable person leads to significant distortions of competitions, either actual or potential, provided that the risk of distortion is more than negligible.

The explanation of the VAT treatment of public bodies serves to better understand the legal context under which the ECJ solved the cases I proceed to analyze. These judgements are hard cases as above explained, since the solution to their legal controversy (whether public bodies are entitled to the exemption provided for by article 13(1) of the VAT Directive in respect of their activities) depended on a prior interpretation of the concept of economic activity, as to whether a particular transaction lies within the scope of this concept, whose meaning is not sufficiently clear, inasmuch as the wideness of its terms encompasses a great variety of transactions<sup>217</sup>.

Therefore, the observance of the guidelines which determine whether a particular activity is of an economic nature, or an explanation as to why those guidelines are not to be followed is required in the field of the VAT exemption of public bodies, in order to preserve the principle of legal certainty. This would imply, as *supra* referred, a second-order of justification in the sense of, for instance, consistency with pre-established case law and a combination of *logos*, *pathos* and *ethos* arguments. However, in the two of the following judgements, the ECJ either missed to apply those guidelines (*Commission v Greece* and *Hutchinson & T-Mobile*). I provide, nevertheless, a case (*Commission v Finland*) in which

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<sup>216</sup> Case C- 288/07 *Isle of Wight*, para 77.

<sup>217</sup> Case C-186/89 *Van Tiem*, para 17.

the ECJ did apply this guidelines, as a model of how a correct observance of the *economic-nature* criteria should be done.

## **6. Analysis of the judgements regarding the application of the *economic-nature* criteria and the VAT treatment of public bodies**

The cases I attempt to discuss are *Commission vs Greece*<sup>218</sup>, *Hutchinson & T-Mobile*<sup>219</sup> and *Commission vs Finland*<sup>220</sup>. In all these judgments the concept of economic activity was key in solving their particular legal issues. Likewise, they deal with the VAT treatment of public bodies, which *supra* was in-depth explained. Of these cases I analyze the way the ECJ employed the *economic-nature* criteria, as to whether it respected the application of those guidelines, and, if so, whether it enhanced or diminished the principle of legal certainty.

### **6.1. *Commission v Greece***

The first case to study is *Commission vs Greece*. This case dealt with the failure to levy VAT on motorway tolls. The Commission brought an action against the failing to subject to VAT tolls paid by users as consideration for the service of providing access to motorways and related infrastructures<sup>221</sup>. In this regard, the Commission submitted that, when providing access to roads on payment of a toll, National Road Construction Fund was carrying on an economic activity, which must have been deemed as a supply of services, via the exploitation of property for the purpose of obtaining income therefrom<sup>222</sup>. Nonetheless, the Hellenic authorities took the view that tolls constituted an indirect tax and their collection was a transaction executed by a public authority, so that it did not fall within the scope of VAT<sup>223</sup>. In the first place, the ECJ deliberated that the fact that this activity was carried out by a body governed by public law cannot *per se* remove the transactions in question from the scope of

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<sup>218</sup> C-260/98 *Commission v Greece*.

<sup>219</sup> Cases C-369/04 *Hutchison* and C-284/04 *T-Mobile*. Although these cases were not solved jointly, they are based on the same reasoning. Therefore, they will be treated as a single unit.

<sup>220</sup> Case C- 246/08 *Commission v Finland*.

<sup>221</sup> Case C-260/98 *Commission v Greece*, para 1.

<sup>222</sup> *Ibid.*, para 21.

<sup>223</sup> *Ibid.*, para 11.

VAT<sup>224</sup>. Secondly, the ECJ analyzed whether this activity might constitute an economic activity. In this regard, the ECJ pointed out that the scope of the term economic activities is very wide, and objective in character; namely that an activity is to be considered *per se* and without regard to its purpose or results. Therefore, in the view of the wideness of its scope, the ECJ held that in providing access to roads in return for payment, the National Road Construction Fund in Greece carried out an economic activity. Also, the ECJ examined the existence of a direct link between the service provided and the consideration received<sup>225</sup>. Thereon, the ECJ took the view that providing access to roads on payment of a toll fits in that direct link<sup>226</sup>. This is because the payment of a toll for the use of the road depends on the category of vehicle used and the distance covered<sup>227</sup>. That is why providing access to roads on payment of a toll constitutes a supply of services for consideration<sup>228</sup>. Finally, the ECJ examined whether the National Road Construction Fund is entitled to the exemption of bodies governed by public law<sup>229</sup>. The ECJ pointed out that, for this to happen, two conditions must be fulfilled. First, the activities must be carried out by a body governed by public law. Second, they must be carried out by that body acting as a public authority<sup>230</sup>. Regarding the former, the ECJ affirmed that National Road Construction Fund was carrying out its activities a body governed by public law<sup>231</sup>, since they are part of the public administration<sup>232</sup>. With respect to the second, the ECJ set forth that National Road's activities are not pursued under the same legal conditions as those that apply to private traders<sup>233</sup>, because they fall within the prerogatives of the public authority<sup>234</sup>. Therefore, the ECJ dismissed the action in its entirety<sup>235</sup>.

