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Interpretation in Conformity with EU Law

- the Case of the Financial Service Exemption in the Swedish VAT Act

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

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Semester of graduation: VT2015

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Summary

The area of VAT constitutes a completely harmonized area within the EU and the national provisions in this area are to their entirety based on EU law. A uniform application of the VAT provisions throughout the EU therefore becomes essential in order to ensure the proper function of the VAT system. The obligation for national courts to interpret national law in conformity with EU law becomes an important tool to ensure the uniform application and the effectiveness of EU law in every Member state. The obligation to interpret national law in conformity with EU law is absolute and can only be limited under exceptional circumstances. National courts always need to observe this obligation when interpreting provisions of national law.

In the area of VAT, the matter of exemptions has been subject to many discussions ever since they were introduced in the Sixth directive, especially the exemption regarding financial services. The uncertainty of the interpretation and application of the exemption has been the subject to many questions posed to the ECJ to clarify. This uncertainty has in turn affected the uniform application of the exemption throughout the EU.

The objective of this thesis is to examine the concept of consistent interpretation regarding the financial service exemption in VAT and to examine if the Swedish interpretation of this exemption is in conformity with EU law. In order to achieve its objective, the thesis commences by examining the interpretation of the financial service exemption stated in article 135(1)(b)-(g) in the VAT directive. This implies an analysis of the ECJ case law. The thesis continues by examining the interpretation of the corresponding exemption provision in chapter 3 paragraph 9 in the Swedish VAT Act and its interpretation by the HFD. The thesis highlights the influence the interpretation of article 135(1)(b)-(g) has had on the interpretation of chapter 3 paragraph 9 of the VAT Act and what limits the obligation to interpret national law in conformity with EU law.

The thesis finds that the ECJ has been inclined to interpret the financial service exemption extensively and not according to the general principle of strict interpretation regarding exemptions. Moreover, the thesis finds that the interpretation of the Swedish exemption provision is in conformity with EU law in the sense that the interpretation of the HFD follows the case law of the ECJ. It is clear that the interpretation of the ECJ greatly influenced the interpretation of the HFD. In addition, the accession of Sweden into the EU has changed the Swedish interpretation of the exemption to be more extensive than before.

Furthermore, since the general principles of EU law limits the obligation of consistent interpretation, the degree of harmonization in the VAT area effects this limitation. Basically, as long as the interpretation of the ECJ does not contradict the treaties and their general principles, the obligation to

interpret national law in conformity with EU law is not limited for national courts.

Sammanfattning

Mervärdeskatterätten utgör ett fullständigt harmoniserat område inom EU och medlemsstaternas lagstiftning på området är till sin helhet baserad på EU rätten. En uniform tillämpning av momsreglerna i medlemsstaterna är av stor vikt för mervärdesskattesystemets funktion. Skyldigheten att tolka nationell lag i enlighet med EU rätten är därför ett viktigt instrument för att säkerställa en uniform tillämpning samt att EU rätten får avsedd effekt i varje medlemsstat.

På mervärdesskatteområdet har undantagen från mervärdesskatt varit föremål för mycket diskussion i och med deras införande i Sjätte mervärdesskattedirektivet, i synnerhet undantaget för finansiella tjänster. Undantagets omfattning och tillämpning har framstått som oklar och EU-domstolen har i flera fall ställts inför frågor rörande tolkningen av detta undantag. Denna oklarhet har inverkat på den uniforma tillämpningen av undantaget inom EU:s medlemsstater. Att tolka undantaget för finansiella tjänster EU konformt är således av stor vikt för att säkerställa en likartad tillämpning inom hela EU. Skyldigheten att tolka nationell rätt EU konformt är absolut och begränsas endast i exceptionella fall. De nationella domstolarna kan inte bortse från denna skyldighet i tolkningen och tillämpningen av den nationella lagstiftningen.

Denna framställnings syfte är att analysera konceptet EU konform tolkning rörande undantaget för finansiella tjänster ur ett svenskt perspektiv och huruvida Sverige uppfyller skyldigheten att tolka lagstiftningen EU konformt rörande motsvarande undantagsregel i ML. För att uppnå syftet med framställningen tar den sin utgångspunkt i fastställandet av EU rätten, vilket innebär en genomgång av hur undantaget för finansiella tjänster i artikel 135.1 b-g i mervärdesskattedirektivet har tolkats av EU-domstolen. Därefter följer en likartad genomgång av 3:9 i ML och hur denna bestämmelse har tolkats av HFD. I framställningen belyses den effekt som tolkningen av undantaget i direktivet har haft på tolkningen av den svenska bestämmelsen samt i vilken mån skyldigheten att tolka EU konformt begränsas.

Det kan konstateras att EU-domstolen inte har varit benägen att tillämpa den generella principen om restriktiv tolkning av undantag och valt att tolka undantaget för finansiella tjänster mycket extensivt. Den svenska tolkningen av undantaget kan anses vara EU konform i den meningen att HFD:s tolkning följer EU-domstolens praxis. Det framstår också som klart att den svenska tolkningen till stor del har influerats av motsvarande tolkning av EU-domstolen rörande direktivet. Sveriges inträde i EU har förändrat HFD:s tolkning av undantaget till att vara betydligt mer extensiv i enlighet med hur undantaget har tolkats av EU-domstolen. Vidare gäller att effekten av den genomharmoniserade karaktären hos mervärdesskatteområdet får särskilt stor betydelse i förhållande till begränsningen av skyldigheten att tolka EU

konformt. Så länge EU-domstolens tolkning inte strider mot fördragen är skyldigheten att tolka EU konformt ej begränsad för nationella domstolar.

Preface

This thesis marks the end of a wonderful five years of studying in Lund. During this time I have had the privilege of meeting and working with amazing people and experienced the life as a student in Lund. This journey owes thanks to many people but it is of course impossible to list them all.

First and foremost, I owe the greatest of thanks to my family who supported me during this entire period.

I would also like to extend my gratitude to Setterwalls Law Firm who provided a great atmosphere during the writing of this thesis and especially to Niclas Hermansson for your help and guidance.

Last but not least, I would like to thank my supervisor Oskar Henkow for your help and support and for inspiring me to enter the area of VAT. It has been truly a great learning experience for me, one that will keep inspiring me in my future endeavors.

Lund 6th of August 2015

Omar Khalil

Abbreviations

AG	Advocate General
ECJ	European Court of Justice
EU	European Union
HFD	Swedish Supreme Administrative Court
ML	Swedish VAT Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

1 Introduction

1.1 Background

At the outset, it is important to bear in mind the character of the legal system such as the one in the EU and the correlation of the system with the legal systems of the Member states. The ECJ has established the basic principle of the primacy of EU law. According to this principle, EU law provisions are on top of the norm hierarchy and cannot be overridden by national legislation.¹ Consequently, in the harmonised areas, national provisions are under the influence of EU law and its principles that entails certain obligations with which national courts need to comply. The application of EU law throughout the EU is hinged on cooperation between the ECJ and the national courts.² An expression of this cooperative relationship can be derived from the treaties.³

Furthermore, in applying the provisions of national law, in particular the provisions implementing a directive, national courts must interpret such laws in light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of article 288 TFEU.⁴ The obligation to interpret the law in such manner has been described as interpretation in conformity with EU law.⁵

This thesis sets out to examine the obligation for national courts to interpret national law in conformity with EU law regarding the VAT exemption for financial services. VAT in the European Union is defined as a general tax on consumption that should be levied on all goods and services. Exemptions from VAT constitute derogations from this principle and a harmonized application of these exemptions throughout the EU therefore becomes of great importance in order to achieve a uniform VAT system. The obligation to interpret national law in conformity with EU law is therefore meant to ensure that the objectives of EU law are enforced in all Member states.

The area of VAT constitutes a complete harmonized area within the EU where national provisions are entirely based on the sources of EU law.⁶ Apart from the treaties, the sources of law mainly consist of the VAT directive and the case law of the ECJ. The obligations and principles derived

¹ Judgment in *Costa v. ENEL*, C-6/64, EU:C:1964:66.

² R.F. van Brederode, R. Krever (eds), *Legal Interpretation of Tax Law* (2014), p. 112.

³ Article 267 of the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. Hereinafter the 'TFEU'.

⁴ Judgment in *Von Colson and Kamann*, C-14/83, EU:C:1984:153, para. 26. This was later confirmed in *Marleasing*, C-106/89, EU:C:1990:4135.

⁵ O. Henkow, *Mervärdesskatt i teori och tillämpning* (2013), p. 15.

⁶ Article 113 of the TFEU. See also B. Terra, J. Kajus, *Introduction to European VAT (Recast)* (2015), p. 7.

from the VAT directive⁷, the treaties and the ECJ case law, therefore becomes relevant to observe for the Member states in matters regarding VAT and when applying their VAT provisions within their national legal order.

The matter of exemptions in the field of VAT has been subject to a lot of discussions over the past decades. The Sixth Directive showed the introduction of the current exemptions in the VAT area.⁸ One of the main purposes of the Sixth Directive was to present a common list of the exemptions to be applied in the Community.⁹ However, the main idea was always to keep the exemptions as small as possible in order to ensure that VAT was still a general tax on consumption.¹⁰ Nevertheless, even though the intention was to keep the exemptions to the minimum, the scope of the introduced exemptions was flexible, much due to the political and economic dimension in each Member State.¹¹

The financial service exemption is an area that has spurred many questions over the years. When introduced in the Sixth directive, the scope and the application of the exemption was very unclear and thus provided for an indistinct application of the exemption throughout the EU. In the end, this discrepancy affected the legal certainty of the provision.¹² The significant amount of case law from the ECJ in this area confirms this uncertainty. Given the uncertain nature of the financial service exemption in EU law, an indistinct interpretation of these exemptions in the Members states thus becomes imminent. From the start, the scope of the exemption has been consistently developed in the legislation, but more importantly in the case law of the ECJ. It can be argued whether the ECJ actually has provided clarity in this matter or not. Nevertheless, the development of the financial service exemption has highlighted certain issues of the interpretation and application of the financial service exemption within the legal orders of the Members states. In light of these developments, the interpretational approach of the national courts regarding this exemption becomes of interest to examine as well as if and how the national courts have adapted to these developments in order to comply with their obligation to interpret national law in conformity with EU law.

⁷ Council Directive 2006/112/EC on the common system of value added tax, OJ L 347/1. Hereinafter “VAT Directive”.

⁸ Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment, OJ L 145/1. Hereinafter “Sixth Directive”.

⁹ B. Terra, J. Kajus, *Commentary – A Guide to the Sixth VAT Directive (Historical Archive)* (2010), p. 2215.

¹⁰ The preamble for the Proposal of a Sixth Directive, COM(73) 950, p. 7.

¹¹ B. Terra, J. Kajus (2010), p. 2215; C. Amand, *Are VAT Exemptions Compatible with Primary EU Law?* (2010), p. 410.

¹² M. Lamensch, *Commission proposal for a Modernization of VAT Rules that are applied in respect of financial and insurance services*, (2008), p. 371; C. Amand (2010), p. 410.

1.2 Objective and research questions

The objective of this thesis is to examine the Swedish interpretation of the VAT exemption regarding financial services and if this interpretation is in conformity with EU law. To achieve this objective, the thesis will examine how the exemption for financial services in the VAT directive is interpreted by the ECJ and how the corresponding exemption provision in the Swedish VAT Act¹³ is interpreted by the HFD. In detail, the thesis will highlight the interaction between EU law and Swedish national law and the limitations to this interaction. In relation to this, the thesis will also examine how the interpretational power of the ECJ has influenced the developments of the scope of financial service exemption and if these developments has effected the interpretation of the HFD regarding the exemption.

The thesis will seek to answer the following questions in order to fulfil its objective:

- How are the EU VAT provision regarding financial services interpreted in EU law and in what way has this interpretation affected the uncertainty of the scope?
- How is the Swedish VAT exemption provision regarding financial services interpreted in national law and has the development in EU law effected the Swedish interpretation of the provision?
- What is an interpretation in conformity with EU law?
- Is the Swedish interpretation of the financial service exemption interpreted in conformity with EU law?
- What limitations are there to this interpretation?

The thesis could therefore be seen as divided into two parts. First, the interpretation of the provisions, both in the VAT directive and in the Swedish VAT Act, will be examined as well as how the developments of the scope of the provisions in the VAT directive has impacted the interpretational approach of the Swedish provisions. Second, the thesis seeks to examine the concept of consistent interpretation regarding the VAT exemption dealing with financial services and if this interpretation is manifested in the Swedish interpretation of its national provisions. Thus, the purpose of the thesis is descriptive in nature and seeks to establish how the law is applied, i.e the law as it is.

¹³ Mervärdesskattelagen (SFS 1994:200).

1.3 Methodology

In order to achieve its objective, the thesis applies the legal dogmatic method by examining the relevant sources of law. The purpose of the dogmatic method is to examine and present the law as it is, in order to address a legal issue.¹⁴ Even though the purpose of this thesis is descriptive in nature, it does not preclude the usage of the dogmatic method. Interpreting and establishing the law as it is, is only one of the perspectives contained within this method.¹⁵

When applying the method, the sources of law are examined according to their status as legal norms.¹⁶ In this instance, the thesis deals with a harmonized area within the EU, the starting point of the research therefore becomes the sources of EU law. These sources of law ranges from the primary law to the secondary law followed by the case law of the ECJ.¹⁷ Thereafter, the national provisions are examined starting with the legal provisions and the preparatory works and then continuing with the case law of the HFD.¹⁸

The focus of this thesis is to examine how the law is applied in both Swedish and the European legal order. This implies an examination of the case law of the ECJ and the HFD respectively. However, in order to establish the potential discrepancies between the two legal orders, the thesis starts with establishing the law as it is according to each legal order.

