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RELATIONS BETWEEN THE PRINCIPLE OF NEUTRALITY AND ELEMENTS OF VALUE ADDED TAX STRUCTURE

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Abstract The principal of neutrality is a key principle of the European Union (EU) Value Added Tax (VAT) system. The concept of tax neutrality has a number of dimensions and meanings. The purpose of the article is to examine whether the principle of neutrality shapes the main elements of VAT structure, what concepts of tax neutrality are proper to shape each of those elements, and how the principle of neutrality affects each of those elements. The method adopted for the examination is a doctrinal method – analysis of the VAT Directive provisions (using a formal-dogmatic approach supported by analysing selected judgements of the Court of Justice of the EU) but without those that concern special rules. The study showed that the basic elements of the VAT structure such as the subject of taxation, object of taxation, tax basis, tax rates, exemptions, and conditions of payment are shaped in different manner and extent by the principle of neutrality. Tax neutrality in its basic sense (marked N1) has the strongest influence on basis of taxation (improper amount of the basis disallows shifting the tax forward onto the customer and regaining output tax to relieve the taxable person entirely from the burden of the VAT) and obviously it influences the right to deduct input tax likewise in the tax period (term of refund). Tax neutrality in another sense (marked N2) by demanding equal treatment, affects such VAT elements as subject and object of taxation, exemptions and rates. Tax neutrality in the broadest sense (N3), as a term consisting of N1 and N2, concerns all the elements of VAT.

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Introduction

The value added tax (VAT) has its background in turnover taxes known already in ancient times. The serious disadvantage of such type of tax was the lack of neutrality due to multi-stage functioning – the more upstream stage in the supply chain, the higher final prices (cascading taxation). Thus, the amount of accumulated taxation increased proportionally to the number of stages. Obviously, it led to distortion of competition, especially in long trade chains. The remedy for the problem might be a tax that solely burdens value added in the current stage of turnover. This kind of taxation was introduced for the first time to an internal country tax system in France in 1954 (Charlet & Owens, 2010, p. 943) and more than a decade later - to the European Union's law, by several directives, among which the most important were First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes and Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes. Presently, the value added tax is mainly ruled by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive). The VAT Directive recitals indicate neutrality as a result of a common system of VAT (recital 7) and as something that should be preserved (recital 30). Therefore, tax neutrality is regarded as the principle specific for VAT (Famulska & Rogowska-Rajda, 2018, p. 88) and as the quintessence of VAT (Kondraszuk, 2016, p. 127).

The purpose of the article is to examine whether the principle of neutrality shapes the main elements of VAT structure, what concepts of tax neutrality are proper to shape each of those elements and how the principle of neutrality, interpreted by the Court of Justice of the European Union (CJEU), affects each of those elements. The method adopted for the examination is a legal (doctrinal) method - analysis of the VAT Directive provisions (using a formal-dogmatic approach supported by analysing selected judgements of CJEU) but without those provisions that concern special rules (only *lex generalis* not *lex specialis*). That approach allows us to focus on the main elements of the topic.

The concept of tax neutrality and the principle of neutrality

The concept of tax neutrality mainly has an economic dimension however it fulfils its normative equivalent. In other words, legal VAT neutrality is a consequence of neutrality in an economic sense (Gibasiewicz, 2012, p. 47). The VAT Directive, neither in its normative part nor in recitals, does not define neutrality. Nevertheless, looking through recitals and some essential articles of this act, we are able to construct a legal principal of neutrality.

The concept of tax neutrality has a number of dimensions and meanings. At least three of them should be highlighted.

The basic meaning (N1), frequently used by CJEU, concerns the right to deduct (or refund) input tax that is meant to relieve the taxable person entirely of the burden of the VAT payable or paid in the course of all his economic activity (CJEU, Rompelman case, 1985, pt 19; CJEU, I. Zimmermann case, 2012, pt 47), which prevents any aggregation of the tax. It directs that only consumption is an object of taxation.