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<sup>224</sup> Case C-260/98 *Commission v Greece*, para 22.

<sup>225</sup> *Ibid.*, para 29.

<sup>226</sup> *Ibid.*, para 30.

<sup>227</sup> *Ibid.*, para 30.

<sup>228</sup> *Ibid.*, para 31.

<sup>229</sup> *Ibid.*, para 32.

<sup>230</sup> *Ibid.*, para 34.

<sup>231</sup> *Ibid.*, para 41.

<sup>232</sup> *Ibid.*, para 40.

<sup>233</sup> *Ibid.*, para 35.

<sup>234</sup> *Ibid.*, para 40.

<sup>235</sup> *Ibid.*, para 45.

### 6.1.1. Analysis of the case *Commission v Greece*

I would like to start the examination of this case explaining the motives, for which this judgement is to be deemed as a hard case. Then, I expose the legal reasoning the ECJ should have followed, so that to enhance the principle of legal certainty.

Hard cases are those whose solution to the legal controversy depends on the interpretation of a norm, and whose meaning is wide or vague. In this case, the norm was the second subparagraph of article 9(1) of the VAT Directive regarding the concept of economic activity, as to whether the provision of access to motorways constituted an economic activity. With regard to the principle of legal certainty, as I already mentioned, this general principle covers two fundamental aspects. First, the foreseeable aspect which advocates for the predictability of legal effects, as to that those subject to, in this case the VAT Directive, must know the interpretation of law and, therefore, be able to plan their actions accordingly. Second, the rational-justificatory aspect which look for the legal reasoning of the decision-maker to reach a state of maximum consensus within its recipients. For hard cases to achieve legal certainty, the court should stick to previous case-law, unless there is a reason for departing, and to be coherent with law.

Regarding this case, the ECJ deemed that the provision of access to motorways is an activity of an economic nature, because it lies within the scope of the terms of the concept of economic activity. However, the ECJ did not provide any further explanation as to the motives for reaching this decision; namely no reference was mentioned to the *economic-nature* criteria already established in its case law, for example the activity's degree of permanence or the presence of consideration. Although the ECJ has discretion to solve its judgments not referring to its previous judgements, as already mentioned, the ECJ should rationally justify its decisions consistently with pre-established case law, unless there is a cogent reason to departing from it. Also, it should provide a combination of *logos*, *ethos* or *pathos* arguments giving meaningful reasons in support of its decision, employing analogical use of precedents, and appealing to principles. However, the ECJ limited itself to *ipso facto* deem the referred provision to access as an economic activity. And so, this cannot be seen as a rational justification of the case.

Nonetheless, the ECJ did conclude that the provision of access to motorways constituted a supply of services for consideration, which was determined according to the category of vehicle used and the distance covered, which in turn expressed the existence of a direct link between the toll and the use of the road. However, I would argue that, according to the *economic-nature* criteria (in specific in case *Coöperatieve*), the consideration of a supply should represent a subjective value, not a value assessed according to objective criteria, such as the category of the vehicle or the distance covered. It also may be pointed out that, in this case, the consideration was the value actually received, i.e., the toll paid by car drivers. Be as it may, the ECJ did not provide any sort of reasoning as to whether the consideration was set by subjective or objective criteria, which would have helped to clarify this issue.

The ECJ has in similar cases, nevertheless, confirmed that making road infrastructure available on payment of a toll constitutes an economic activity in the form of a supply of services in return for consideration<sup>236</sup>. In this sense, it is also possible to argue that, with regard to this particular sort of economic activity, the ECJ has developed a consistent line of argumentation shaping a “building block” in accordance with the principle of legal certainty. This does not leave persons in an unforeseeable situation, in which they are not able to plan their activities more carefully for achieving a better outcome. Also, despite the disagreements this interpretation might arise, the ECJ reached a state of maximum consensus that road infrastructure, available on payment of a toll, is an economic activity in the shape of a supply of services. In this sense, I would argue that although the ECJ missed to rationally justify the economic nature of this activity, it elaborated a coherent and consistent “building block”, based on which people can foresee that this transaction is an economic activity, and plan their actions accordingly.

To sum up, although the ECJ did not rationally justify the economic nature of the provision of access to motorway roads, it did structure a coherent line of argumentation in which this operation is to be considered as an economic activity, thanks to which people can rely with certain degree of confidence that this way of reasoning will continue, unless circumstances change and the ECJ point it out.