1.4 Structure

The thesis is thematically structured. It describes the concept of consistent interpretation and the interpretation of the VAT exemption provision, both in the directive and in Swedish national law in separate chapters. Each chapter is aimed at answering one research question and the content of the chapters is arranged as to commence with providing a general overview before continuing with dealing with the matters and questions in depth.

After an introduction to the thesis in the *first* chapter, the *second* chapter discusses the concept of directive implementation into national law. Moreover, it provides for an examination of the concept of consistent interpretation and its application in national law.

¹⁴ L. Olsen, *Rättsvetenskapliga perspektiv* (2004), p. 112; F. Korling and M. Zamboni, *Juridisk Metodlära* (2013), p. 21, 23.

¹⁵ L. Olsen (2004), p. 119 and forward; F. Korling and M. Zamboni (2013), p. 35.

¹⁶ C. Dahlman, *Rätt och rättfärdigande* (2010), p. 21 and forward.

¹⁷ J. Hettne, I. O. Eriksson, *EU-rättslig metod – Teori och genomslag i svensk rättstillämpning* (2012), p. 40.

¹⁸ C. Dahlman (2010), p. 24.

The *third* chapter examines the methods of interpretation used by the ECJ when interpreting EU law provisions. The chapter continues by examining how these methods apply in relation to one another.

The *fourth* chapter deals with the exemption provision for financial services in the VAT directive and examines the case law of the ECJ regarding the financial service exemption. The purpose is to give a description of how this exemption is interpreted and how the case law has developed the scope of the exemption. In addition, the goal is also to show how the interpretation of the VAT exemptions is conducted by the ECJ, in light of what has been dealt with in the preceding third chapter.

With a similar character as the fourth chapter, the *fifth* chapter examines the financial service exemption provision in the Swedish VAT Act and how the exemption provision is interpreted by the HFD. In this chapter, emphasis is put on the correlation between the Swedish and European interpretational approaches. In addition, examples of the practical application of consistent interpretation in the Swedish practice will be dealt with in this chapter.

The *sixth* chapter provides some concluding remarks on the findings and the conclusions that can be drawn from the conducted analysis of the previous chapters. In order to provide for a pedagogical overview of the conclusions of this thesis the final chapter is divided into three sections, one dealing with EU law, one dealing with Swedish law and the third dealing with the concept of consistent interpretation.

1.5 Terminology and delimitations

The obligation to interpret national law in the light of EU law has been referred to by the ECJ as the obligation to interpret national law “in conformity with EU law”.¹⁹ The literature features this expression as well.²⁰ However, in the doctrine, various expressions have been used in reference to the obligation as a concept. For example, Ben Terra refers to the obligation with the term “reconciliatory interpretation”.²¹ Sacha Prechal uses the expression “consistent interpretation”,²² which also seems to be an expression somewhat consistent in the literature.²³ Therefore, the thesis uses the expression of the ECJ when referring to the obligation itself and the term “consistent interpretation” throughout the thesis in reference to the actual concept.

¹⁹ See for ex. Judgments in *Von Colson and Kamann*, C-14/83, EU:C:1984:153 and *Marleasing*, C-106/89, EU:C:1990:4135.

²⁰ O. Henkow (2013), p. 15; R.F. van Brederode, R. Krever (eds) (2014), p. 125; N. Wittock, *The influence of the Principle of Union Loyalty in Tax Matters*, (2014), p. 174.

²¹ See B. Terra, J. Kajus, *Introduction to European VAT (Recast)* (2015), p. 141.

²² S. Prechal, *Directives in EC Law*, (2005), p. 180 and forward.

²³ G. Betlem, A. Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, (2003), p. 572.

For the purpose of this thesis, only the literal, contextual and teleological interpretation will be focused on the most and therefore the historical method of interpretation will only be touched upon briefly. In addition, the thesis only focuses on the interpretation of EU law as practised by the ECJ.

Since the purpose of the thesis is to examine the interpretation of the financial service exemption in both the directive and in the VAT Act this will require an examination of the case law of both the ECJ and the HFD. In this case, it is important to make a distinction. The examination of the interpretation inevitably requires an examination of the scope of these provisions. However, the thesis will not set out to define the scope of the financial service exemption. An actual definition of the scope of the financial service exemption is a subject of its own and will be too big of a subject to include in this thesis.

The analysis of case law of the ECJ concerning the financial service exemption will start from the year 1995, with the case SDC. A full coverage of the case law regarding financial services will be too difficult to achieve. Chapter 4 will therefore focus on the cases that have had a big impact on the interpretation and application of the financial service exemption.

The same principle applies to the fifth chapter, where focus is on the cases from the HFD that have been decisive for the determination of the interpretational approach of the HFD regarding the exemption.

2 Interpretation in conformity with EU Law

2.1 Directive implementation into national law

Before going into how the interpretation of national law needs to take into account EU law, it is necessary to explain the Member states obligation to implement a directive into national law. The European directives are binding for each Member state as to its result to be achieved and article 288 of the TFEU states an obligation for each Member state to implement EU directives into their national legislation. The implementation of EU directives into national law also follows from the general EU principle of union loyalty, stated in article 4 paragraph 3 of the TEU.²⁴ According to this principle, in order to ensure that the goal of the directive is achieved it is not only important to implement the directive correctly but also ensure that national law is applied according to the same. This means that the Member states must ensure that there are no provisions in national law that are in conflict with the purpose and goal of the directive that is to be implemented and must use the necessary means to implement the directive to achieve its result.²⁵

2.2 Interpretation in conformity with EU directives

The matter of maintaining the objectives of EU law is not solely a task for the institutions of the EU but also a matter for the institutions of the Member states. The objectives and the purpose of the acts of the EU cannot be effectively upheld throughout the EU if not those objectives and purposes are also upheld within the Member states. For this purpose, the ECJ has established the primacy of EU law over national provisions.²⁶ Where implementing a directive creates national provisions, the application of these national provisions in the national legal order is still subject to the influence of EU law and its general principles enshrined in the treaties. The reason for this is in order to ensure the effectiveness of EU law in the national legal order.²⁷ This has been expressed by the ECJ as well. In a

²⁴ The principle of Union loyalty is also referred to as the principle of sincere cooperation. See B. Terra, J. Kajus (2015), p. 141.

²⁵ This follows from article 4 paragraph 3 TEU. See also J. Hettne, I. O. Eriksson (2012), p. 179.

²⁶ See N. Wittock (2014), p. 171 with reference to the judgment in *Costa v. ENEL*, C-6/64, EU:C:1964:66.

²⁷ J. Hettne, I. O. Eriksson (2012), p. 182. See also judgment in *Pfeiffer and others*, C-397/01, EU:C:2004:584, para. 114.

judgment concerning VAT, the ECJ has held that although the Member states has been given a wide discretionary power in the framework of VAT exemptions, the Members states must refrain from taking measures that can jeopardize the attainment of the result prescribed by the directive and not undermine the purpose of the exemptions.²⁸

Even though the binding feature of a directive is its result this still invokes an obligation for the Member states to interpret and apply their national provisions introduced due to a directive in the light of EU law. The reason for this is in order to achieve a uniform application of EU law throughout the EU. This obligation extends to all the institutions of a Member state and is referred to as the indirect effect of the directives, and consistent interpretation.²⁹ There is an important distinction to be made in this regard. The indirect effect is a separate notion than the direct effect of the directives. When referring to the direct effect the national court applies the provision of the directive as an independent basis of its decision while the indirect effect refers to an application of a national provision in light of EU law. This ensures the effect of the directive through the national provision and thus applying its indirect effect.³⁰

As mentioned above the obligation to interpret national provisions in light of EU law is derived from the treaties but is also further expressed in the case law of the ECJ. The ECJ has stated in the case *von Colson and Kamann* that the obligation to achieve the result of a directive is binding on all the institutions of the Member states including the national courts. In applying national provisions that are introduced to implement a directive, national law must be interpreted in the light of the wording and the purpose of the directive.³¹ In latter cases, the ECJ has further stated that this obligation also extends to national law adopted before the directive.³² In addition, the obligation can be regarded as autonomous in some ways since the ECJ has also stated that national courts always must presume that the state intended to entirely fulfil its obligation that arises from the directive concerned.³³ Thus, it is of little importance if the state has implemented a directive correctly into its national law or not. National courts are still obliged to interpret the national provisions in the light of the wording and purpose of the directive.³⁴

However, even though the obligation of consistent interpretation is extensive it is not without restrictions. The ECJ stated in the *Marleasing* case that the national court must interpret national law *as far as possible* in

²⁸ See for ex. judgment in *Royscott and Others*, C-305/97, EU:C:1999:481 and *Leo Liberia*, C-58/09, EU:C:2010:333. See also N. Wittock (2014), p. 174.

²⁹ S. Prechal (2005), p. 194; A-M. Vlaicu, *Effectiveness of EU Law in Member States*, (2011), p. 165 with further references.

³⁰ G. Betlem, A. Nollkaemper (2003), p. 572.

³¹ Judgment in *Von Colson and Kamann*, C-14/83, EU:C:1984:153, para. 26.

³² See judgment in *Centrosteeel*, C-456/98, EU:C:2000:402, para. 16.

³³ See judgment in *Wagner Miret*, C-334/92, EU:C:1993:945, para. 20.

³⁴ Judgment in *Marleasing*, C-106/89, EU:C:1990:395, para. 8.

conformity with EU law.³⁵ A basis for consistent interpretation is that national law provides for room to interpret a provision. In other words a provision must be sufficiently unclear that an interpretation of that provision is required.³⁶ The ECJ held in *von Colson and Kamann* that the interpretation and application of national law by the national courts in conformity with EU law is obliged *as far as its given discretion to do so under national law*.³⁷ The starting point is therefore national law and it is for the national courts to decide according to national methods of interpretation if a consistent interpretation of a provision is required. In the case *Pfeiffer* the ECJ also stated that if the national court applies consistent interpretation, it is the role of the national judge to choose the methods of interpretation which are provided in national law that best achieves the result sought by the directive.³⁸

Overall, it is quite a complex analysis that the national courts have to conduct in order to determine the necessity of consistent interpretation. At first, the national judge must determine the result that the directive aims to achieve. Second, an analysis of the national provisions according to interpretational methods provided for in national law is to be conducted. At that point it can be determined if the result of the application of national provisions is not in accordance with the achievable result provided for in the directive. In this instance it is worth noting that the national court is not only required to examine the provisions implementing the directive but national law as a whole.³⁹ If the national court finds that result contradict the result the directive seeks to achieve, then the national courts is required to proceed to interpret the provision in order to reach the result sought by the directive.⁴⁰

As mentioned above, the notion of indirect effect is that the principles of EU law and the rights that is provided from the directives permeates national provisions when they are derived from a directive and are subject to the discretion of the Member states.⁴¹ A consistent interpretation of national law is subject to the general principles of EU law, such as legal certainty and fundamental rights.⁴² Therefore, the obligation to interpret national law in conformity with EU law does not authorize the national courts to interpret national law *contra legem*.⁴³ In addition, consistent interpretation does not preclude the obligation of the Member states to implement a directive into their national law by clear rules in order to meet the requirements of legal

³⁵ Judgment in *Marleasing*, C-106/89, EU:C:1990:395, para. 8.

³⁶ U. Nilsson, *Direktivkonform tolkning på mervärdesskatterättens område*, (2009), p. 67. See also J. Kellgren, *Mål och metoder vid tolkning av skattelag* (1997), p. 52.

³⁷ Judgment in *Von Colson and Kamann*, C-14/83, EU:C:1984:153, para. 28.

³⁸ Judgment in *Pfeiffer and others*, C-397/01, EU:C:2004:584, para. 116.

³⁹ Judgment in *Pfeiffer and others*, C-397/01, EU:C:2004:584, para. 115.

⁴⁰ O. Henkow (2013), p. 15.

⁴¹ A-M. Vlaicu (2011), p. 169.

⁴² Judgment in *Kolpinghuis Nijmegen*, C-80/86, EU:C:1987:431, para. 13.

⁴³ S. Prechal (2005), p. 194. See also judgment in *Adeneler and others*, C-212/04, EU:C:2006:443, para. 110.

certainty.⁴⁴ A Member state cannot rely on consistent interpretation of a provision that has not been correctly implemented into its national legislation.⁴⁵

Essentially, national law must implement directive provisions in a clear and precise manner. Where the national provisions provide room for interpretation, the national court needs to interpret the provisions in a consistent manner. Nevertheless, if the national provision provides room of interpretation, the room of interpretation itself presupposes some degree of uncertainty.⁴⁶

The principle of legal certainty as well as the general principles of EU law limits the obligation for a consistent interpretation and is regarded as a safety net, which prevents the national courts to interpret the law too extensively.⁴⁷ However, a greater basis for a consistent interpretation is considered to exist in the areas where there is a complete harmonisation of the laws, such as the area of VAT. In those cases, national provisions should be open for a more extensive interpretation of the national provisions as long as it is within the limits of the directive.⁴⁸ Therefore, an extensive interpretation of the national provision in accordance with a directive should in principle not be regarded as affecting legal certainty due to the primacy of EU law. The ECJ has not further explained in what way the principle of legal certainty limits the obligation of consistent interpretation.⁴⁹ However, the ECJ has stated that the principle of legal certainty must be observed in a strict sense when dealing with rules enable to entail financial consequences.⁵⁰ Therefore, one must proceed with caution when performing a consistent interpretation in order to not infringe this principle in the area of VAT.⁵¹

⁴⁴ See judgment in *Commission vs. France*, C-197/96, EU:C:1997:155, para. 14-15.

