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Indirect Taxation and the role of the European Court of Justice within the preliminary reference procedure

by

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Abstract

This article examines the interpretation of indirect taxes by the Court of Justice of the European Union (hereinafter, "CJEU" or "the Court") by means of the preliminary reference procedure. It is argued that the nature of the relationship between the national courts that send requests for preliminary rulings and the CJEU has undergone profound changes. By analysing the case law in the field of indirect taxation, the aim is to identify the new elements that frame this jurisdictional dialogue, as well as to explain how this framework affects the hermeneutic criteria employed by the Court. Finally, in this particular field, it will be stressed that the CJEU adopts a hierarchical role, rather than the traditional cooperative one as set out in the Treaty.

Key-words

Preliminary reference procedure, CJEU, indirect taxation, reformulation, formula, hypothetical questions, artificial dispute, effet utile, constructive cooperation, hermeneutic criteria, hierarchical model of justice

1. Introduction

The aim of this article is to contrast the classical axioms of the preliminary reference system with the current case law in the field of indirect taxation. These axioms can be defined as the structural elements – the bricks, in a metaphorical sense – of the interplay between the national courts which pose questions for preliminary rulings and the CJEU. In this complex and unsteady procedural framework, these axioms enable the Court to pinpoint exactly which are the specific functions and goals of the national courts within the preliminary reference procedure. How do we recognise these axioms in the case law? The answer is very easy: those axioms emerge as "*formulas*" employed by the Court in its legal reasoning. Therefore, my idea with this article is to challenge these axioms represented in the *"formulas*" used in the case law in this particular field on indirect taxation (Azoulai 2009: 165).

For the purpose of this article, I will focus on the analysis of the following indirect taxes: (i) Taxes on the raising of capital regulated by Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes (hereinafter, "Capital Duty Directive");[I] and (ii) the Value Added Tax regulated by the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter, "VAT Directive").

According to cases selected in relation to these two types of taxes, I emphasize that the interpretation of EU indirect tax law by the CJEU suggests that the preliminary reference scheme may not be generally applicable. Indeed, the necessity for the CJEU to look into the factual context of each case, in addition to solving the matter in dispute, is an element which, among others, clearly shows the breach of the axioms of the preliminary reference.

Insofar as the axioms of the preliminary reference procedure are challenged whenever the Court considers cases related to indirect taxation, the new procedural framework influences the hermeneutic criteria used by the Court in making decisions. Finally, this article claims that the case law in the field of indirect taxation is a good example of the change of policy that the CJEU is adopting towards a hierarchical model of justice, rather than a cooperative one, in the field of indirect taxation. In other words, the traditional functions of the CJEU within the preliminary reference system are being replaced by those which belong to a national Supreme Court.

2. The breach of the axioms of the preliminary reference procedure in the field of indirect taxation

Article 267 TFEU (ex article 177 TCE) sets out a clear distribution of roles between the national courts and the Court of Justice of the EU. According to this provision, the CJEU has the right to interpret EU law at the request of national courts which apply that law – as interpreted by the Court – to the cases they are dealing with. In other words, under this model of cooperation, whereas national courts have exclusive jurisdiction to raise questions for preliminary reference by means of assessing the relevance and content of the questions to be addressed, the CJEU is confined to giving an abstract interpretation of EU law that should be useful for the former. The idea behind this cooperation between national courts and the CJEU is thus a dialogue in *"equality of arms"*.

As long as the tasks are clearly assigned, the preliminary reference procedure provides a rigid framework for safeguarding the above-mentioned distribution of roles between the national courts and the CJEU. Taking into account the drafting of preliminary rulings by the Court, the following three axioms, which constantly emerge as "formulas" in the case law, can be extracted to characterize this relationship:

i. The national court is the only body competent for providing the CJEU with the facts and the applicable national law. The CJEU is therefore confined to interpreting EU law within the fixed parameters provided by the national court.
ii. The national court is the only body competent for resolving the case at stake, using the interpretation of EU law given by the CJEU.
iii. The Court is precluded from answering either references raised in artificial claims or hypothetical questions.