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<sup>236</sup> See: Case C-276/97 *Commission v France*, para 36, Case C-408/97 *Commission v Netherlands*, para 30, Case C-83/99 *Commission v Spain* para 11, and Case C-359/97 *Commission v UK*, para 42.

Finally, regarding the VAT exemption to the National Road Construction Fund, the ECJ did justify that its activities were carried out as a body governed by public law, as well as a public authority. Therefore, ECJ's reasoning is in light of the criteria laid down under article 13(1) of the VAT Directive, along with the pre-established case law which confirms these criteria, as expressed in point 5.1 of this work.

## **6.2. *Hutchinson & T-Mobile***

The second case to analyze is *Hutchinson & T-Mobile*. This case is about the assertion of several undertakings for deducting the amount of VAT, which they claimed they had paid when they were granted third-generation mobile telecommunications licenses. In 2000, RA (Radiocommunications Agency of the United Kingdom) and TCK (Telecommunications Control Commission of Austria) each awarded to several undertakings, by auction, licenses to use a defined part of the radio-frequency spectrum reserved for telecommunications services<sup>237</sup>. No reference to VAT was made during the auction procedure, but if RA and TCK were to be considered as taxable persons performing economic activities, the fee to use the relevant frequencies must have included VAT. That is why the companies that were assigned the licenses at issue claimed a right to deduct input VAT<sup>238</sup>, under article 168 of VAT Directive<sup>239</sup>.

Yet, the CCE (Commissioners of Customs and Excise of the United Kingdom) and the tax authorities in Austria rejected the petitions of the undertakings, for they pondered that actions of RA and TCK were not economic activities within the meaning of article 9(1) of the VAT Directive, but rather measures to regulate the market<sup>240</sup>. And so, they should not be considered as taxable persons.

Consequently, the domestic courts of the UK and Austria asked to the ECJ, in essence, whether the allocation, by auction, by public authorities, of rights for providing mobile telecommunications services constituted an economic activity. And, if so, whether those

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<sup>237</sup> Case C-369/04 *Hutchison*, para 22 and Case C-284/04 *T-Mobile*, para 25.

<sup>238</sup> As referred above in case *T-Mobile* the claimants sought for invoices showing VAT to be issued, in order to exercise the right to deduct VAT. See: Case C-284/04 *T-Mobile*, para 3.

<sup>239</sup> Article 168 of the VAT Directive.

<sup>240</sup> AG Opinion on Case C-369/04 *Hutchison*, para 46 and AG Opinion on Case C-284/04 *T-Mobile*, para 51.

authorities might be considered as taxable persons<sup>241</sup>, which would have the effect of subjecting the allocation of such licenses to VAT<sup>242</sup>.

To find a solution to these questions, the ECJ analyzed, first, whether those activities constituted exploitation of property, within the meaning of Article 9(1) of the VAT Directive<sup>243</sup>, in the same way as private economic operators do when supplying mobile telecommunications services<sup>244</sup>.

Then, the ECJ distinguished between granting an authorization and participating on the exploitation of radio-frequency spectrum. The first activity was attributed to RA and TCK, and the second to the undertakings. This is because the issuing of authorizations allows economic operators to exploit the frequency spectrum by offering their services to the public on the mobile telecommunications market, for the purpose of obtaining income therefrom on a continuing basis<sup>245</sup>, but not the other way around<sup>246</sup>; namely through their activities the authorities ensure the effective use of the frequency spectrum, avoiding harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems, but they do not exploit, as an economic activity, the radio spectrum<sup>247</sup>.

Moreover, the ECJ stated that even if such regulatory activity could be classified as an economic activity, it would not be encased of economic nature<sup>248</sup>. This is because, when issuing those licenses, authorities are not in fact participating in the telecommunications market; insomuch as only the economic operators exploits the radio spectrum<sup>249</sup>. Also, the ECJ considered irrelevant that undertakings may reallocate the licenses, for that would not be a similar activity which enters in competition with the first allocation done by RA and TCK.

That is why, ECJ concluded the assignment of those authorizations is not covered of any economic nature, for the issuance falls exclusively within the competence of RA and

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<sup>241</sup> Case C-369/04 *Hutchison*, para 25 and Case C-284/04 *T-Mobile*, para 31.

<sup>242</sup> *Ibid.*, para 26 and *Ibid.*, para 32.

<sup>243</sup> Article 9(1) of the VAT Directive.

<sup>244</sup> Case C-369/04 *Hutchison*, para 31 and Case C-284/04 *T-Mobile*, para 37.

<sup>245</sup> *Ibid.*, para 36 and *Ibid.*, para 42.

<sup>246</sup> *Ibid.*, para 33 and *Ibid.*, para 39.

<sup>247</sup> *Ibid.*, para 34 and *Ibid.*, para 40.

<sup>248</sup> *Ibid.*, para 46 and *Ibid.*, para 46.