⁴⁵ See judgment *Commission vs. Netherlands*, C-144/99, EU:C:2001:257, para. 21.

⁴⁶ U. Nilsson (2009), p.73.

⁴⁷ S. Prechal (2005), p. 208.

⁴⁸ K. Ståhl, *Fusionsdirektivet: svensk beskattning i EG-rättslig belysning* (2005), p. 74.

⁴⁹ U. Nilsson (2009), p.72.

⁵⁰ See for example judgments in *Teleos and Others*, C-409/04, EU:C:2007:548, para. 48 and *Halifax and Others*, C-255/02, EU:C:2006:121, para. 72.

⁵¹ See S. Prechal (2005), p. 213; J. Kellgren (1997), p. 53.

3 Methods of interpretation used by the ECJ

3.1 Initial observations

Since there is an obligation for national courts to interpret their law in conformity with EU law, it is important to understand the interpretation of the provisions on EU level. There is no legal support in EU law provisions concerning the interpretation of EU law. The matter of interpretation has been dealt with explicitly neither in the treaties nor in the secondary law.⁵² However, the ECJ has adopted certain methods to interpret EU law that can serve as guidelines. Where the methods of interpretation have not clearly been expressed by the ECJ, there are three methods of interpretation that can be deduced from the consistent use by the ECJ in the case law, namely the literal, contextual and teleological interpretation method.⁵³ These methods are not entirely a new way of interpreting law, since they are also stated in the Vienna convention on the law of the treaties and considered internationally acknowledged methods of interpretation.⁵⁴ Nevertheless, the frequent references to them by the ECJ has in some ways distinguished them as tools for the ECJ to use.

The ECJ has referred to these methods very early on in its case law. First, in the case *Fédération Charbonnière de Belgique* the ECJ stated, “*It is necessary to consider not only (the) wording of a provision [of Community law] but also the context in which it occurs and the objects of the rules of which it is part.*”⁵⁵ Later on, in the case *Van Gend en Loos*, the ECJ stated that in order to assess the scope of international provisions “*it is necessary to consider the spirit, the general scheme and the wording of those provisions.*”⁵⁶ This approach of interpretation has been maintained and consistent over the decades, as the ECJ in recent case law, has stated the same approach.⁵⁷ There is also confirmation in the tax doctrine regarding the methods used by the ECJ. For example, AG Poires Maduro describes the legal interpretation of the ECJ as being governed by text, context and teleos (purpose).⁵⁸ Others have described the methods as criteria of interpretation

⁵² G. Itzcovisch (2009), p. 539.

⁵³ C. Amand, *The Limits of the EU VAT Exemptions for Financial Services*, (2009), p. 265.

⁵⁴ Vienna Convention on the Law of the Treaties, May 23, 1969, 1155, U.N.T.S, articles 31-32.

⁵⁵ Judgment in *Federation Charbonniere de Belgique*, C-8/55, EU:C:1956:11.

⁵⁶ Judgment in *Van Gend en Loos*, C-26/62, EU:C:1963:1, p. 3.

⁵⁷ See for example Judgment in *Klarenberg*, C-466/07, EU:C:2009:85, para. 37 and the case law cited therein.

⁵⁸ M. Poires Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, (2007), p. 4.

such as linguistic, systemic (contextual) and dynamic criteria.⁵⁹ Nevertheless, despite the terminology they agree on the same approach.

The ECJ does not only confer to one method of interpretation when interpreting EU law. The interpretational approach of the ECJ is described as being that the ECJ applies one method first and then confirms its results with reference to a second method.⁶⁰ In addition, historical context of the provisions is also applied as guidance to how the provisions were meant to apply.

The following sections will provide for further description of each method of interpretation.

3.2 Literal interpretation

The literal interpretation method is sometimes referred to as the linguistic criteria employed by the ECJ and is described as the traditional method of interpretation. The basis for this method sets out from the sense of the “proper meaning of the words”.⁶¹

Naturally, some issues follow with an interpretation of a provision according to the proper meaning of the words in a legal system such as the one in the EU. Since the EU consists of several Member states with different languages, a wording in one language does not necessarily have the same meaning as an identical wording in another language. Consequently, this gives rise to the difficulty of determining which draft of the EU provision to use in order to interpret the provision according to the proper meaning of the words. According to article 55 of the TEU, the texts of the Treaties in each of the EU member states are equally authentic. It is also worth mentioning a regulation adopted by the Council that establishes the equality of the official languages in the EU.⁶² Although, this regulation is only binding to the institutions of the Union and cannot be relied upon by individuals, the regulation has been referred to as laying down the principle of linguistic equality within the EU.⁶³ By treating each version of EU law as an authoritative original, this will provide for the EU members to all be treated equally.⁶⁴

⁵⁹ J. Bengoetxea, *The legal reasoning of the European court of justice: Towards a European Jurisprudence* (1993), p. 234.

⁶⁰ C. Amand (2009), p. 265. See also Judgment in *Plato Plastik Robert Frank*, C-341/01, EU:C:2004:254, para. 54.

⁶¹ G. Itzcovisch (2009), p. 550.

⁶² Council Regulation 1/1958, *Determining the Languages to be Used by the European Economic Community*, 1958 O.J. (385) 58 EEC. With the accession of a new Member state into the EU the regulation has been amended accordingly.

⁶³ K. Lenaerts, J. A. Gutiérrez-Fons, *To say what the Law is: Methods of Interpretation and the European Court of Justice*, (2014), p. 10.

⁶⁴ L. M. Solan, *The Interpretation of Multilingual statutes by the European Court of Justice*, (2009), p. 279.

A confirmation of this view can also be located in the case law of the ECJ. The ECJ has stated that the interpretation of a community provision cannot depart from one language version of the provision but should be considered with regard to other existing official language versions. In principle, all the language versions must be recognised as having the same weight when interpreting community law.⁶⁵ In the case *CILFIT*, the ECJ held that community legislation is drafted in several languages and that all the language versions are all equally authentic. An interpretation of community law thus involves a comparison of the different language versions.⁶⁶ In addition, by taking into account all the language versions in the EU while interpreting a provision of EU law is a way of ensuring the uniform application of the provision within the whole EU.⁶⁷ However, most of the issues that arises when interpreting a provision literally arises when two or more language versions deviate from one another regarding the same provision. The difficulty then becomes to establish which wording to use to interpret the provision without neglecting the status of the other language versions as official.

Looking at the case law of the ECJ where there is a divergence between one and more of the language versions, the approach of the ECJ has been to interpret the provisions in accordance with the wording that is consistent with the most language versions in the EU. In the joined cases *Denkavit and others*, the ECJ in application of the literal interpretation method, examined all language versions to discover the wording that was the most consistent with the different language versions.⁶⁸ All the language versions in the current case except the Danish one used the same wording, which resulted in the ECJ disregarding the wording of the Danish language version in the interpretation of the provision in question. The same line of reasoning was adopted by the ECJ in a much older judgment *Regina v Bochereau*, where the ECJ also examined the wording of the provision in the different language versions and based its interpretation on the wording which was the most consistent in the different versions.⁶⁹

In order to ensure the objectives of the principle of legal certainty as far as possible, the literal interpretation is the method that best reflects that principle since it ensures a high degree of predictability.⁷⁰ However, as the ECJ has stated, the literal interpretation method is not enough to rely on where there is an existence of linguistic divergences between the different language versions.⁷¹ In addition, nothing precludes the ECJ from relying on the contextual or the teleological interpretation of a provision, if the literal

⁶⁵ See Judgment in *EMU Tabac and Others*, C-296/95, EU:C:1998:152, para. 36.

⁶⁶ Judgment in *CILFIT*, C-283/81, EU:C:1982:335, para. 18.

⁶⁷ Judgment in *Les Verts*, C-294/83, EU:C:1986:166, para. 25. K. Lennaerts, J. A. Gutiérrez-Fons (2014), p. 13.

⁶⁸ Judgment in *Denkavit and Others*, C-283/94, EU:C:1996:387, para. 25.

⁶⁹ Judgment in *Regina v. Bochereau*, case 30/77, EU:C:1977:172, para. 13.

⁷⁰ H. Rasmussen, *Towards a Normative Theory of Interpretation of Community Law*, (1992), p. 167-171.

⁷¹ See for ex. Judgment in *Plato Plastik Robert Frank*, C-341/01, EU:C:2004:254, para. 64.

interpretation of the provision is at odds with the common meaning of the other language versions.⁷² This will be further described below.

3.3 Contextual interpretation

The wording of a provision cannot solely be enough to rely on if there is any doubt to how a provision should be interpreted. Therefore the provision must be examined with regard to the context it is in, also referred to as contextual interpretation.

In the literature, the contextual interpretation method, sometimes referred to as the systemic criteria⁷³, have been described from two different perspectives. The first perspective is from an internal point of view where the contextual interpretation is seen to focus on the purely normative context in which the EU law provision in question is placed. The second perspective is from an external point of view where the contextual interpretation is seen to focus on the decision making process which led to the adoption of the EU law provision in question.⁷⁴ Overall, provisions interpreted by the contextual interpretation method, should be interpreted in a way that is consistent with the system they are placed in. This means taking into account all the principles, rules and characteristics of the legal system of which the provision in question is part.⁷⁵ In the contextual interpretation the ECJ has also considered the structure of the provision. For example the interpretation of a provision is influenced by if the provision in question constitutes a main rule or an exemption from the main rule, since exemptions from the main rule generally are interpreted strictly.⁷⁶

As mentioned above, one interpretation method is not solely relied on when interpreting EU law provisions. Usually the literal interpretation method is supplemented with the contextual or the teleological interpretation methods in order to confirm the result.⁷⁷

⁷² See for ex. Judgment in *Konservenfabrik Lubella*, C-64/95, EU:C:1996:388, para. 18.

⁷³ G. Itzcovisch (2009), p. 552.

⁷⁴ K. Lennaerts, J. A. Gutiérrez-Fons (2014), p. 16.

⁷⁵ G. Itzcovisch (2009), p. 552.

⁷⁶ J. Hettne, I. O. Eriksson (2012), p. 168.

⁷⁷ See for ex. opinion of AG Trstenjak in *Deutsche Telekom*, C-543/09, EU:C:2011:90, para. 46-62 and Judgment in *Denkavit and Others*, C-283/94, EU:C:1996:387, para. 26. See also above, C. Amand (2009), p. 265.

3.4 Teleological interpretation

Apart from interpreting a provision with regard to its context, the ECJ has also adopted a method to interpret a provision with regard to its purpose, known as the teleological approach. The teleological interpretation method is one thing that distinguishes the ECJ from other courts. The ECJ has made itself known to apply this method targeting the purpose of the provision in question. The reason for developing this method has been described as being that EU law provisions in many aspects are not sufficiently clear and precise and therefore needs a more extensive interpretation in order to determine their actual meaning.⁷⁸ In the case *Hong Kong Trade* the question asked to the ECJ was whether an organisation who provided services free of charge constituted a taxable person according to the Second VAT Directive.⁷⁹ The ECJ found that a literal interpretation of article 2 and 4 in the directive does not provide for any guidance as to how these provisions shall be interpreted regarding services provided free of charge. Therefore, this “*indicates that it would be advisable to identify the relevant features of the common system of value added tax in light of its purpose.*”⁸⁰

The teleological interpretation has been explained as having mainly three different purposes. To facilitate the purpose that the provision in question strives to achieve, to eliminate a potential absurd result of a strictly literal interpretation of a provision and to fill out the slots that would otherwise exist in EU law.⁸¹ The most traditional use of the teleological interpretation method is to facilitate the purpose of the provision. For instance, the case *Sturgeon and Others* concerned the interpretation of Regulation 261/2004.⁸² The regulation confers a right of compensation to airline passengers whose flights are cancelled. Since the regulation did not expressly state a right of compensation to other passengers than those whose flights were cancelled, the question referred to the ECJ was whether this regulation also applied to passengers whose flights were delayed. The ECJ observed that the objective of the regulation is to ensure a high level of protection for air passengers whether it concerns passengers whose flight are cancelled or delayed.⁸³ The ECJ continued by stating that community acts must also be interpreted in accordance with primary law and in this case the principle of equal treatment becomes relevant. On those grounds the ECJ ruled that the regulation in question must be interpreted as to also conferring a right to compensation to those passengers whose flights were delayed.⁸⁴

⁷⁸ J. Hettne, I. O. Eriksson (2012), p. 168.

⁷⁹ Judgment in *Hong Kong Trade*, C-89/81, EU:C:1982:121.

⁸⁰ Judgment in *Hong Kong Trade*, C-89/81, EU:C:1982:121, para. 5.

⁸¹ H.G. Schermes, D.F. Waelbroeck, *Judicial Protection in the European Union* (2001), p. 21.

⁸² Judgment in *Sturgeon and Others*, C-402/07, EU:C:2009:716.

⁸³ Judgment in *Sturgeon and Others*, C-402/07, EU:C:2009:716, para. 44.

⁸⁴ Judgment in *Sturgeon and Others*, C-402/07, EU:C:2009:716, para. 69. However, the judgment in *Sturgeon and Others* has been criticized, see judgment in *Nelson and Others*, C-581/10, EU:C:2012:657.