In a broader sense (N2) tax neutrality means that supplies of goods or services which are similar, and which are accordingly in competition with each other, should not be treated differently for VAT purposes (CJEU, K. Fischer case, 1998, pt 22; CJEU, I. Zimmermann case, 2012, pt 48). In this context, neutrality preserves competition among enterprises. Looking from a subject's point of view, it can also be noticed that taxable persons in similar situations should be treated in equally, regardless of legal form of business (OECD, 2011, p. 5; CJEU, Ambulanter Pflegedienst Kügler GmbH case, 2002, pt 30). This is the transposition of the general principle of equal treatment (Famulska & Rogowska-Rajda, 2018, p. 88).

In the broadest sense (N3), tax neutrality means that taxation has no impact on taxpayers' decisions (Stiller, 2016, p. 243; Kristoffersson, 2019, p. 21), and is economically invisible (Adamczyk & Kluzek, 2018, p. 10). Tax neutrality in this meaning consists of all the above-mentioned forms (N1 and N2). Additionally, tax is recognised as neutral when it is not avoidable by legal methods (Stiller, 2016, p. 244). The broadest meaning of tax neutrality also comprises tax convenience (compliance-friendly). In practice, such neutrality is not fully achievable in any tax system simply because of the many compliance costs and administrative obligations levied on taxpayers. For instance, according to the report Paying Taxes 2020 (PWC, 2020), complying with consumption tax obligations in Poland requires 172 hours a year (the worldwide average is 90 hours).

Elements of value added tax in the light of the principle of neutrality

Elements of a tax can be defined as units that build a tax structure. Regarded as essential are: the subject, the object of taxation, basis of taxation, tax rates, exemptions, and conditions of payment (Wolański, 2009, p. 21). All those elements are present in VAT structure. Therefore, it seems to be important to examine how the principle of neutrality shapes or affects them.

Subject of taxation – taxable persons

According to Article 9 of the VAT Directive 'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity. Thus, subject of taxation in VAT is constructed on two strictly connected points.

The first is a personal scope which is stated in a very general and broad way ('any person'). All persons — natural and legal, both public and private, even entities devoid of legal personality — which, in an objective manner, satisfy the criteria set out in that provision are regarded as being taxable persons for the purposes of VAT (CJEU, Gmina Wrocław case, 2015, pt 28). Excluding one of the categories from the list would pose a risk of distortion of competition between persons taxable and non-taxable, which ought to lead to infringement of tax neutrality (N2). Moreover, operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them (CJEU, GfBk Gesellschaft für Börsenkommunikation mbH case, 2013, pt 31). Nevertheless, the VAT Directive specifies one significant exception. Due to Article 13, states, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions. However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. The reason for this exception is, as it supposed to be, that such entities, acting in the *imperium* sphere, have some kind of a monopoly. Activities pursued as public authorities are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators (CJEU, Fazenda Pública case, 2000, pt 17). Prima facie such exception, as far as it depends on lack of significant distortion of competition, is pursuant to the principle of neutrality (N2), however all Member States have their own public law systems and may define 'bodies governed by public law' in different ways. That would potentially be in contravention of the principal of neutrality (N2) and requires evaluation of distortions of competition by reference to the activity in question, as such, without that evaluation relating to any particular market, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical (CJEU, National Roads Authority case, 2017, pt 41).

The second point describing subject of taxation in VAT is related to a notion of 'any economic activity'. Article 9 presents several exemplifications of economic activity (producing, trading, supplying services, exploitation of tangible or intangible property for the purposes of obtaining income) but it does not define the notion. Thus, the most important, in the light of the principal of neutrality (N2), is to establish its strict meaning. Otherwise, supplies of goods or services which are similar, and which are accordingly in competition with each other, may be treated differently for VAT purposes. First of all, it is necessary to distinguish economic (professional, commercial) activity from private actions. A taxable person must act 'as such' for a transaction to be subject to VAT. A person performing a transaction in a private capacity does not act as a taxable person. A transaction performed by a taxable person in a private capacity is not, therefore, subject to VAT (CJEU, D. Armbrecht case, 1995, pts 16-18). Secondly, the purpose or results of the business activity do not matter. It is clear from the wording of Article 9 and seems to be obvious that even unprofitable activity is competitive to the profitable. Thirdly, the concept of 'taxable person' is defined widely, on the basis of the

factual circumstances and the status of taxable person does not depend on any authorisation or licence granted by the authorities for the exercise of an economic activity (CJEU, G. Tóth case, 2012, pt 30). Similarly, unregistered economic activity and illegal activity or even offences should be treated as taxable, apart from such cases where any competition between a lawful economic sector and an unlawful sector is precluded (CJEU, Coffeeshop 'Siberië vof case, 1999, pt 14).