<sup>249</sup> *Ibid.*, para 36 and *Ibid.*, para 42.

TCK<sup>250</sup>. As a result, the allocation of rights to exploit the radio spectrum can constitute neither an ‘economic activity’, nor the authorities taxable persons<sup>251</sup>.

### 6.2.1. Analysis of the case *Hutchinson & T-Mobile*

As it was done in previous analysis of case *Commission v Greece*, first I examine whether this case is a hard case, as well as whether the ECJ’s reasoning led to the enhancement of the principle of legal certainty.

*Hutchinson & T-Mobile* is a hard case, because to solve the legal controversies, the ECJ needed to interpret the concept of economic activity (which, as it has been stated, is very general and wide), as to whether the allocation of rights to exploit radio spectrum was encased of economic nature.

ECJ’s justification on this matter is not in light with the parameters of legal reasoning which follow the principle of legal certainty. First, the ECJ was incoherent regarding the examination of the second subparagraph of article 9(1) of the VAT Directive, because it did not fully examine the different activities listed therein, which encompasses the following transactions:

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as ‘economic activity’. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity

In the case at hand, the ECJ studied whether the allocation of radio spectrum constituted an exploitation of property by RA and TKC. However, I criticize this approach because this activity is more likely to be examined as a supply of services (as I below expose). Moreover, it was clear, *prima facie*, that RA and TKC did not participate in the market exploiting the radio spectrum, in the way private undertakings do. And so, it was needless to analyze whether such authorities exploited the radio spectrum. Rather, an examination of whether the referred allocation constituted either telecommunications services or a supply of

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<sup>250</sup> Ibid., para 35 and Ibid., para 41.

<sup>251</sup> Ibid., para 40 and Ibid., para 46.

services, according to articles 24 (2) and 25(a) of the VAT Directive<sup>252</sup>, had been more pertinent. These articles dispose:

2. ‘Telecommunications services’ shall mean services relating to the transmission, emission or reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception, with the inclusion of the provision of access to global information networks.

[25(a)] A supply of services may consist, inter alia, in one of the following transactions:

- (a) the assignment of intangible property, whether or not the subject of a document establishing title;

In this sense, it is conceivable to deem the allocation of frequency rights for mobile telecommunications either as telecommunications services in the form of assignment of the right to use capacity for transmitting, emitting or receiving signals<sup>253</sup>, or as supply of services in the way of assigning intangible property. Moreover, considering the principle of *lex specialis derogat legi generali*, whereby more specific rules must be examined and applied first, if conditions governing their application are fulfilled<sup>254</sup>, a systematic interpretation of articles 9(1) with respect to the general concept of economic activities, together with either article 24(2) if decided that this activity is to be considered as telecommunications services, or article 25(a) if the ECJ deemed the activity as a supply of services, would have been more logical, based on the wording of the provisions referred. Also, the ECJ missed to provide a thorough examination of whether this activity was of an economic nature as to its degree of

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<sup>252</sup> Although the decisions of this case was based on the Sixth VAT Directive, and so, it should have been examined in light of Article 6(1), the text in both article remains practically unchanged.

<sup>253</sup> However, others as, for instance, AG Kokott does not openly supports this view, because other language versions withstand an interpretation whereby the concept “capacity” should be understood in the sense of infrastructure, specially the German and the Dutch which refer to this concept as *Einrichtungen* and *infrastructuur* respectively, yet other versions such as Italian, Portuguese, French and Spanish, refer to the term capacity as *mezzi*, *meios*, *moyens* and *medios*, in the sense of means for transmission, which would encompass the issuance of licenses. Nevertheless, there is no clarity on this issue, because the ECJ did not examine this situation. See AG Opinion Case C-369/04 *Hutchison*, para 88 and AG Opinion Case C-284/04 *T-Mobile*, para 93.

<sup>254</sup> AG Opinion Case C-270/09 *Macdonald*, para 66.

permanence, along with whether it was carried out in return for consideration, and, finally, whether there was a direct link between the supply and the consideration.

Also, if the ECJ had examined the activities of RA and TKC as in the light of articles 24(2) or 25(a) of the VAT Directive, together with the *economic-nature* criteria, its reasoning might have led to a thorough analysis of whether RA and TKC were exempted of VAT according to article 13(1) of the VAT Directive.

In my view, what the ECJ did was to take AG's opinion on this case as a starting point to examine this judgement. This is because, in her opinion, although she concluded that the assignment of radio spectrum was an economic activity, AG took the view of analyzing the referred allocation of radio spectrum as an exploitation of property. So, it seems to me, the ECJ decided to debate AG's arguments, because, as I referred, *prima facie* it looked not correct to consider that what RA and TKC did was to exploit property. That is why the ECJ should have analyzed whether articles 24(2) or 25(a) applied, as well as whether the activity was of an economic nature.