The ECJ also applies the teleological method in order for the result of the interpretation to be in line with the objective of the EU and its principles.⁸⁵ In the case *Les Verts*, the question posed to the ECJ was whether a procedure of annulment, according to article 173 in the EC treaty, could be raised against a decision from the European Parliament by an association affected by the parliament's decision.⁸⁶ The core matter in this case was that article 173 in the EC treaty did not include the acts adopted by the European Parliament, which meant that their acts could not be challenged. The ECJ observed that the general scheme of the EC treaty is to make a direct action available against all measures adopted by the institutions that are intended to have legal effect.⁸⁷ The ECJ held that article 173 in the Treaty also covers acts adopted by the parliament since this would otherwise be considered to be against the spirit of the Treaty and to its system.⁸⁸

As seen above, the teleological interpretation has been given a special status in EU law. It does not only refer to a purposive driven interpretation of a provision but also to a systemic understanding of a provision with regard to the rules in the EU legal order.⁸⁹ Nevertheless, it has been questioned when the court uses the teleological method to extend the applicability of EU law provisions beyond their wording and context, since it means that the ECJ is acting not solely as a judicial instance but also assuming the role of the legislator.⁹⁰

3.5 Literal, contextual or teleological interpretation?

An obvious question to ask at this point is how the different methods of interpretation apply in relation to each other. According to settled case law, the ECJ departs from the literal interpretation method when interpreting community provisions. As the AG Stix-Hackl noted in her opinion, the starting point for assessing a provision, in this case article 23 of a cooperation agreement concluded between the EU and Russia, must be the wording.⁹¹ Following the principle of “*In Claris non fit interpretio*”, if the meaning of the provision is clear then there is no room for interpretation, the literal interpretation should serve as the starting point from an interpretational point of view.⁹² In addition, the literal interpretation must take precedence over other methods of interpretation since the wording of a provision could be used to provide evidence in the determination of the

⁸⁵ J. Hettne, I. O. Eriksson (2012), p. 169.

⁸⁶ Judgment in *Les Verts*, C-294/83, EU:C:1986:166.

⁸⁷ Judgment in *Les Verts*, C-294/83, EU:C:1986:166, para. 24.

⁸⁸ Judgment in *Les Verts*, C-294/83, EU:C:1986:166, para. 25.

⁸⁹ M. Poires Maduro (2007), p. 5.

⁹⁰ G. Itzcovich (2009), p. 550. See also judgment in *Nelson and Others*, C-581/10, EU:C:2012:657.

⁹¹ AG opinion in *Simutenkov*, C-265/03, EU:C:2005:6, para. 14.

⁹² G. Itzcovich (2009), p. 550.

legislative purpose of the provision.⁹³ Although, there has been some opinions that suggests that the ECJ style of interpretation is relatively free. The court does not see itself bound to apply one method before another and rather considers the contextual and teleological methods of special importance.⁹⁴ As mentioned above, the meaning of a provision cannot always be ascertained based on the wording. In those circumstances the provisions must be viewed in light of their context and purpose.⁹⁵ Moreover, as the ECJ has stated in its case law, to interpret a community provision it is not only the wording that needs to be considered but also the context and the purpose of the provision.⁹⁶ In the case CILFIT the ECJ stated the following in its judgment:

“every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and its state of evolution at the date on which the provision in question is to be applied.”⁹⁷

However, according to a general principle of interpretation, when a provision is open to several interpretations preference must be given to that interpretation that ensures that the provision retains its effectiveness.⁹⁸ The principle of effectiveness is stated in the EU treaties and thus applies as primary law within the EU.

So to answer the question on how to apply the interpretation methods in relation to each other, answers can only be provided as to examine the literal wording first. However, how the ECJ applies the other methods from that point is guided by the purpose of ensuring that EU provisions are as effective as possible. If that result is derived from the context of a provision or its purpose, is determined in the particular case, as shown by the case law of the ECJ.

⁹³ L. M. Solan (2009), p. 283.

⁹⁴ C. Gulmann, *Methods of Interpretation of the European Court of Justice*, (1980), p. 198-199.

⁹⁵ See further references under section 3.2.

⁹⁶ See for ex. Judgment in *Merck*, C-292/82, EU:C:1983:335; Judgment in *CILFIT*, 281/83, EU:C:1982:335.

⁹⁷ Judgment in *CILFIT*, 281/83, EU:C:1982:335, para. 20.

⁹⁸ Judgment in *Commission v. France*, C-434/97, EU:C:2000:98, para. 19.

4 Interpretation of the exemptions in the VAT directive

4.1 Interpretation of VAT exemptions in general

As explained above, the ECJ has established certain interpretational methods in order to interpret EU law provisions. In the case of exemptions, these methods are applicable but in a slightly modified way. Exemptions provide for derogations from the main principle and in the area of VAT this principle is that VAT is a general tax on consumption.⁹⁹ The concept of exemptions in the VAT area has been described in the tax doctrine as a very complex notion and has been met with some scepticism because of the repercussions they have in the VAT system.¹⁰⁰

The ECJ has in most cases stated that exemptions in the VAT area constitutes exemptions from the general principle of VAT, that turnover tax is to be levied on all goods and services supplied for consideration by a taxable person, and should therefore be interpreted strictly.¹⁰¹ The strict interpretation can be explained as an expression of the literal interpretation method but only concerning exemptions. The strict in this sense aims at not extending the scope of the provision than what is provided by its wording.¹⁰² This requires the ECJ to examine the wording of the provision and the meaning of those words in all the official language versions of the EU and the interpretation must depart from the wording of the provision that is consistent with most language versions of the provision.¹⁰³

The preference of the ECJ of referring to the strict interpretation method when interpreting VAT exemptions is well documented in the case law. Nevertheless, the ECJ has also made reference to the contextual interpretation method in its judgments. In usage of the contextual interpretation in the area of VAT, the ECJ examines the provisions from

⁹⁹ An expression of this principle is found in article 1 of the VAT directive.

¹⁰⁰ See for example R. de la Feria, *The EU VAT Treatment of insurance and financial services (again) under review*, (2007), p. 74; C. Amand (2010), p. 409; B. Terra, J. Kajus (2010), p. 2215.

¹⁰¹ Judgment in *Stichting Uitvoering Financiële*, C-348/87, EU:C:1989:246, para. 13. See also judgment in *Volker Ludwig*, C-453/05, EU:C:2007:369, para. 21 and the case-law cited therein.

¹⁰² See for example the reasoning of the ECJ in judgment in *Klinikum Dortmund*, C-366/12, EU:C:2014:143, para. 32.

¹⁰³ Judgment in *Commission vs. Italy*, C-122/87, EU:C:1988:256, para. 9. See also section 3.2 above.

both an external and internal point of view.¹⁰⁴ The internal element is the general statement of the ECJ regarding the interpretation of the exemptions. VAT exemptions constitute independent concepts of EU law and must therefore be placed in the general context of the common system of VAT as introduced by the directive.¹⁰⁵ The meaning of this is that the exemptions constitute derogations in relation to the general context. Which in itself requires a strict interpretation. Furthermore, the internal element provides for an examination of the exemption provisions in relation to the context in which they appear.¹⁰⁶

Every provision of EU law must be put in its context and interpreted with regard to the objectives of EU law as a whole i.e. the systematic context of the provisions. Therefore, a contextual interpretation of a provision does not solely refer to the context of the sentence in which the provision appears.¹⁰⁷ It is also aimed at putting the provisions in a historical context, thus applying a historical interpretation method. Based on that, the interpretation of the VAT exemptions must therefore take into account the intention of the legislator at the time when the rules were introduced in 1977.¹⁰⁸ Thus, the provisions are placed in the context of the system of rules of which they are part, i.e. using the contextual interpretation from an external point of view.¹⁰⁹

Moreover, when interpreting VAT exemptions, the ECJ has referred to the purpose of the VAT exemption provisions, consequently applying the teleological interpretation method. In the case *Abbey National*, the ECJ stated that the exemptions in the VAT directive have their own independent meaning. Therefore, they need to be interpreted with regard to the purpose of the directive, which is “to avoid divergences in the application of the VAT system from one Member state to another.”¹¹⁰ In addition, the ECJ has highlighted a purpose for exempting specific services from VAT.¹¹¹

However, the one thing that distinguishes the interpretation of the provisions in the VAT area, among them VAT exemptions, is the usage of the principle of fiscal neutrality as a method of interpretation. The ECJ has stated that the principle of fiscal neutrality is a principle of interpretation that should be applied together with the principle of strict interpretation when interpreting exemptions.¹¹² A demonstration of this usage is found in the case *JP*

¹⁰⁴ See section 3.3. This will be further exemplified below.

¹⁰⁵ See for example the judgment in *Stichting Uitvoering Financiële*, C-348/87, EU:C:1989:246, para. 11 and judgment in *SDC*, C-2/95, EU:C:1997:278, para. 21. The ECJ makes reference to the 11th recital in the preamble of the Sixth directive.

¹⁰⁶ See section 4.3.3.

¹⁰⁷ C. Amand (2009), p. 267.

¹⁰⁸ M. Walpole and R. de la Feria, *Options for Taxing Financial supplies in Value added tax: EU VAT and Australian GST Models Compared*, (2009), p. 902.

¹⁰⁹ See section 3.3.

¹¹⁰ Judgment in *Abbey National*, C-169/04, EU:C:2006:289, para. 38.

¹¹¹ See for ex. Judgments in *Velvet & Steel Immobilien*, C-455/05, EU:C:2007:232 and *Abbey National*, C-169/04, EU:C:2006:289. This will be further dealt with below.

¹¹² Judgment in *Deutsche Bank*, C-44/11, EU:C:2012:484, para. 45.

Morgan, where the ECJ held that a VAT exemption provision cannot be interpreted as providing a different treatment for VAT purposes of economic operators carrying out the same transactions.¹¹³ This principle does not apply as primary law within the EU but is intended to reflect the general principle of equal treatment in matters relating to VAT.¹¹⁴

4.2 Financial service exemption in the VAT Directive

The exemption for financial services in the VAT directive is perhaps the area in VAT that has been subject to most development over the last decades. The topic of financial services has been frequently discussed over a long time but the actual reason for exempting these services have never been clearly specified.¹¹⁵ Looking at the preparatory acts that preceded the adoption of the Sixth Directive it is only mentioned that the exemptions for other services relating to a specific field, among them financial services, set out in article 14 section B of the Sixth directive are justified for reasons of general policy common to all Member states.¹¹⁶ Only a few reasons were given for exempting financial services under the Sixth directive. The first was that the turnover tax replaced by the VAT did not apply to financial services and it would therefore be logical not taxing these services under a VAT. Second, most Member states already applied other taxes to these kind of services, such as insurance premium tax and a payroll tax.¹¹⁷

The difficulties of the exemption for financial services are often described as being that the exemption provision does not provide for clear definitions of the scope. The ECJ has been called upon on several occasions to interpret the various factors of the exemption.¹¹⁸ The exemption for financial services has mainly been construed to avoid practical difficulties as opposed to the exemptions for public bodies and health services. The main reason for this difficulty is that it is hard to determine the taxable amount. Along with leasing of immovable property and gambling activities, financial services form part of a group of services that are considered to be too difficult to tax.¹¹⁹ Nevertheless, there is a lot of disagreement on how financial services should be treated for VAT purposes. Many opinions in the doctrine consider

¹¹³ Judgment in *JP Morgan*, C-363/05, EU:C:2007:391, para. 29.

¹¹⁴ See judgment in *NCC Construction Danmark*, C-174/08, EU:C:2009:669, para. 41. See also C. Amand, *VAT neutrality: a principle of EU law or a principle of the VAT system?* (2013), p. 164.

¹¹⁵ Report of the Committee on Economic and Monetary Affairs, A6-0344/2008, p. 22.

¹¹⁶ Art. 14 of the Proposal for a Sixth council directive, Commission of the EC, suppl.

11/73. Art. 14 of the proposal corresponded with art. 13 of the definitive version of the Sixth Directive.

¹¹⁷ R. F. van Brederode, *New Developments in the European Union: Taxation of Financial Services Under a Credit Invoice Method VAT* (1995), p. 5-6.

¹¹⁸ C. Amand (2010), p. 409.

¹¹⁹ R. de la Feria (2007), p. 74.

it more proper to include financial services in the tax base and not exempting them.¹²⁰

However, most financial services are exempt under article 135(1)(b) to (g) in the VAT directive. The article has the following wording:

“1. Member States shall exempt the following transactions:

...

(b) the granting and negotiation of credit and the management of credit by the person granting it;

(c) the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

(f) transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2);

(g) the management of special investment funds as defined by Members States;”

The problematic task of interpreting the scope of the exemptions has been especially difficult in the case of financial services. Developments of new forms of financial products and supply structures have created uncertainty as to what is actually considered to be included in the scope of the exemption provision and what is not.¹²¹ It is therefore important to examine the case law in this area in order to get a clearer picture of how the financial service exemption is to be interpreted and applied according to the ECJ. The following chapter will deal with the case law of the ECJ that has in some ways provided for an explanation to how EU law stands in terms of applying and interpreting this exemption.

¹²⁰ The doctrinal debate features a lot of material on this subject. Examples are M. Walpole and R. de la Feria (2009); F. Borselli, *A Sensible reform of the EU VAT Regime for Financial Services* (2009); R. F. van Brederode, *New Developments in the European Union: Taxation of Financial Services Under a Credit Invoice Method VAT* (1995).

¹²¹ M. Walpole and R. de la Feria (2009), p. 900.

4.3 The exemption for financial services as interpreted by the ECJ

4.3.1 Case SDC C-2/95

Article 135(1) has been subject to a great amount of case law from the ECJ and one case is prominent among them, the case SDC.¹²² SDC is considered to be a landmark case with regard to the interpretation of the exemption provision because it is in this case where the ECJ started to define and evolve the scope of the exemptions under article 135(1) in the VAT directive.