All of the aforementioned factors indicate that the subject of VAT taxation should be interpreted broadly. Any narrowing of the concept of 'taxable person' may lead directly to infringement of the principal of neutrality (N2) due to unequal competition between persons taxable and non-taxable. We must be also reminded that the person excluded from the VAT system is automatically deprived of the right to deduct input tax (tax neutrality N1) and in consequence is treated as a consumer.

Object of taxation – objective nature of taxable transactions

The object of taxation in VAT is turnover that consists of supply of goods and services. Additionally, it includes certain intra-Community acquisitions and importation which actually do not make turnover. Supply of goods may take the form of domestic supply, exportation, intra-Community supply or intra-Community distance sales of goods and distance sales of goods imported from third territories or third countries.

According to Article 14.1 of the VAT Directive 'supply of goods' shall mean the transfer of the right to dispose of tangible property as owner. The term 'as owner' means that transfer a right of ownership is not necessary. A transaction may be categorised as a 'supply of goods' if, by that transaction, a taxable person makes a transfer of tangible property authorising the other party to hold that property de facto as if it were the owner, without the form by which a right of ownership of that property was acquired having any bearing in that regard (CJEU, 'Evita-K' EOOD case, 2013, pt 35). The purpose of such regulation is to eliminate differences between civil law regulations within the Member States and consequently to entail equal treatment and tax neutrality (N2).

According to Article 24.1 'supply of services' shall mean any transaction which does not constitute a supply of goods. Thus, in simplified point of view, all turnover ought to be classified as supply of either goods or services. This negative definition (as well as a positive definition of 'supply of goods') is objective in nature and applies without regard to the purpose or results of the transactions concerned (CJEU, Lajvér Meliorációs Nonprofit Kft. case, 2016, pt 22). That causes equal treatment of services which are similar and therefore follows the principal of neutrality (N2).

Basis of taxation – taxable amount depends on the principle of neutrality

The basis of taxation can be defined as the object of taxation expressed quantitatively or valued, predominantly in money (Wolański, 2009, p. 22). The VAT Directive (Article 73) rules that the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply. Keeping in mind that VAT is a direct tax and therefore is added onto the net price, it must be indicated that the taxable amount should allow one to regain the output tax to relieve the taxable person entirely from the burden of the VAT. In other words, the VAT should be shifted forward (as an input tax) onto a buyer. Any tearing down of this rule is contrary to the principle of neutrality (N1). It is also the reason why the VAT Directive introduces regulations providing that the taxable amount shall not include i.a. price reductions by way of discount for early payment, price discounts and rebates granted to the customer and obtained by him at the time of the supply (Article 79) and shall be reduced in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place (Article 90). In addition, the expression 'consideration' is a part of a provision of the European Union law which does not refer to the law of the Member States for the determining of its meaning and its scope. It follows that the interpretation, in general terms, of the expression may not be left to the discretion of each Member State. Such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria (CJEU, Grattan plc case, 2012, pt 22). This approach not only strengthens tax neutrality (N1), but also ensures equal treatment of taxpayers across the European Union and therefore corresponds with the principle of neutrality (N2).

Tax rates – different but neutral?