This reasoning creates legal uncertainty for those involved in the telecommunications market, because, for instance, what would happen if private undertakings would reallocate the radio spectrum under article 9(b) of the Directive 2009/140/EC. In this sense, would the ECJ take the same view and consider that such reallocation by private operators is not an activity of economic nature, inasmuch as those operators would not exploit property, but rather facilitate the exploitation of radio spectrum?<sup>255</sup> And so, would those private undertakings have a right to deduct the VAT they incurred in making such supply? This problems arise because, as things stand now and following the ECJ's reasoning, allocation of spectrum is neither exploitation of property<sup>256</sup>, nor, in consequence, an economic activity. As AG Mazák, in an opinion of a posterior case, pointed out:

The activity consisting of the issuing of authorizations which allow the economic operators who receive them to exploit the resulting frequency use rights by

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<sup>255</sup> Although AG Kokott opens the window to the possibility of reassessing this VAT treatment, I still consider that this ruling will cause problems when this situation will arise. See: AG Opinion Case C-369/04 *Hutchison*, paras 132 and 133 and AG Opinion Case C-284/04 *T-Mobile*, para 139.

<sup>256</sup> Moreover, as I already mentioned, the ECJ does not give an alternative to examine this activity as a supply of services.

offering their services to the public on the mobile telecommunications market in return for remuneration does not constitute exploitation of tangible property<sup>257</sup>

This activity, moreover, has to be considered *per se* and applied whatever its legal form, for its character is objective. Therefore, it would be contradictory to this very position if the ECJ changes its criterion and sets forth that if the assignment is done by a private entity, then the activity is economical, but not if performed by public operators. However, had the ECJ analyzed whether RA and TKC carried out the assignment as public authority, then it would have been relevant to determine whether this activity was carried on by a public or a private person, but this is not the case in this situation.

And so, I consider that this judgment put private undertakings in a position in which they are not able to plan their actions, ascertaining unequivocally their rights and obligations.

### **6.3. *Commission v Finland***

The third and last case to study is *Commission v Finland*. This case deals with the failure to levy VAT on legal advice services<sup>258</sup>. Thereon, the Commission sent to Finnish authorities a letter concerning that legal aid services provided by public legal aid offices in return for a part contribution had a different treatment from those provided by private lawyers, since the former were not subject to VAT<sup>259</sup>. According to the Commission, that legal aid constituted an economic activity<sup>260</sup>, and the difference in treatment might create significant distortions of competition to the detriment of private legal advisers<sup>261</sup>. The Finnish authorities, however, took the view that any distortion of competition, as a result of this, is at most minimal. This is because there are other aspects which influence recipients' of legal aid choices, besides just VAT, such as professional experience or the workload of the public offices<sup>262</sup>. In those circumstances, the Commission decided to bring the present action to the ECJ, which concerns on the failure to levy VAT on legal aid services provided by public offices, in return for a part contribution borne by the recipient, where his disposable income

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<sup>257</sup> AG Opinion Joined Cases C-180/10 and C-181/10 *Slaby*, f.n., 10.

<sup>258</sup> Case C-246/08 *Commission v Finland*, para 1.

<sup>259</sup> *Ibid.*, para 17.

<sup>260</sup> *Ibid.*, para 25.

<sup>261</sup> *Ibid.*, para 17.

<sup>262</sup> *Ibid.*, para 18.

surpasses the limit set for entitlement to free legal aid, but does not surpass the maximum barring all entitlement to legal aid<sup>263</sup>.

To solve this controversy, the ECJ analyzed whether the legal aid services provided by the public offices in exchange for a part payment are economic activities<sup>264</sup>. To that end, the ECJ examined the permanency of the activity and whether it was supplied in return for remuneration. Regarding the former, the ECJ took the view that the public officers supplied legal aid on a permanent basis, despite their activity consists in the performance of duties in pursuance of the law<sup>265</sup>. As to the latter feature, the ECJ affirmed that a service is supplied in return for consideration, when the parties involved in the transaction stipulate a price<sup>266</sup> that arise a legal relationship between the provider of the service and the recipient<sup>267</sup>, in the sense of a direct link among parties pursuant to which there is reciprocal performance<sup>268</sup>. This is, on the one hand, the value actually given in return for the supply, and, on the other hand, the service provided by the supplier<sup>269</sup>. And so, the ECJ determined that, since legal aid services provided by the public advisers are not free of charge, the recipients of those services are required to pay a consideration for the legal services<sup>270</sup>. However, the consideration concerned is only a part of the payment, since recipients of legal advises does not cover the whole amount; namely the payment consists in a contribution, whose percentage range varies from 20% to 75% of the total amount of the fees and expenses of the adviser consulted<sup>271</sup>. Even though this part payment represents a portion of the fees, its amount is calculated considering the recipient's income and assets, instead of the number of hours worked by the public offices or the complexity of the case concerned<sup>272</sup>. Therefore, the part payment depends just in part on the actual value of the services provided, so that the link

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<sup>263</sup> Ibid., paras 23 and 33. It is important to recall that, by this action, the Commission did not seek to challenge the fact that VAT is not levied on those services when they are provided by public offices free of charge. See: Ibid., para 25.