SDC was an association that provided services relating to transfers, advice on, trade in, management of deposits and purchase contracts and loans. The association was registered for VAT purposes and most of its members were savings banks. A typical service performed by SDC was described as consisting of a number of components, which added together, made up a service which a bank or its customers wished to had performed. SDC only performed these services upon request of a bank or its customers. SDC applied to the Danish Customs and Tax Directorate that the services it performed relating to certain transfers should be covered by the exemption provided for by article 2(3)(j) in the Danish VAT law, implementing article 13B(d) in the Sixth directive. The Directorate granted the application but the decision was later overturned by the Danish VAT Tribunal, who decided that the services provided by SDC were subject to VAT. The SDC appealed against the decision of the VAT Tribunal to the Danish administrative court, which decided to stay the proceedings and refer a couple of questions to the ECJ.¹²³

The first question posed by the national court was if the services that SDC performed are covered by the exemptions in article 135(1)(d) and (f), and if it made any difference if these services were performed wholly or in part electronically for the purpose of the exemption. Second, the national court wanted to know if the specification of the person providing the service in paragraphs (b) and (c) of article 135(1) were important to bear in mind when interpreting the paragraphs (d) and (f) in the same article. Third, the national court asked if services that are provided to parties performing exempt activities under paragraph 135(1)(d) and (f) by a third party, also falls within the scope of those provisions and therefore also exempt from VAT or is the entire service required to be performed by a financial institution in order to benefit from the exemption. In addition, is a contractual link between the person performing the exempt service and the customer required for the purpose of the exemption. Fourth, the national court asked how the expression “transactions... concerning transfers” in paragraph (d) should be interpreted and if the VAT exemption in article 135(1)(d) and (f) also

¹²² Judgment in *SDC*, C-2/95, EU:C:1997:278.

¹²³ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 7-15.

applied to a person performing only a part of an exempt financial service or only carries out certain operations necessary to supply an exempt financial service.

The ECJ began with stating that the assessment of the exemptions stated in article 135(d) and (f) must be based on the nature of the service provided and not according to the person that is supplying the service. The exemptions in paragraphs (d) and (f) are different than the exemptions provided for in paragraphs (b) and (c) since their wording does not clearly specify the person performing the exempt activity. Therefore, the person providing the service is irrelevant since the exemption from VAT is connected to the service itself.¹²⁴ This also applies to the manner in which the service in question is performed. The provision in question does not provide for any restrictions regarding how the service is performed. Whether it is performed electronically or not does not affect the application of the exemption. Only the fact that the service is performed electronically does not preclude the service from being exempt.¹²⁵

The ECJ then continued by examining the need of a contractual link as was asked in the third question. The ECJ observed that the contractual link between a customer and the bank does not diminish the role of the data-handling center since the data-handling center in reality performs the service requested by the customer even though the services of the data-handling center are provided to the bank itself and alters the financial situation of the bank.¹²⁶ The ECJ therefore rejected the argument that paragraph (d) in article 135(1) only covered services that were provided by a financial institution to the end consumer since the practical effect would be that only certain transfer transactions would be exempt and there is no support in the wording of the article for such a restriction of the scope.¹²⁷

Regarding the fourth question, the ECJ stated that given that exemptions must be interpreted strictly the mere fact that a service constitutes an element essential to perform a complete exempt transaction cannot guarantee the service to qualify as exempt. In order for a service to be classified as an exempt service under article 135(1)(d) and (f) the service must be viewed broadly, form a distinct whole and fulfil in effect the specific and essential functions of that provision. For a transaction concerning transfers the service in question must therefore have the effect of transferring funds and entail changes in the financial and legal situation. However, there is nothing that prevents services from being broken down into separate services which would then constitute transactions concerning transfer within the meaning of the provision.¹²⁸

¹²⁴ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 32-33. This confirms the view that was held by the ECJ in the previous judgment, *Muys 'en de Winter*, C-281/91, EU:C:1993:855, para. 13. The case is further examined below.

¹²⁵ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 37.

¹²⁶ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 55.

¹²⁷ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 56.

¹²⁸ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 64 and 66.

After providing these answers to the questions referred to it by the national court the ECJ referred the case back to the national court for it to deliver a judgment. It was for the national court to determine if the services that SDC performed fulfilled the criteria established by the ECJ since it was more familiar with all the facts in the case.¹²⁹

4.3.2 Determining criteria for financial service exemption

The judgment in *SDC* spurred a certain interpretational approach in terms of interpreting article 135(1). However, this was not the first time that the ECJ has been asked to interpret article 135(1). In the case *Muys' en de Winter*, the ECJ was asked to interpret the expression in article 135(1)(b), “the granting and negotiation of credit and the management of credit by the person granting it”. The case concerned a deferred payment for a supply of land to the date of delivery instead of payment when the contract was signed. In order for the customer to defer the payment, the customer had to pay an interest.¹³⁰ According to the Dutch tax authorities, the interest paid on the deferred payment did not constitute a consideration for the granting of the credit but should be considered as consideration for the actual supply of the land and therefore subject to VAT.

In its judgment, the ECJ held that the deferring of payment in return for payment of interest might in principle be regarded as granting of credit within the meaning of the provision in the directive.¹³¹ The ECJ continued by stating that, even though exemptions should be interpreted strictly, without a clear specification of the borrower and lender in the directive, the wording of article 135(1)(b) is broad enough to cover the situation in question. Such a treatment would otherwise be contrary to the objective of the VAT system.¹³² According to the ECJ the interest paid in case of a deferred payment is covered by the exemption in article 135(1)(b) since the situation is regarded as granting an exempt credit within the meaning of that provision.

The criteria introduced by the ECJ in *SDC* were further specified in the case *CSC Financial Services*. In reference to the judgment in *SDC* the ECJ stated, in addition to the service having to form a “distinct whole”, that an exempt service must be distinguished from a mere physical and technical supply.¹³³ This mere physical and technical supply also needs to alter the legal or financial situation in order for the exemptions to apply to the service

¹²⁹ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 67.

¹³⁰ Judgment in *Muys' en de Winter*, C-281/91, EU:C:1993:855, para. 5.

¹³¹ Judgment in *Muys' en de Winter*, C-281/91, EU:C:1993:855, para. 12.

¹³² Judgment in *Muys' en de Winter*, C-281/91, EU:C:1993:855, para. 13-14.

¹³³ Judgment in *CSC Financial Services*, C-235/00, EU:C:2001:696, para. 26.

in question.¹³⁴ The wording of the provision in article 135(1)(f) does not provide for activities that does not create, alter or extinguish parties rights and obligations in respect of securities to be exempt. Even though the services that CSC provided in the case were essential to complete such a financial transaction, they constituted merely a preliminary stage of the transaction and formed such a little part of the total service. Therefore, the services were considered not to come within the scope of the exemption.¹³⁵

Three years after the case *CSC* was decided, the ECJ dealt with the interpretation of article 135(1) once again in the case *Abbey National*.¹³⁶ The question posed to the ECJ concerned if management activities related to management of special investment funds also were covered by the exemption in article 135(1)(g) when provided by a third party. The ECJ maintained the approach stated in the previous judgments that the exemption was referred to the service itself and not to the person providing the service.¹³⁷ Moreover, in order for a service to benefit from the exemption in article 135(1)(g) the service must fulfil the “distinct whole” criteria established in the case *SDC*. In addition, the wording of the provision in question does not preclude the services provided from being broken down into a number of separate services each covered by the exemptions as long as they fulfil the “distinct whole” criteria.¹³⁸

It is interesting to note that in the case *Abbey National* the AG did not consider the distinct whole criteria appropriate to apply when interpreting article 135(1)(g) in the same sense as the ECJ has established it for the other paragraphs in article 135(1). According to AG Kokott, the concept of management in paragraph (g) is more general and does not relate to specific operations in the same way as the other paragraphs in article 135(1). Therefore, when interpreting paragraph (g) it is more appropriate that the interpretation should depart from the purpose and context of article 135(1) rather than general criteria.¹³⁹

However, the ECJ does not seem to have adopted the same view. In the case *GfBk*, the ECJ was asked again to interpret the concept of management in paragraph (g). The question concerned specifically management services that are provided by a third party.¹⁴⁰ Here the ECJ reiterated the distinct whole criteria and stated that in order to determine if the services provided fall within the scope of paragraph (g) it has to be examined whether the

¹³⁴ Judgment in *SDC*, C-2/95, EU:C:1997:278, para. 73 and judgment in *CSC Financial Services*, C-235/00, EU:C:2001:696, para. 28.

¹³⁵ Judgment in *CSC Financial Services*, C-235/00, EU:C:2001:696, para. 31-32.

¹³⁶ Judgment in *Abbey National II*, C-169/04, EU:C:2006:289.

¹³⁷ Judgment in *Abbey National II*, C-169/04, EU:C:2006:289, para. 66. See also the judgments in *SDC*, C-2/95, EU:C:1997:278, para. 32-33 and *Muys' en de Winter*, C-281/91, EU:C:1993:855, para. 13.

¹³⁸ Judgment in *Abbey National II*, C-169/04, EU:C:2006:289, para. 67 and 70.

¹³⁹ AG opinion in *Abbey National II*, C-169/04, EU:C:2005:523, para. 63 and 67.

¹⁴⁰ Judgment in *GfBk*, C-275/11, EU:C:2013:141.

services has the effect of performing the specific and essential functions of management of a special investment fund.¹⁴¹

The ECJ adopted the same reasoning in the case *ATP Pension Service*, in which the ECJ delivered its judgment last year. Although the ECJ regarded the purpose of the exemption in paragraph (g) as being to facilitate investment in securities through investment undertakings, the services provided by a third party must fulfil the distinct whole criteria in order to be covered by the exemption.¹⁴²

After the case *Abbey National*, the ECJ delivered its judgment in the case *Volker Ludwig*. This case concerned the interpretation of paragraph (b) in article 135(1) and the question posed to the ECJ was if paragraph (b) requires either a contractual or direct link between the person negotiating the credit and the borrower in order for the exemption to be applicable. In essence, the question sought to be answered was if article 135(1)(b) also covers credit negotiation by a third party. The answer is relevant in order to determine if the nature of the person providing the service is considered to be fundamental in the case of outsourcing credit-related activities.¹⁴³ The ECJ began by reiterating that exempt transactions under article 135(1) are defined in terms of the service provided and not by the person supplying and receiving the service. A contractual link is therefore not required in order to benefit from the exemption within the meaning of the provision since the wording of the article does not define the identity of the negotiator.¹⁴⁴ After establishing that the negotiation service provided is considered to be the principal service the ECJ continued by examining the concept of negotiation within the meaning of article 135(1)(b). With reference to its previous rulings in *SDC* and *Abbey National*, the ECJ repeated its statement that in order for the service to be considered exempt, the service must, viewed broadly, form a distinct whole and fulfil in effect the specific and essential functions of the provision, in this case of negotiation.¹⁴⁵ Negotiation in the sense of article 135(1)(b) is considered to be an act of mediation and could have several purposes and the negotiation that is described in this case is covered by this exemption according to the ECJ. Therefore the ECJ answered the question posed by the national court in the negative thus maintaining the relevance of the “distinct whole” criteria when determining the scope of financial supplies.

With regard to the above and, judging by recent case law, the criteria still plays an important part in the interpretational approach of the ECJ regarding the financial service exemption.¹⁴⁶

¹⁴¹ Judgment in *GfBk*, C-275/11, EU:C:2013:141, para. 21 and 23.

¹⁴² Judgment in *ATP Pension Service*, C-464/12, EU:C:2014:139, para. 62 and 65. The purpose of the exemption referred to by the ECJ was also stated by the AG in her opinion in the case *Abbey National*, EU:C:2005:523, para. 68.

¹⁴³ R. de la Feria (2007), p. 86.

¹⁴⁴ Judgment in *Volker Ludwig*, C-453/05, EU:C:2007:369, para. 25-26.

¹⁴⁵ Judgment in *Volker Ludwig*, C-453/05, EU:C:2007:369, para. 27 and 36.

¹⁴⁶ See for ex. Judgments in *Nordea Pankki*, C-350/10, EU:C:2011:532 and *Granton Advertising*, C-461/12, EU:C:2014:1745.

4.3.3 The usage of the interpretational methods

As the above analysis demonstrates, the ECJ has dealt with the interpretation of article 135(1)(b) to (g) on numerous occasions and although the ECJ starts its reasoning by referring to the general approach when interpreting VAT exemptions, the interpretational methods established were not entirely prominent in the reasoning of the ECJ. No real emphasis is placed on the interpretation of the exemptions with regard to either context or purpose in the earlier cases. Instead, the ECJ departs from the “distinct whole” criteria to determine if a certain service falls within the scope of the exemption or not.

In 2007 the ECJ delivered its judgment in the case *Velvet & Steel Immobilien*, which concerned the interpretation of article 135(1)(c) in the VAT directive. Important to note is that this case was referred to the ECJ the same year as the case *Volker Ludwig* in which the ECJ delivered its judgment a few months later. The question in the case concerned an assumption of an obligation to renovate a building in return for a part of the purchase price of the building and if this kind of assumption of obligation falls within the scope of article 135(1)(c).