Our task in the following section is precisely to challenge the above mentioned three axioms with the case law of the CJEU within the field of indirect taxation.

2.1. The growing importance of the facts and national law settings

One of the main axioms of the preliminary reference procedure, put forth in *Salgoil,*[II] was the preclusion of the CJEU to appraise the facts of the case: *"Article 177 is based on a distinct separation of functions between national courts and tribunals on the one hand and the Court of*

Justice on the other, and it does not give the Court jurisdiction to take cognizance of the facts of the case, or to criticize the reasons for the reference." This means that the Court was not entitled to examine the facts of the case, nor to rule on the compatibility of the domestic provisions with EU law. The Court has, however, progressively widened its room for manoeuvre in order to examine the facts provided by a national court and the national law background applicable to the case at stake (Lenaerts 1994: 356).The breach of this *Salgoil* axiom came about in two stages.

First, as LENAERTS points out, the Court introduced a duty on the national court to provide an adequate and proper explanation of both the facts and the applicable national law. In the event that this requirement was not fulfilled, the CJEU would be forced to reject the reference for a preliminary ruling (Lenaerts 1994: 359; Barnard and Sharpston 1997: 1145). In its landmark decision, *Telemarsicabruzzo,*[III] the Court concluded that the information contained in the order of reference was fragmentary and inadequate for the Court to give a ruling, taking into account the importance of the facts in the field of competition law. Thus, in the words of KOVAR, *Telemarzicabruzzo* envisages the new framework of the preliminary reference procedure as a cooperation *"disciplinée"* between the national court and the CJEU (Kovar 2010 : 275).

The obligation to provide the CJEU with adequate factual context prevents the Court from giving an abstract judgment on the interpretation of EU law that would not be useful to the national court for solving the case in question.

The entrenchment of this cooperation *"disciplinée"* is also visible in terms of the reformulation of the references requested by the national court. According to the *Salgoil* reasoning, which strived at a radical separation between interpretation and application, some scholars conceptualised the reformulation of the preliminary references as a mechanism for phrasing new concepts of EU law (Bergerès 1985 : 158). To this effect, the reformulation was deemed to be an abstract task, a purely interpretative attempt to develop new categories of EU law that should be applied on a general basis in all cases. To put it another way, the idea was that the reformulation of preliminary references needed to be separated from the factual context provided by the national court.[IV] The CJEU has, however, begun to oversee the way in which the questions for preliminary references are drafted and submitted by national courts with the aim of giving a precise interpretation of the relevant EU law that is useful for the national courts to decide the case.[V] In other

words, for the purposes of reformulating or reframing the references for preliminary ruling, the Court will specify and flesh out the questions in light of the particular facts set out in the order for reference and the national case-file. For instance, in the recent case of *Nilaş and others,*[VI] the Court notes that: *"the fact that a national court has, formally speaking, worded a question by referring to certain provisions of European Union law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is, in this context, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of European Union law which require interpretation, regard being had to the subject-matter of the dispute".*

Second, not only is it necessary to provide an adequate description of the facts and the national law but, as the case law on indirect taxation reveals, this factual context also forms part of the final judgment. The interpretation of the relevant EU law provided by the CJEU depends on the description of these national settings.[VII] In *Schriever,*[VIII] the referring court asked whether or not a transaction, whereby a trader transferred the stock and fittings of his retail outlet to a purchaser and merely leased the premises which he owned to the purchaser for an indefinite period but terminable at short notice by either party, amounted to a *"transfer of a totality of assets within the meaning of the Sixth Directive"*. This specific narrative required the Court to take into account the relevant facts:[IX] *"It follows from the foregoing considerations that an overall assessment must be made of the factual circumstances of the transaction at issue in order to determine whether it is covered by the concept of the transfer of a totality of assets for the purposes of the Sixth Directive. In that context, particular importance must be attached to the nature of the economic activity which it is sought to continue."* Likewise, with regard to the taxes on an increase in shared capital, the recent case of *Speranza*[X] reveals how the Court considers the facts contained in the order of reference: *"it is also apparent from that file that it subsequently emerged, before the duty had been paid, that, as result of fraud, the contribution of assets had not in fact taken place at the time of registration and it was clear that it would not take place. In such circumstances and in the light of the considerations set out at paragraphs 32, 34 and 36 above, there could therefore be no demand for payment of capital duty."*