<sup>264</sup> Case C-246/08 *Commission v Finland*, para 39.

<sup>265</sup> Ibid., paras 40-41.

<sup>266</sup> Ibid., paras 43.

<sup>267</sup> Ibid., paras 44.

<sup>268</sup> Ibid., paras 44-45.

<sup>269</sup> Ibid., paras 44-45.

<sup>270</sup> Ibid., paras 46.

<sup>271</sup> Ibid., paras 47.

<sup>272</sup> Ibid., paras 48. Also, according to Finnish Government, the payments made by recipients of legal aid services, given by public offices amounted to EUR 1.9 million, while the gross operating costs of those offices were EUR 24.5 million, that is why the ECJ considered this more as a fee. See para 50.

between the value and the service is not sufficiently direct for that payment to be regarded as consideration and, as well, for those services to be regarded as economic activities<sup>273</sup>. In those circumstances, the ECJ concluded that there is not a prior finding that the activity considered is of an economic nature, and so the public officers do not engage in an economic activity<sup>274</sup>.

### **6.3.1. Analysis of the case *Commission v Finland***

As I did in the analysis of previous judgments, first I justify whether this is a hard case, and, later on, I examine whether ECJ's reasoning enhanced or not legal certainty.

*Commission v Finland* is a hard case because it was necessary, in order to determine whether the provision of legal aid by public offices is an economic activity, an interpretation of the concept of economic activity, together with the guidelines that shape the features of economic nature.

With regard to the principle of legal certainty, this judgement is line with the requirements of second-order of justification, as well as with arguments *logos*, *ethos* and *pathos*. This is because the ECJ correctly referred to the *economic-nature* criteria enshrined in pre-established case law, when analyzing whether the legal aid services, provided by the public offices in exchange for a part payment, constituted economic activities. In this sense, the ECJ first examined the degree of permanency of the activity. Second, whether the legal services were supplied in return for remuneration. And third, whether there was a direct link among parties pursuant to which there was reciprocal performance.

I would like, also, to highlight that even though the ECJ affirmed that the activity was permanent and carried out in return for remuneration, it concluded that the link was not sufficiently direct, inasmuch as recipients of legal aid pay only a part of the consideration, whose amount does not depend on subjective criteria, but rather on recipient's income and assets. This also shows a thorough examination of the scope of the *economic-nature*.

Therefore, this case exemplifies the importance of observing the *economic-nature* criteria, because it gives certainty and makes law more predictable in the way that persons can rely that their activities would be legally assessed according to pre-established principles

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<sup>273</sup> Ibid., paras 51.

<sup>274</sup> Case C-246/08 *Commission v Finland*, paras 53.

which they know beforehand they act, so that they can be aware about their rights and obligations.

## 6. Conclusions

- The ECJ follows a *de facto* doctrine of *stare decisis*, inasmuch as it is not bound by its precedents, yet it seldom departs from it.
- In order to respect the principle of legal certainty the ECJ should rationally justify its decisions, especially when departing from its pre-established case law.
- The principle of legal certainty encompasses two aspects. First, the foreseeable which advocates for that legal effects of the application of law be predictable. And second, the rational-justificatory as to that courts' legal reasoning reach a state of maximum consensus as to agree on that is right an offered interpretation. This allow that legal effects of the application of law be predictable.
- The concept of economic activity encompasses a big number of transactions in the form of supply of goods or services, or exploitation of property. This is because this concept is very wide and is applied whatever the legal form of the activity.
- Only activities of an economic nature lie within the scope of the VAT Directive.
- To assess whether an activity is of an economic nature it is necessary to observe its degree of permanence; whether it is carried on in return for consideration; and whether there is a direct link between the supply of the activity and the consideration received, which I referred to as the *economic-nature* criteria.
- In case *Commission v Greece* the ECJ did not rationally justify the reasons whereby the provisions of access to motorway roads is an activity of an economic nature. However, the ECJ elaborate a consistent "building block" of cases in which it determined that this operation is an economic activity. This wrong argumentation does not, therefore, diminishes the principle of legal certainty, since persons are able to foresee and to plan their actions in accordance with the postulates of this case.
- ECJ's reasoning in *Hutchinson & T-Mobile*, whereby the allocation of frequency is not an economic activity since it does not amount as exploitation of property, creates

n scenario of legal uncertainty for private undertakings that could reallocate the radio spectrum under article 9(b) of the Directive 2009/140/EC. Since, although the very nature of the activity points that this is either telecommunications services, or supply of services (therefore an economic activity), the lack of analysis of the nature of this activity, in the light of the *economic-nature* criteria does not permit to know whether this same activity is carried out by private operators, the ECJ would stick to this criterion.