In its judgment, the ECJ began by stating that exemptions as a general rule must be interpreted strictly and that they are independent concepts of EU law whose purpose is to avoid divergences in the VAT system.¹⁴⁷ Since the directive does not provide for a definition of the concept of assumption of obligations the ECJ examined the different language versions of article 135(1)(c). The ECJ concluded that in some language versions the concept of assumption of obligation had a general meaning while other versions, such as the English and Spanish, limited the concept to only pecuniary obligations. In view of the language differences, the concept cannot be interpreted on a literal basis but has to be viewed in light of the context in which it is used and with regard to the aims and scheme of the VAT directive.¹⁴⁸ The ECJ then continued by stating that with regard to the context of the article 135(1)(c), the paragraph deals with transactions that are by their nature financial services and the assumption of an obligation to renovate a building cannot be considered a financial transaction by its nature. Therefore, it does not come within the scope of the provision in question.¹⁴⁹ According to the ECJ, this conclusion is also supported by the purpose of the exemption for financial transactions, which is to alleviate the difficulties connected with determining the tax base and to avoid an increase in the cost of consumer credit. Since the obligation to renovate a building does not provide for such difficulties, the transaction cannot be exempted.¹⁵⁰

¹⁴⁷ Judgment in *Velvet & Steel Immobilien*, C-455/05, EU:C:2007:232, para. 14-15.

¹⁴⁸ Judgment in *Velvet & Steel Immobilien*, C-455/05, EU:C:2007:232, para. 20.

¹⁴⁹ Judgment in *Velvet & Steel Immobilien*, C-455/05, EU:C:2007:232, para. 23.

¹⁵⁰ Judgment in *Velvet & Steel Immobilien*, C-455/05, EU:C:2007:232, para. 24. Worth mentioning is that the statement regarding the purpose of the exemptions have also been criticized, see for ex. Confédération Fiscale Européenne, *Opinion Statement of the CFE on the Velvet & Steel Case (C-455/05)* 50 Eur. Taxn. 4 (2010). However, the ECJ has

A similar reliance on the interpretational methods when interpreting the exemptions can be found elsewhere in the case law. In the case *MKG Factoring* the ECJ was asked to interpret the concept of debt collection in article 135(1)(d). The question posed to the ECJ was if the activity of true factoring could also be considered as debt collection within the meaning of paragraph (d) in article 135(1). The ECJ observed that only the English and Swedish language versions had specifically excluded factoring from the exemption in paragraph (d) while other versions only mentioned the exclusion of debt collection in general.¹⁵¹ Nevertheless, the wording in those language versions did not preclude the concept of factoring to be included in debt collection.¹⁵² The ECJ reached this conclusion by examining the context and spirit of article 135(1)(d) in relation to the scheme of the directive.¹⁵³ The essential aim of the debt collection is to recover debts owed to a third party. In that sense, factoring therefore constitutes a more general concept of the debt collection thus falling within the scope of paragraph (d).¹⁵⁴

In view of these cases, the ECJ did not make any reference to the distinct whole criteria it had applied in its previous case law. The interpretation of the ECJ departed from the traditional methods of interpretation when interpreting EU provisions. Yet in the case *Volker Ludwig* and later cases, the distinct whole criteria appeared once again.¹⁵⁵ Notably, the ECJ itself pointed out that the legal certainty is aimed to be achieved regarding the exemptions and therefore the exemptions must be interpreted in a uniform way.¹⁵⁶

4.3.4 Strict or extensive interpretation

When dealing with the interpretation of exemptions the ECJ has consistently held that the exemptions constitutes derogations from the general principle of VAT and must therefore be interpreted strictly. This strict interpretation could be perceived as somewhat nuanced when looking at the case law. The strict interpretation does not necessarily suggest for an entirely restrictive interpretational approach. AG Jacobs stated in his opinion in the case *Zoological Society* that a strict interpretation of VAT exemptions does not

maintained its position regarding the purpose, see for ex. Judgments in *Tiercé Ladbroke*, C-231/07, EU:C:2008:275, para. 24 and *Granton Advertising*, C-461/12, EU:C:2014:1745, para. 30.

¹⁵¹ Judgment in *MKG Factoring*, C-305/01, EU:C:2003:377, para. 68.

¹⁵² Judgment in *MKG Factoring*, C-305/01, EU:C:2003:377, para. 79.

¹⁵³ Judgment in *MKG Factoring*, C-305/01, EU:C:2003:377, para. 70.

¹⁵⁴ Judgment in *MKG Factoring*, C-305/01, EU:C:2003:377, para. 77. The interpretational approach was later confirmed by the ECJ in the case *Axa UK*, C-175/09, EU:C:2010:646 which also dealt with interpreting the term debt collection in article 135(1)(d).

¹⁵⁵ See section 4.3.2.

¹⁵⁶ Judgment in *MKG Factoring*, C-305/01, EU:C:2003:377, para. 64.

necessarily mean restrictive. VAT exemptions should apply to which it is intended to and not more.¹⁵⁷

Looking at the area of financial service exemptions the ECJ has, in some of the cases, adopted an extensive view when interpreting these exemptions. In *GfBk*, the ECJ interpreted the concept of exempt management services as also including advisory services despite the fact these services did not alter the funds legal or financial position nor were listed in annex II in the UCITS directive listing exempt management activities.¹⁵⁸

Furthermore, the ECJ provided another extension basis in *Volker Ludwig* by stating that activities deemed to be ancillary to the principal exempt activity would also be deemed exempt.¹⁵⁹ This widening statement diverge from the interpretation of the exemption made by the ECJ in *CSC*.

The role of the principle of fiscal neutrality as a method of interpretation is a significant reason for this extensive interpretation. The interpretation of paragraph (g) in article 135(1) provides for several examples of that. In the case *Abbey National* the ECJ stated that article 135(1)(g) does not define a special investment fund and that this exemption applies to all undertakings that deals with collective investments. The ECJ emphasized that the principle of fiscal neutrality prevents unequal treatment for VAT purposes of taxable persons in the same situation. In the case *JP Morgan* the ECJ stated that an exclusion of close-ended investment funds as being regarded as special investment funds would be contrary to the principle of fiscal neutrality when compared to open-ended investment funds that were covered by the exemption.¹⁶⁰ Therefore, the ECJ extended the scope to also include close-ended investment funds. In addition, the principle of fiscal neutrality was also used by the ECJ to extend the scope of special investment funds to include also pension funds.¹⁶¹

In the case *SEB*, the ECJ interpreted article 135(1)(f) as including underwriting guarantees regardless of if the shares has been fully or partially subscribed. To make such an exemption conditional on whether the shares has been fully or partially subscribed would be contrary to the principle of fiscal neutrality.¹⁶² Furthermore, with reference to the principle of fiscal neutrality, the ECJ also interpreted the exemption of a credit granted by a non- financial institution as being exempt. Otherwise, by not extending the exemption to a non-financial institution granting the same credit referred to in article 135(1)(b) the VAT treatment of persons performing the same activities would be different.¹⁶³

¹⁵⁷ AG opinion in *Zoological Society*, C-267/00, EU:C:2001:698, para.19.

¹⁵⁸ Judgment in *GfBk*, C-275/11, EU:C:2013:141, para. 25-26.

¹⁵⁹ Judgment in *Volker Ludwig*, C-453/05, EU:C:2007:369, para. 17-20.

¹⁶⁰ Judgment in *JP Morgan*, C-363/05, EU:C:2007:391, para. 29.

¹⁶¹ See for ex. Judgment in *Wheels*, C-424/11, EU:C:2013:144, para. 21 and also judgment in *ATP Pension Service*, C-464/12, EU:C:2014:139, para. 44.

¹⁶² Judgment in *SEB*, C-540/09, EU:C:2011:137, para. 36.

¹⁶³ Judgment in *Muys ' en de Winter*, C-281/91, EU:C:1993:855, para. 13-14.

This extensive approach does not seem to be unique to the area of financial service. On the contrary, the ECJ seems to have adopted a more extensive approach when interpreting VAT exemptions in general.¹⁶⁴ With reference to the opinion of AG Jacobs in the case *Zoological society*, AG Colomer stated the same view in his opinion in the case *Temco Europe*.¹⁶⁵ His opinion was subsequently followed by the ECJ.¹⁶⁶ In addition, the ECJ has stated that this strict interpretation must not deprive the exemptions of their intended effect, which does not suggest for a restrictive approach.¹⁶⁷ The interpretation of the exemptions must be consistent with the objectives they pursue and need to comply with the principle of fiscal neutrality.¹⁶⁸

¹⁶⁴ See for ex. Judgment in *Canterbury Hockey*, C-253/07, EU:C:2008:571.

¹⁶⁵ AG opinion in *Temco Europe*, C-284/03, EU:C:2004:287, para. 37.

¹⁶⁶ Judgment in *Temco Europe*, C-284/03, EU:C:2004:730.

¹⁶⁷ See for example judgment in *Axa UK*, C-175/09, EU:C:2010:646, para. 25. See also the judgment in *MKG Factoring* EU:C:2003:377, para. 71.

¹⁶⁸ Judgment in *SEB*, C-540/09, EU:C:2011:137, para. 20.

5 Financial service exemption in the Swedish VAT Act

5.1 Historical background

In 1991, the Swedish tax system was profoundly reformed with regard to both the direct and indirect tax area. Before 1991, financial services were considered not to be taxable services and were not included in the scope of the VAT provisions. In 1991, the scope of VAT was extended to include all goods and services that were not specifically exempt from taxation. In the process leading to the reform of the VAT provisions, it was considered to be more correct to tax financial services due to the cascading effect of the VAT and the distortions in competition.¹⁶⁹ However, Sweden was hesitant to tax financial services in fear of having a legislation that was not compatible with EU law.¹⁷⁰ A study was conducted in order to ascertain the international consequences of taxing financial services. However, the study was not followed in the bill to the VAT Act, which proposed that financial services should be exempt from VAT.¹⁷¹

Furthermore, the study did not result in a proposal that financial services should be subject to VAT.¹⁷² The reason for this was the difficulties that will arise when taxing financial services. The report observed for example that a tax on financial services would be hard to achieve due to the difficulty of determining a taxable amount on the financial service. In addition, since the Sixth directive exempted financial activities from VAT and that the purpose of the Sixth directive was to achieve harmonisation of the VAT rules throughout the community, this strongly suggests that financial services should remain VAT exempt.¹⁷³ It is interesting to note however, that even though the investigation did not result in the financial services being subject to VAT it was proposed that the services should be subject to a separate tax only targeting financial services.¹⁷⁴ This however, did not result in a concrete proposal. Instead, Sweden adopted a revised VAT act with an exemption for financial services stated in chapter 8 paragraph 3 of the Act and as will be further examined below, this provision has not gone through any profound change due to the accession of Sweden into the EU.

¹⁶⁹ SOU 1989:35, part I, p. 192.

¹⁷⁰ SOU 1989:35, part I, p. 193.

¹⁷¹ Proposition 1989/90:111, p. 104.

¹⁷² SOU 1990:46

¹⁷³ SOU 1990:46, p. 181.

¹⁷⁴ SOU 1990:46, p. 17. Worth mentioning is that Sweden has launched another study into this separate tax on financial services, Government Directive 2015:51.

5.2 Incorporation of article 135(1)(b)-(g)

As has been examined above, the obligation for the Member states to implement the provisions of a directive into their national law is stated in article 288 of the TFEU. With regard to the VAT directive, Sweden has dealt with this obligation through the provisions in the current Swedish VAT Act.¹⁷⁵ Due to the accession into the EU, Sweden was required to adjust its national VAT provisions in order to achieve a more harmonized structure. The result of this adjustment led to the adoption of the current Act.¹⁷⁶ The VAT Act is modelled after the VAT directive and the structure of the provisions in the act does somewhat resemble the structure in the directive.¹⁷⁷ However, there are some deviations. The exemption for financial services is stated in chapter 3 paragraph 9 in the VAT act and has the following wording:

“Supplies of banking and financial services and transactions involving securities and comparable activities are exempt from taxation.

Banking and financial services shall not include notarial activity, collection of invoices or administrative services relating to factoring or the leasing of storage facilities.

Transactions in securities shall mean:

- 1. trading and brokerage of shares, other equities and debts, whether or not represented by instruments, and*
- 2. management of investment funds pursuant to Law (2004:46) on investment funds and Law (2013:561) on management of alternative investment funds.”¹⁷⁸*

The structure of this provision deviates from the structure of the exemption provision in the directive. The directive provision is much more specific in terms of exempt transactions. Instead, the Swedish provision is structured as a general exemption for financial services and only provides a few examples of the services covered by the exemption.

Looking at the preparatory works to the Swedish VAT act only a slightly more specific description of the exemption is found. Banking and financial services within the meaning of the provision should be regarded as lending and deposit services along with remittance services.¹⁷⁹ The provision in chapter 3 paragraph 9 was only a technical revision of the provision introduced in 1991 and was not intended to provide for a further change in the scope of the exemption.¹⁸⁰

¹⁷⁵ Mervärdesskattelagen (SFS 1994:200).

¹⁷⁶ Proposition 1993/94:99.

¹⁷⁷ U. Nilsson (2014), p. 19.

¹⁷⁸ Translation of the ECJ in case *SEB*, C-540/09, EU:C:2011:137.

¹⁷⁹ Proposition 1989/90:111, p. 193.

¹⁸⁰ Proposition 1993/94:99, p. 153. See also proposition 1994/95:57, p. 96-98, only a change regarding the exclusion of factoring from the exemption was implemented.

5.3 Consistent interpretation in practice

As mentioned above, the basis for consistent interpretation is that the national provision provides room for interpretation. Before dealing with the financial service exemption, it seems appropriate to illustrate the reasoning of the HFD regarding the determination of interpretational space.