Tax rates in the EU VAT system have not been fully harmonised and each Member State has its own rate system. The VAT Directive provides that Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services (Article 96). It must be no less than 15%, but there is no maximum (Article 97). A country may apply either one or two reduced rates, but only to goods or services listed in the VAT Directive (Article 98). Such a system of tax rates would pose a risk for the principle of neutrality (N2). Level of taxation of similar goods or services may differ significantly in each State. The risk is partially reduced by the application of the destination principle (taxation in the place of consumption). For instance, the place of supply of intra-Community distance sales of goods shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends (Article 33 of the VAT Directive). Nevertheless, it must be admitted that there is no border control between Member States which makes it very difficult to apply the destination principle. As the OECD (2011, p. 5) has noticed, it is even more difficult to apply this principle to supply of services and intangible assets. Although the system of VAT rates does not comply with the principle of neutrality (N2), it must be borne in mind that the current provisions on VAT rates are the result of different compromises agreed upon by all the EU Countries and cannot be amended at the present time without rejecting those compromises. The EU Countries should focus on observing the principle of neutrality (N2) in their domestic law (see recital 7 of the VAT Directive and CJEU, J.K. case, 2021, pts 40-44). The exercise of the possibility granted to the Member States to apply selectively the reduced rate of VAT is subject to the twofold condition: first, that they isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply at issue and, secondly, that they comply with the principle of fiscal neutrality. Those conditions seek to ensure that Member States make use of that possibility only under conditions which ensure the correct and straightforward application of the reduced rate chosen and the prevention of any possible evasion, avoidance or abuse (CJEU, Pro Med Logistik GmbH and E. Pongratz joined cases, 2014, pt 45).

Tax exemptions – do they have something in common with tax neutrality?

Tax exemptions in the VAT system are specific. First of all, when any supply of goods or services is exempt from VAT it does not mean that it is not an object of VAT regulations and has impact on a few elements of the system such as the right to deduct. Secondly, the VAT Directive introduces two types of exemptions: exemptions without the right to deduct (this concerns most exempt transactions) and exemptions in respect of which suppliers are allowed to deduct their input VAT (used for exports of goods and also for intra-Community supplies of goods) which is technically applied by a 0% rate mechanism. The second type of exemption, applying to exports, serves to ensure tax neutrality (N3) called 'external neutrality' (VAT does not deform a geographical structure of a trade chain), and applying to intra-Community supplies corresponds with tax neutrality (N2) by 'supporting' the destination principle.

It has been stated (Piłaszewicz, 2010, p. 64) that exemptions from VAT may induce disruptions and infringe the principle of neutrality. Undoubtedly, lack of deduction of input tax impacts tax neutrality (N1) but it is possible in some cases, as long as it has compensation in potential output tax (amount of the tax that would be paid if the exemption were excluded), so that the tax neutrality (N1) will be not infringed. Furthermore, regulations introducing VAT exemptions could infringe the principle of neutrality (N2) if they were implemented or interpreted improperly. Exemptions provided for the VAT Directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another (CJEU, Commision v. Hellenic Republic case, 2006, p. 9). The terms used to specify the exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect (CJEU, PFC Clinic AB, 2013, p. 23).

Conditions of payment – should they be shaped by the principle of neutrality?

Analysing relations between tax neutrality and conditions of payment in VAT three elements must be taken into consideration - tax period, tax calculation and terms of tax payment. All those elements, in the VAT system, should be established by Member States in domestic legislation in respect of the principles of convenience and proportionality. Otherwise, complying with obligations concerning the elements will not be in accordance with tax neutrality (N3).

Tax period is also connected with the principal of neutrality (N1) – if it is too long, the refund of the input tax is excessively deferred. For instance, a monthly tax period when the term of refund is 60 days results in 90 days of awaiting the refund (30 + 60), whereas an annual tax period and the same term of refund results in 425 days of waiting (365 + 60). Conditions of refund cannot undermine the principle of neutrality (N1) by making the taxable person bear the burden of the VAT in whole or in part. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT. This implies that the refund is made within a reasonable period of time by a payment in liquid funds or equivalent means, and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (CJEU, A. Sosnowska case, 2008, pt 17).