- In case *Commission v Finland* the ECJ adhere and analyzed in-depth the concept of economic activity in the light of the *economic-nature* criteria. That is why to consider the supply of legal aid services in return for a part contribution as an economic activity does not create any distortion to the principle of legal certainty.
- The judgements in which the ECJ assesses the economic nature of an economic activity, regarding the application of the VAT treatment of public bodies enshrined in the VAT Directive are consistent with the principle of legal certainty, as long as it develop a “building block” in which persons can rely, or provide the reasons whereby it justifies departing from it.

## 7. Bibliography

### 7.1. Literature

- Aarnio, Aulis. *The rational as reasonable: a treatise on legal justification*. n.p.: Dordrecht: Reidel, cop. (1987).
- Alexy, Robert, *A theory of legal argumentation: the theory of rational discourse as theory of legal justification*. n.p.: Oxford: Oxford University Press; (2010).
- Beck, Gunnar, *The legal reasoning of the Court of Justice of the EU*. n.p.: Oxford: Hart, (2012).
- Bengoetxea, Joxerramon, *The legal reasoning of the European Court of Justice: towards a European jurisprudence*. n.p.: Oxford: University Press, (1993).
- Craig, Paul & Gráinne De Búrca. *EU law: text, cases, and materials*. n.p.: Oxford: Oxford Univ. Press, (2011).
- De la Feria, Rita, “The EU VAT Treatment of Public Sector Bodies: Slowly Moving in the Wrong Direction”, The Netherlands, *INTERTAX*, Kluwer Law International BV, Volume 37, Issue 3, (2009).
- Dewey, John, "Logical Method and Law." in MacCormick, Neil, and Aulis Aarnio. 1992. *Legal reasoning*. n.p.: Aldershot: Dartmouth, Vol. II, cop. (1992),
- Henkow, Oskar, *The VAT/GST Treatment of Public Bodies*, Kluwer Law International, UK, (2013).
- Ilija, Vukčević, 'CILFIT Criteria for the Acte Clair/Acte Éclairé Doctrine in Direct Tax Cases of the CJEU', 40 *Intertax*, Issue 12, (2012).
- Jonathan Law & Elizabeth A. Martin, *A Dictionary of Law*, 7 ed., Oxford University Press Published online, (2014).
- Koopmans, T., “Stare Decisis in European Law” in D. O’ Keffe & H. Schermers (eds.), *Essays in European Law and Integration*, Deventer, Kluwer, (1982).
- Kuzenski, W. F., “Stare Decisis”, *Marquette Law Review*, Vol. 6, Issue 2, Art. 1, (1922).
- Luanratana, Woraboon & Romano, Alessandro, “Stare Decisis in the WTO: Myth, Dream, or a Siren’s Song?” *Journal of World Trade* 48, no. 4 (2014).
- Payandeh, Mehrdad, "Precedents and Case-based Reasoning in the European Court of Justice." *International Journal of Constitutional Law* 12, no. 3 (2014).
- Paunio, E., “Beyond Predictability –Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order” 10 *German Law Journal*, (2009).
- Portuese, Aurelien (et. al.), “The Principle of Legal Certainty as a Principle of Economic Efficiency”, Research Paper No. 13-13, *University of Westminster School of Law*.

- Raitio, Juha. *The principle of legal certainty in EC law*. n.p.: Dordrecht; London: Kluwer Academic, cop. (2010).
- Roscoe, Pound, “What of Stare Decisis?”, 10 *Fordham L. Rev.* 1 (1941).
- Semmelmann, C. "General Principles in EU Law between a Compensatory Role and an Intrinsic Value." *European Law Journal* 19, no. 4 (2013).
- Terra, Ben & Kajus Julie, *Introduction to European VAT (recast)*, IBFD, (2014).
- Tjong Tjin Tai, Eric & Karlijn Teuben, “European Precedent Law”, 16 *European Review of Private Law*, Issue 5, (2008).
- Tridimas, Takis. *Precedent and the Court of Justice: A Jurisprudence of Doubt?*, n.p.: Oxford University Press, *Oxford Scholarship Online*, (2012).
- Tridimas, Takis. *The general principles of EU law*. n.p.: Oxford: Oxford University Press, (2006).
- Wimmer, Michael. "Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality, *European Public Law* no. 2 (2014).
- Wroblewski, Jerzy, “Legal Language and Legal Interpretation”, in MacCormick, Neil, and Aulis Aarnio, *Legal reasoning*. n.p.: Aldershot: Dartmouth, Vol. II, cop. (1992).