The HFD delivered a judgment in a case that concerned refund of VAT.¹⁸¹ In this case consistent interpretation was regarded as not necessary since the wording of the provision was not sufficiently unclear that an interpretation was required. According to the wording of the provision in the VAT act, VAT is to be refunded if the goods or service is supplied to a person performing taxed activities outside the EU. The question posed to the court was if the refund of VAT also applied when the supply of goods or services is made to a private consumer within the EU since they technically do not perform taxed activities inside the EU. According to the HFD, the VAT is refundable even when a supply is made to a private consumer and that the wording of the Swedish provision is sufficiently clear to support such a conclusion.

In 2007, the HFD delivered a judgment, in an appeal from the National Tax Board. The case concerned the fee paid for the parking and storage of boats.¹⁸² The provision in the VAT act stated that rental of premises and spaces for parking vehicles and parking activities were subject to VAT. According to the HFD, this also included the parking and storage of boats. The decision was based on the judgment of the ECJ regarding the exemption in article 13B(b) in the Sixth directive.¹⁸³ In that judgment the ECJ stated that the exclusion from the exemption in article 13B(b) also applies to boats and their storage, both on land and in water.

In its judgment, the HFD stated that the concept of parking and parking activities had not been clearly defined in Swedish law. The wording of the provision was not sufficiently clear and precise in order to interpret the provision different from the interpretation made by the ECJ regarding the Sixth directive. Therefore, the HFD stated that there is a need to interpret the Swedish provision according to EU law in order to achieve the result of the directive and in this case this means the inclusion of boats into the provision in question.

It is worth mentioning that two members of the National Tax Board contested this decision, stating that the wording of the Swedish provision does not provide for room to include boats in the definition and that the interpretation made by the HFD is contrary to the legality principle. The fact that the ECJ has decided a similar case with regard to the directive is not relevant since the principle of direct effect of EU law has not been invoked

¹⁸¹ RÅ 1999 not. 245.

¹⁸² RÅ 2007 ref. 13.

¹⁸³ See judgment in *Marselisborg Lystbådehavn*, C-428/02, EU:C:2005:126.

in the case in question. However, since the national courts are obliged to interpret national law in conformity with EU law, the HFD in this case was required to interpret the Swedish concept of parking according to the directive.

As can be seen above, an interpretation in conformity with EU law can provide for a very extensive interpretation of the national provision. It also proves the extent to which the HFD is prepared to interpret national VAT provisions even though there is not a complete unity in the matter.

5.4 Financial service exemption as interpreted by the HFD

5.4.1 Interpretational methods in general

Since the provision and the preparatory works provide for a vague description, guidance has to be sought in the case law of the HFD, in order to further define the scope of the Swedish exemption provision.

At the outset, it is relevant to note that the interpretation legal provisions in the Swedish practice departs from the wording of the provision and the preparatory works leading to the adoption of the provision in question. If the wording does not provide for any guidance as to how the provision should be interpreted, guidance is sought in the preparatory works.¹⁸⁴ Given that Sweden is a country whose legal order is based on the civil law system, preparatory works is of equal importance in order to determine the law as the wording of the provision itself.¹⁸⁵ However, due to the direct effect and the primacy of EU provisions, the ECJ considers the Swedish preparatory works to be of little significance when it comes to interpreting Swedish provisions that implements EU law.¹⁸⁶ The preparatory works only become necessary to observe if they advocate for a view that is consistent with EU law or when EU law specifically refers to the national provision.¹⁸⁷

Furthermore, when interpreting the financial service exemption it has occurred that the HFD has tried to apply another interpretational approach. For example, by departing from consulting the preparatory works, the court instead sought guidance, examined the rules, and interpreted the exemption in the general context of the provisions for trade and industry in the Swedish legislation.¹⁸⁸ However, as will be further examined below, the HFD has not continued with that same approach.

¹⁸⁴ See for example the opinion of the National Tax Board in the judgment RÅ 1995 not. 393. See also the judgment RÅ 1995 not. 296.

¹⁸⁵ M. Bogdan, *Komparativ Rättskunskap* (2003), p. 91.

¹⁸⁶ See judgment in *Björnekulla*, C-371/02, EU:C:2004:275, para. 13.

¹⁸⁷ J. Kellgren (1997), p. 50- 55; U. Bernitz, A. Kjellgren, *Europarättens grunder* (2014), p. 195-196.

¹⁸⁸ See RÅ 1996 not. 243.

5.4.2 Interpretation of the exemption before the accession

Seeing, as the exemption provision in the VAT Act is new in relation to the corresponding provision in the VAT directive there is no great quantity of case law in this area before the accession of Sweden into the EU. However, the amount of cases that have been decided by the HFD still provides for a description of the interpretational approach applied by the HFD regarding the exemption.

In a case from 1993, the concept of asset management was subject to ruling of the HFD.¹⁸⁹ The case concerned a company which managed the assets on behalf of a client. The question posed to the HFD was if this management of assets was considered to be exempt as “transactions involving securities and comparable activities” in chapter 8 paragraph 3 in the VAT Act. The HFD held that according to the preparatory works to the provision the exemption targets the actual transaction activity and the distribution of ownership of the securities. Even though asset management services are performed in close relation to the transactions, these services are independent concepts and are therefore not exempt under the same provision.

The HFD has further stated that in order to benefit from the exemption in chapter 8 paragraph 3, the person performing the exempt service needs to be a financial institution.¹⁹⁰

This line of reasoning has been consistent. For example, a real estate agent was not considered to perform exempt negotiation activities when he provided mediation between his clients and the bank granting his clients a loan in exchange for 1 percent of the lending amount as a fee. According to the HFD, the negotiation service needs to be performed by a financial institution in order to be considered exempt and since the real estate agent is not considered a financial institution, the negotiation services he performs could not be considered to be covered by the exemption.¹⁹¹

5.4.3 Chapter 3 paragraph 9

From the year 1994, the old VAT Act was replaced with the current act. However, the provision concerning financial service exemption remained unchanged and the cases that concerned a period before the 1994 and reached the HFD after the new VAT Act entered into force, were decided based on the provision in the current VAT Act.¹⁹²

¹⁸⁹ RÅ 1993 not. 71.

¹⁹⁰ See for ex. RÅ 1992 not. 209 and RÅ 1992 not. 210.

¹⁹¹ RÅ 1994 not. 13.

¹⁹² See for ex. the reasoning of the HFD in RÅ 2003 ref. 72 and RÅ 2004 ref. 100.

The case RÅ 2003 ref. 94 concerned the concept of underwriting guarantees and the question posed to the HFD was whether the service consisting of providing underwriting guarantees could be seen as an ancillary service to exempt corporate finance services and therefore also exempt from VAT.¹⁹³ The case concerned the transition period between the old VAT Act and the new and illustrates that the exemption provision in the old VAT Act was interpreted together with the provision in the new VAT Act.

In its judgment, the HFD consequently changed the judgment of the Administrative Court of Appeal in which the court of Appeal decided that the services were to be exempt. The conclusion of the Administrative Court of Appeal was reached in reference to the contextual interpretation of the exemption provision made by the HFD in RÅ 1996 not. 243.¹⁹⁴ However, the HFD started by stating that the exemption provision is constructed according to the corresponding exemption provision in the Sixth directive. A definition of banking and financial services has not been clearly stated in the preparatory works but should be interpreted according to the directive. The HFD observed that even though the service of underwriting could be ancillary to a corporate finance service, the underwriting could also be provided as a separate service. In the case in question the underwriting guarantee was the sole service provided and unlike the Administrative Court and the Administrative Court of Appeal the HFD decided to deal with it as a separate service. Moreover, according to the judgment in *CSC* the services that benefits from the exemption needs to be able to alter or extinguish parties rights. An underwriting guarantee does not fulfil this requirement and can therefore not be exempt according to the exemption provision.

In 2003, the HFD delivered a couple of judgments concerning the financial service exemption in VAT Act. One case concerned the asset management of investment funds.¹⁹⁵ In reference to the ruling in RÅ 1993 not 71, the HFD stated that these services are the same kind of management services.¹⁹⁶ Furthermore, the HFD stated that the services provided do not alter or extinguish parties' rights to the assets as has been held by the ECJ in *CSC*. Therefore, these services cannot be considered exempt from VAT.

The question whether certain management services provided to a fund trading in securities were exempt from VAT was the subject of another ruling from the HFD in 2003.¹⁹⁷ First, the HFD held that the VAT Act states an exemption for the management of investment funds. According to the HFD, this does not apply to close ended funds as in the case in question. Second, the HFD stated that the Member states has not been given the discretion to define what fund management services are exempt. The

¹⁹³ The HFD stated earlier in RÅ 2001 not. 23 that corporate finance services are covered by the exemption in chapter 3 paragraph 9.

¹⁹⁴ See section 5.4.1 above.

¹⁹⁵ RÅ 2003 not. 178.

¹⁹⁶ The HFD also made reference to the case RÅ 1993 not. 71 in its judgment. The same line of reasoning was followed in RÅ 1998 not. 248.

¹⁹⁷ RÅ 2003 not. 179.

interpretation of the term should therefore be made in conformity with EU law. To exempt administrative services as fund management provides for a too extensive interpretation of the concept of management in the provision. Therefore, VAT exemption was not granted.

In 2005, the HFD delivered its judgment in a case concerning the intermediation services provided by a mail-order company (company X).¹⁹⁸ Company X provided certain intermediation services to customers on behalf of the company that is supplying the loans and credits (company Y). Some of the services provided by X were the administration of loan applications and the promotion of the loans supplied by Y to the clients. The question posed to the HFD was if the services provided by X are regarded as intermediation services exempt from VAT. The HFD considered that the outcome of this case is to be decided according to the judgment of the ECJ in *CSC* and considered it unnecessary to refer the case to the ECJ for preliminary ruling. Furthermore, in reference to the judgment in *CSC*, the HFD considered the services provided by X as being credit negotiation services. According to the HFD, the concept of negotiation entails services of allowing two parties to conclude a contract without the benefit of the negotiator in mind. The mere performance of administrative services as such do not fulfil the concept of negotiation. In addition, the company did not act entirely as an intermediary. Therefore, the HFD decided that the services performed should not be exempt from VAT. A similar line of reasoning has been applied by the HFD in cases regarding mediation services provided by a third party between clients and stockbrokers.¹⁹⁹

In 2010, the HFD decided another case concerning intermediation.²⁰⁰ The case concerned a chain of stores that have entered into an agreement with a company supplying credit services. Company X provided administrative services to the chain of stores and the question posed to the HFD was if the services provided by company X could be considered exempt intermediation services. According to the HFD, the company X does not have the status as an intermediary since the stores perform the actual intermediation activity. The relation between X, the stores and the credit company has not been specified as an intermediation relation, in the same sense as in the *Volker Ludwig* case. In addition, the HFD referenced the judgment in *Volker Ludwig* and stated that the services performed by company X do not fulfil the specific and essential functions of intermediation and are therefore not exempt from VAT.

The influence of *Volker Ludwig* can also be noted elsewhere in the case law of the HFD. The case RÅ 2009 ref. 49 concerned transactions in shares but the HFD still considered the *Volker Ludwig* applicable since there was an element of intermediation involved. The case concerned an asset manager who supplied client contacts and orders to a bank who trades and manages transferable securities. The services performed could essentially be regarded

¹⁹⁸ RÅ 2005 not. 61.

¹⁹⁹ RÅ 2003 ref. 72 and RÅ 2003 not. 190.

²⁰⁰ RÅ 2010 ref. 27.

as administrative services. For every transaction of securities the bank made with the clients, it received a brokerage fee of which the asset manager received a percentage. The HFD observed that the actual purpose of the agreement between the asset manager and the bank was to make sure the bank could conclude the transactions on behalf of the clients. In light of the *Volker Ludwig*, the services provided by the asset manager were therefore considered being an intermediation service exempt from VAT. In addition, the HFD also stated that it is not necessary to actually participate in the transaction of securities in order to benefit from the exemption in chapter 3 paragraph 9.

As a contrast, the judgment RÅ 2009 ref. 49 deviates from previous rulings of the HFD where the HFD has stated that services of negotiation between two parties do not alter or extinguish parties rights and are therefore not exempt from VAT.²⁰¹ In these cases, the HFD relied on the judgment in *CSC* in its conclusions.

The indistinct application of the financial service exemption was highlighted in a case from 2011.²⁰² The case concerned the concept of underwriting guarantees in relation to the buying of shares the Swedish practice. As seen in the previous judgment from 2003²⁰³, the underwriting guarantee service was considered not to be exempt. Both the Administrative Court and the Administrative Court of Appeal ruled according to the judgment of 2003 and considered this situation similar. Therefore, the services were not considered exempt. The HFD however, decided to stay the proceedings and refer the question to the ECJ for a preliminary ruling.

In its judgment, the ECJ stated that the services are considered to be exempt according to the directive due to the effect of the principle of fiscal neutrality.²⁰⁴ Contrary to what the HFD stated in RÅ 2003 ref. 94, the ECJ held that the issuing of an underwriting guarantee meets the requirement of altering and extinguishing parties rights and obligations laid down in *CSC*, if the guarantee is used. By making the exemptions conditional on whether the guarantee is used or not would be contrary to the principle of fiscal neutrality. In accordance with the judgment of the ECJ, the HFD stated that the interpretation of the directive also applies to the interpretation of the VAT Act and therefore the services were considered exempt from VAT.

Furthermore, from an interpretational point of view it is interesting to examine the concept of factoring in the Swedish practice since the wording of the VAT directive in the Swedish language version has explicitly stated factoring alongside the expression of debt collection in article 135(1)(d).²⁰⁵

²⁰¹ See for ex. RÅ 2003 ref. 72, RÅ 2003 not. 189 and RÅ 2003 not. 190.