From a technical point of view, we may consider as a tax calculation in VAT a difference between output tax and input tax in a tax period (usually one calendar month). That difference creates an aggregated value that corresponds in general to value added at this particular stage of turnover. The output tax depends on tax basis and tax rate. The key institution in this process is the right to deduct input tax. The purpose of the right is to relieve the taxable person entirely of the burden of the VAT. Any limitation of that infringes tax neutrality in sense N1 and - as far as it is not applied in a general way - tax neutrality in sense N2. Every limitation on the right of deduction of VAT affects the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases expressly provided for VAT Directive (CJEU, Magoora sp. z o.o. case, 2008, pt 28). The relationship between the principal of neutrality (N1) and deduction of input tax is well researched and described in literature (i.a. Militz, 2013, pp. 65-95; Gibasiewicz, 2012, pp. 262-407; Famulska, 2015, pp. 57-64) and CJEU judgements and it is not purposive to repeat here all those accurate conclusions posted there. Only one significant idea is worth being put forward. The right to deduct input tax has become unfortunately the "Achille's heel" of VAT (Nowak, 2016, p. 365), due to VAT frauds where the right is "used" to obtain unlawful VAT refunds. On the one hand, the taxpayer who is a "beneficial owner" of a VAT refund received by tax fraud should be deprived of all gained advantages. On the other hand, depriving one of a VAT refund or deduction is not pursuant to the principal of neutrality (N1). This dilemma is seemingly unsolvable, but two factors must be taken into consideration. Firstly, quite often there is no real input tax because there is no real transaction at the previous stage of turnover (transactions are artificial). Secondly, taxpayers who have committed tax evasion are not in a situation comparable to that of taxpayers who comply with their obligations. Accordingly, the principle of neutrality (N2) cannot legitimately be invoked by a taxable person who has intentionally participated in tax evasion (CJEU, M. Marinova ET case, 2016, pt 49). In consequence, either the principle of neutrality (N1) is not infringed or is "prevailed" by the principle of neutrality (N2).

Conclusions

The concept of tax neutrality has many, complementary meanings among which the most significant for the EU VAT systems are the right to deduct input tax (N1), equal treatment (N2) and non-influencing taxpayers' decision (N3). All those concepts shape the basic elements of the VAT structure such as subject of taxation, object of taxation, tax basis, tax rates, exemptions, and conditions of payment. The subject of taxation is determined by the VAT Directive in a general and broad way that adheres to the principle of neutrality in sense N2. Similarly, corresponding with this principal (N2) regulations concern the object of taxation, due to their broad character. The next element of VAT structure – basis of taxation – requires, compliance with tax neutrality (N1, N2), and proper interpretation of the term 'consideration' as a subjective value actually received. Tax rates have not been fully harmonised within the European Union which does not support achieving fiscal neutrality (N2) even though the provisions of the VAT Directive introduce, in some areas, taxation at the place of consumption (the destination principle). Nevertheless, the principal of neutrality (N2) should be observed in domestic tax systems, especially by equal treatment of similar goods and services.

Moreover, introducing lower rates, Member States are obliged to prevent any possible evasion, avoidance or abuse, which strengthens neutrality in sense N3. In turn, VAT exemptions, excluding the right to deduct input tax, do not correspond with tax neutrality (N1). However, the terms used to specify the exemptions should be interpreted strictly and consistently with the objectives pursued by those exemptions. That allows us to follow the principle of neutrality in sense N2. The last described element of VAT structure – conditions of payment - may infringe tax neutrality (N3) on the condition it is not proportional and convenient enough for the taxpayer. Moreover, taxpayers seeking a VAT refund with any fraudulent or abusive intent can, in principle, be refused the right of deduction which does not infringe the principal of neutrality (N1, N2).

It should be clear, in the light of CJEU judgements, that there is no main element of the VAT structure that would not be shaped by one of the three, highlighted in the text, meanings of tax neutrality. Nevertheless, impact of each of them differs in various elements. Tax neutrality in sense N1 has the strongest influence on basis of taxation (improper amount of the basis disallows shifting the tax forward onto the customer and regaining the output tax to relieve the taxable person entirely from the burden of the VAT) and obviously on the right to deduct input tax likewise in the tax period (term of refund). Tax neutrality in sense N2 by demanding equal treatment, affects such VAT elements as subject and object of taxation, exemptions and rates. Tax neutrality in sense N3, as a broad term consisting of N1 and N2, concerns all the elements of VAT. Thus, as the analysis shows, the EU VAT system is built on the principle of neutrality in many areas. This conclusion should be borne in mind during both legislative and interpretive processes, especially by courts and fiscal authorities. Despite the fact that the article underlines the significance of the discussed principle, its conclusions do not exhaust the topic. Therefore, this paper should be treated as an introduction to further research. Particularly, relations between tax neutrality and special regulations or special schemes (such as margin scheme or exemption for small enterprises) might be a subject of future research.

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