## 7.2. Internet sources

- <https://www.law.cornell.edu/wex/precedent> (accessed March 13, 2015).
- [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis) (accessed March 13, 2015).
- [https://www.law.cornell.edu/wex/ratio\\_decidendi](https://www.law.cornell.edu/wex/ratio_decidendi) (accessed March 13, 2015).
- [https://www.law.cornell.edu/wex/obiter\\_dicta](https://www.law.cornell.edu/wex/obiter_dicta) Definition from Nolo’s Plain-English Law Dictionary (accessed March 13, 2015).

## 7.3. Official Legal References

- Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01 of 30 March 2010, Official Journal of the European Union, C 83/1.
- Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Official Journal of the European Union, L 347/1.
- Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, Official Journal of the European Union L 337/37.
- Sixth Council Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment of 17 May 1977, Official Journal of the European Union, L 145, p. 1

## 7.4. Table of Cases

- AG Opinion Case C-255/02 *Halifax*, ECLI:EU:C:2005:200.
- AG Opinion Case C-369/04 *Hutchison*, ECLI:EU:C:2006:523.
- AG Opinion Case C-284/04 *T-Mobile*, ECLI:EU:C:2006:520.
- AG Opinion Case C-246/08 *Commission v Finland*, ECLI:EU:C:2009:431.
- AG Opinion Case C-270/09 *Macdonald*, ECLI:EU:C:2010:502.
- AG Opinion Joined Cases C-180/10 and C-181/10 *Slaby*, ECLI:EU:C:2011:240.
- Case 13/61 *Bosch*, ECLI:EU:C:1962:11.
- Joined Cases 28, 29 and 30/62 *Da Costa, Venlo, and Hoechst-Holland N.V.*, ECLI identifier: ECLI:EU:C:1963:6.
- Case C-154/80 *Coöperative*, ECLI:EU:C:1981:38.
- Case C-89/81 *Hong Kong*, ECLI:EU:C:1982:121.
- Case C-283/81 *CILFIT*, ECLI:EU:C:1982:335.
- Case C-268/83 *Rompelman*, ECLI:EU:C:1985:74.
- Case C-235/85 *Commission v Netherlands*, ECLI:EU:C:2000:427,
- Case C-102/86 *Apple & Pear*, ECLI:EU:C:1988:120.
- Case C-239/86 *Ireland v Commission*, ECLI:EU:C:1987:554.
- Case C-186/89 *Van Tiem*, ECLI:EU:C:1990:429.
- Case C-60/90, *Polysar*, ECLI:EU:C:1991:268.
- Case C-16/93 *Tolsma*, ECLI:EU:C:1994:80.
- Case T-115/94 *Opel Austria v Council*, ECLI:EU:T:1997:3.
- Case C-155/94 *Wellcome Trust*, ECLI:EU:C:1996:243.
- Case C-230/94 *Renate Enkler*, ECLI:EU:C:1996:352.
- Case C-306/94. *Régie Dauphinoise*, ECLI:EU:C:1996:290.
- Case C-408/97 *Commission v Netherlands* ECLI:EU:C:2000:427.
- Case C-276/97 *Commission v France*, ECLI:EU:C:2000:424.
- Case C-359/97 *Commission v UK*, ECLI:EU:C:2000:426.
- Joined cases C-9/97 and C-118/97 *Jokela & Pitkäranta*, ECLI:EU:C:1998:497.
- Case C-446/98 *Camara Municipal do Porto*, ECLI:EU:C:2000:691.
- Case C-83/99 *Commission v Spain*, ECLI:EU:C:2001:31.
- Case C-77/01 *EDM*, ECLI:EU:C:2004:243.
- Case C-255/02 *Halifax*, ECLI:EU:C:2006:121.
- Case C-223/03 *University of Huddersfield*, ECLI:EU:C:2006:124.
- Case C-284/04 *T-Mobile*, ECLI:EU:C:2007:381.
- Case C-369/04 *Hutchison*, ECLI:EU:C:2007:382.
- Case C- 408/06 *Götz*, ECLI:EU:C:2007:789.
- Case C-288/07 *Isle of Wight*, ECLI:EU:C:2008:505.
- Case C-246/08 *Commission v Finland*, ECLI:EU:C:2009:671.
- Case C-40/09 *Astra Zeneca*, ECLI:EU:C:2010:450.
- Joined Cases C- 180/10 and C- 181/10 *Slaby*, ECLI:EU:C:2011:589.

- Case C-263/11 *Rēdlihs*, ECLI:EU:C:2012:497.
- Case C-549/11 *Orfey*, ECLI:EU:C:2012:832.
- European Court of Human Rights, *Cossey v. The United Kingdom*, application no. 10843/84.
- U.S. Supreme Court, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (Nos. 91-744, 91-902).