²⁰² HFD 2011 ref. 38.

²⁰³ See RÅ 2003 ref. 94 above.

²⁰⁴ Judgment in *SEB*, C-540/09, EU:C:2011:137. See also section 4.3.4 above.

²⁰⁵ It is interesting to note however that the word "factoring" now has been removed in the Swedish language version of the VAT directive. Nevertheless, confirmation of the fact that factoring was explicitly stated in the language version can be found, see for ex. judgment in *MKG Factoring*, C-305/01, EU:C:2003:377.

In addition, the wording of the VAT Act states that administrative services in relation to factoring are not VAT exempt.

In 2012, the HFD delivered a judgment in a case concerning the concept of factoring.²⁰⁶ The Swedish tax authorities contested that the consideration received from buying debts without the assumption of the risk of loss should be VAT exempt. The question arose in the proceeding whether the wording of chapter 3 paragraph 9 in the VAT Act was sufficiently clear and whether the provision could be interpreted in conformity with EU law. According to the wording of the provision only administrative services in relation to factoring were excluded from the exemption. However, according to the HFD, the provision has been drafted in accordance with the corresponding provision in the VAT directive. The concept of factoring is therefore included in the expression “collection of invoices” in the Swedish provision. In reference to the judgment in *MKG Factoring*, the HFD then continued by stating that this application is consistent with EU law and the fact that administrative services are the only services excluded in the wording does not preclude such an interpretation. The reason that the wording of the provision includes “administrative services in relation to factoring” is only to clarify that these services are also not exempted from taxation.²⁰⁷

Worth mentioning is that the case law also features a discussion on whether factoring is considered to be a debt collection service or actually a corporate finance service exempt from VAT. In the case decided by the Administrative Court of Appeal²⁰⁸, the Administrative court argued in its judgment that the provision in the VAT Act only excludes administrative services from the exemption and that the factoring service itself is exempt.²⁰⁹ The preparatory works to the provision support this. The intention of the legislator was that the collection of invoices consists of two separate services, one taxable administrative service and one exempt financial service.²¹⁰ According to the Administrative court, although the term banking and financial services in the VAT Act is vague and needs to be interpreted in conformity with EU law, the wording of the provision clearly states that only administrative services in relation to factoring is not exempt which suggests that factoring itself is exempt. Therefore, an interpretation in conformity with EU law is not possible to achieve. The result of a consistent interpretation would otherwise be to the disadvantage of the person supplying the service. Nevertheless, as seen above, the Administrative court of Appeal and the HFD do not share this view and has stated that factoring is considered as debt collection in accordance with the interpretation of the ECJ regarding the directive.

²⁰⁶ Judgment by the HFD in case nr. 6291-6293-10.

²⁰⁷ This same interpretation was made by the HFD in case nr. 753-757-11 and by the Administrative Court of Appeal in case nr. 3144-3146-10.

²⁰⁸ Administrative Court of Appeal, case nr. 3144-3146-10.

²⁰⁹ Administrative court, case nr. 10201-10203-10.

²¹⁰ SOU 1994:88, p. 126.

6 Concluding remarks

This chapter summarises and elaborates on the analysis and conclusions made in the previous chapters.

6.1 EU law

It is settled case law that VAT exemptions constitute derogations from the general principle of VAT and should therefore be interpreted strictly. It is also settled case law that the ECJ has not been inclined to interpret the financial service exemption according to that principle. On the contrary, the interpretation of the exemption has been quite extensive. This is mainly due to the effect of the principle of fiscal neutrality. It can be argued whether this interpretation contributes to the increase of legal certainty regarding the exemption or not.

Furthermore, the introduction of the distinct whole criteria by the ECJ is another factor that provides for uncertainty regarding the interpretation of the exemption. When introduced, the ECJ did not motivate this introduction in any way nor explained the lack of references to the methods of interpretation. In addition, the “distinct whole” criteria is used frequently by the ECJ but not entirely consistent. In some cases the ECJ has made no reference to the criteria whatsoever. In the earlier cases dealing with the financial service exemption, ranging from the case *SDC* to the case *Abbey National* the distinct whole criteria has been a reoccurring feature of the interpretation in these cases. In the cases without reference to the criteria, the ECJ has confined in the traditional interpretational methods when interpreting EU law in order to interpret the scope of the provision. In *MKG* and *Velvet & Steel* the ECJ has not referenced the “distinct whole” criteria at all and instead interpreted the exemption with the usage of the traditional interpretational methods. Thus, the case law in this area shows a lack of consistency regarding the interpretational approach of article 135(1)(b)-(g) applied by the ECJ.

However, it is through the case law of the ECJ that the financial service exemption has been developed and the inconsistencies of the ECJ when interpreting the provision has not provided for increased legal certainty in this regard. Moreover, with regard to the impact of the principle of fiscal neutrality on the scope of the exemption, one can ask if the principle actually is compatible with the principle of strict interpretation of VAT exemptions.

Finally, the exemption for financial services has not been clearly motivated in the preparatory acts leading up to the adoption of the Sixth directive. The purpose of exempting financial services from VAT was not specified until the ECJ delivered its judgment in *Velvet & Steel*. Although this purpose has

been criticized to some extent the ECJ has since maintained this approach throughout its judgments. On the basis of that decision the ECJ started to build a proper base for exempting financial services by actually making reference to the purpose they aim to achieve. The Member states has therefore been given a consistent basis of the financial service exemption on which national law can be interpreted in accordance with. Although, it is very fragile.

6.2 Swedish law

The exemption provision in the Swedish VAT Act did not change in a significant manner due to the Swedish accession, which essentially means that the interpretation of HFD before and after the accession departs from the same wording. Therefore it becomes interesting to note that the conclusions reached by the HFD in the cases before the accession are different from those reached by ECJ in *Muy's en de Winter* and *SDC* concerning the directive. This supports the conclusion that even though the Sixth directive influenced the VAT Act, the interpretation and application of the VAT Act by the HFD is different from the result according to the VAT directive.

It is clear that the interpretation and developments of the financial service exemption in the VAT directive has influenced the interpretation and application of the Swedish provision. Looking at the case law of the HFD before the accession into the EU, the financial service exemption has been given a restrictive interpretation and the HFD has been unwilling to extend the scope of the exemption. The most significant example is the fact that the HFD considered the financial service exemption applicable only to the services performed by financial institutions. As seen from further case law, the HFD has changed this opinion due to a clear statement in that regard made by the ECJ in *SDC* and in latter cases.

Furthermore, the Swedish financial service exemption has not been given an autonomous meaning in the VAT Act, in comparison to the corresponding exemption in the directive. The HFD has made little effort to define the exemption and instead departed from the strict meaning of the wording. After the accession, the HFD has relied on the definition and interpretation of the ECJ regarding the directive and has looked at the outcome of individual cases decided by the ECJ in order to define the exemption.²¹¹

Consequently, the reliance on the ECJ provides for the inconsistencies of the ECJ to manifest in the judgments of the HFD. A good example is the case RÅ 2005 not. 61, in which, the HFD relied on the judgment of the ECJ

²¹¹ See for example RÅ 2001 ref. 23, RÅ 2003 ref. 72, RÅ 2004 ref. 100, RÅ 2009 ref. 49, HFD 2014 ref. 73. Although some examples can be found where the HFD has tried to define the financial service exemption in the VAT act, see section 5.4.1 above.

in the case *CSC*. However, as the case RÅ 2010 ref. 27 shows, the reliance on *Volker Ludwig* provides for a different interpretational outcome. Although the HFD did consider the services performed in both cases as not exempt, the reason for not exempting the services in RÅ 2010 ref. 27 was the lack of an intermediary relationship and that the person seeking the exemption did not perform the intermediation activity. However, the outcome of the case RÅ 2005 not. 61 would likely be very different if we apply the reasoning of the HFD in RÅ 2010 ref. 27 to it instead.

Overall, it is perhaps the uncertainty of the financial service exemption on EU level and the fear of having a legislation that is incompatible with EU that has provided for such a restrictive approach from the HFD and such extensive reliance on the judgments of the ECJ. The interpretation and the application of the exemption have been developed in the case law of the ECJ instead of in the legislation. The task of clarifying the uncertainty that exists regarding the exemption has therefore been left to the interpretation of the ECJ. As the ECJ has provided a more extensive interpretation of the exemption, the HFD has changed its restrictive stance accordingly. Thus, it becomes clear that the interpretation of the HFD has changed to a much more extensive approach due to the interpretation of the ECJ.

6.3 The consistent interpretation

As seen above, the whole purpose of consistent interpretation is to give effect to EU law in the application of national legislation. In case of financial services, the question that needs to be answered is, if EU law provides for a clear and consistent base in order to give the national courts a chance to put EU law in effect. The legal uncertainty that exists on EU level in this area provides difficulties for the national courts to follow, at least when looking at how the ECJ judgments has effected the interpretation of the HFD. However, the case law of the ECJ seem to have reached the point where some consistency can be established for the national courts to rely on.

With regard to the consistent interpretation itself, the key in this issue lies within the question if the national provision provides room for interpretation. Seeing as the Swedish VAT Act is structured according to the directive it is quite remarkable that the wording of the exemption provision provides such a general wording and deviates to such extent from the wording in the directive. Consequently, a general wording provides for greater room to interpret a provision, which leaves a lot of responsibility to the national court to make sure the law is interpreted in conformity with EU law.

In this instance, the HFD has relied on the case law of the ECJ in order to interpret the provision in the VAT Act. According to the judgment of ECJ in *Pfeiffer*, the basis of a consistent interpretation is the result of the provision according to national methods of interpretation. However, in a harmonized area such as the area of VAT, the purposes of the EU acts, in this case the

VAT directive should in principle be underlying the national provisions implementing said directive. Due to the primacy of EU law, the Swedish method of interpreting law by examining the preparatory works is not actually used. A consistent interpretation therefore becomes the interpretation of the national provisions according to the principles and methods sought to interpret the directive. In essence, this means that the national court needs to interpret EU law in order to achieve a truly consistent interpretation regarding the VAT provisions. By examining EU law, the national court can determine if the result of the application prescribed in EU law fits the result of the application of national law, in this case chapter 3 paragraph 9 in the VAT Act.

The case law of the HFD shows that when dealing with the financial service exemption, the interpretation of the HFD has its substantial starting point in EU law, which establishes a consistent interpretation made by the HFD. However, the perception demonstrated in the preparatory works to the financial service exemption, that the provision is entirely compatible with EU law should perhaps be reviewed. It is clear that when relying on the wording of the Swedish provision alone and without any guiding judgments by the ECJ it is not certain whether the HFD would reach the same conclusions as the ECJ. In the case from 2003 regarding fund management services, the HFD did observe the need to interpret the concept of management in conformity with EU law but that it could rely on the Swedish provision in this regard.²¹² The HFD decided the case without referring it to the ECJ for a preliminary ruling. However, a few years later the ECJ delivered the judgment in *Abbey National*, concerning the same type of management services provided in the case before the HFD earlier. It was stated in that judgment that administrative services relating to fund management are to be considered exempt within the meaning of the directive. This judgment showed that the interpretation of the HFD was not in accordance with the directive. Thus, the ruling of the HFD in the RÅ 2003 not 179 no longer becomes valid law since there is a ruling from the ECJ in this matter that contradicts it.

Moreover, in the judgment HFD 2011 ref. 38, the HFD stated that the treatment of underwriting guarantees in the directive also applies to the treatment of the same guarantees according to the VAT Act. This despite the fact that the HFD in the previous ruling RÅ 2003 ref. 94, stated that the service of providing underwriting guarantees is not exempt under the Swedish provision. It is obvious that the HFD in the judgment HFD 2011 ref. 38 overrules the judgment delivered in RÅ 2003 ref. 94 after consulting the ECJ.

In addition, the HFD has even used the definitions of the ECJ regarding the directive in order to establish the law according to the Swedish provision. The judgments of the HFD concerning factoring exemplifies this. The combination of the statements in the preparatory works concerning factoring

²¹² RÅ 2003 not. 179. The case has been presented above.

and the fact that the expression “factoring” has been removed from the Swedish language version of the VAT directive, could perhaps suggest a different view on factoring. From a Swedish point of view, factoring is perhaps not intended to be a debt collection service entirely. This advocates somewhat for the opinion of the Administrative court in this regard and that factoring actually is an exempt financial service.

Seeing as the HFD strives to interpret the Swedish provision according to the directive, it is noteworthy that not more cases are referred to the ECJ for a preliminary ruling. The cases RÅ 2003 ref. 94 and RÅ 2011 ref. 38 are only one example of the difference between the view of the HFD and the view of the ECJ about how EU law is interpreted and applied. In addition, had the HFD referred the case RÅ 2003 not. 179 to the ECJ as well, it would most likely have resulted in a different outcome.

It becomes clear that consistent interpretation is able to provide an extensive interpretation of the national provision, as seen in the case RÅ 2007 ref. 13. Moreover, it is clear from the discussion above that the HFD has not deviated from the interpretation of the ECJ when interpreting the financial service exemption.

However, as seen above, the consistent interpretation is still subject to the fundamental principles stated in the EU treaties, such as the principle of legal certainty. The national court cannot interpret national provisions against these principles, i.e. *contra legem*. Nevertheless, the degree of EU harmonization plays an important role when determining the limitations of the consistent interpretation. In the area of VAT, national provisions are to their entirety based on the sources of EU law. Seeing as the financial service exemption has been developed by the ECJ, the main source therefore becomes the case law. Thus, the consistent interpretation is not limited for the national courts, as long as the interpretation of the ECJ does not infringe the general principles of EU law.

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