The level of detail of the indirect taxation regulations within the relevant EU law requires the Court to carefully examine the file of the case provided by the national court in order to reply properly to the national court. The indirect taxation case law demonstrates

that the task assigned to the CJEU cannot be confined to giving an abstract interpretation of EU law.

2.2. The solution to the dispute: does the CJEU rule on the compatibility of national provisions with EU law?

The crucial role of the facts and national legal settings for the interpretation of indirect taxation directives creates a new role for the Court by means of the preliminary reference procedure. According to one classical axiom mentioned above, article 267 TFEU precludes the CJEU from actually resolving the case at stake. Whereas the interpretation of EU law belongs to the Court alone, the application of the judgment falls within the scope of national courts. Therefore, the Court cannot rule on the compatibility of national law with EU law:[XI]

"It should first of all be noted that, although in proceedings brought under Article 177 of the Treaty, it is not for the Court to rule on the compatibility of national rules with provisions of Community law, the Court is competent to give a ruling on the interpretation of Community law in order to enable the national court to assess the compatibility of those rules with the Community provisions."

This formula, strongly evident in the case law of the Court, forestalls abstract interpretations of EU law which are not useful for national courts (Lenaerts 2006: 190). It should be noted that only the national court is endowed with the exclusive competence to set aside national provisions in breach of EU law.

In relation to the case law on indirect taxation, however, inasmuch as the CJEU has an adequate knowledge of the facts and applicable national law, it really does solve the dispute in question. Hence, the national court is only required to implement the judgment of the CJEU which is *per se* directly applicable.[XII] What is omitted from this new procedural framework applicable to indirect taxation is the distinction between interpretation and application. This phenomenon can easily be identified in the preliminary rulings handed down by the CJEU concerning the classification of goods under the Common Custom Tariff Nomenclature. In cases like *Gmurzynska-Bscher*[XIII], the Court ruled that *"a work of art consisting of a steel plate with a fused coating of enamel-glaze colors constitutes a painting executed entirely by hand within the meaning of Heading 9701"*. Insofar as the CJEU solves the dispute at stake, the national court is only obliged to implement the judgment of the Court. The justification for this breach of the established division between interpretation and application is clear:

customs duties at EU countries" national borders were abolished and replaced by a harmonized and uniform system for taxing imports (the Common Customs Code). As long as a harmonized regulation is contained within the Common Customs Code and the national court provides an adequate description of the facts, a shift in the role of the CJEU can be observed. The Court cannot be confined to providing an abstract interpretation of EU law; it must decide upon the case at stake. The same circumstances arise when the Court deals with cases belonging to the field of indirect taxation: a widely applicable regulation contained within the Directives as well as an adequate knowledge of the facts and national law background. The final outcome overcomes transcends the rigid margins of a mere interpretation of EU law. In *Komen,*[XIV] the dispute was about the meaning, for VAT purposes, of the transfer of a building in which the vendor started refurbishment works before the sale of the property. To the extent that those works required to be continued by the purchaser of the building, the national court questioned whether or not this transfer was deemed to be VAT exempted. The answer of the Court was that the "*directive must be interpreted as meaning that the exemption from value added tax provided for in that first provision covers a supply of immovable property consisting of a plot of land and an old building undergoing transformation into a new building, such as that in issue in the main proceedings, where, at the time of that supply, the old building had only undergone partial demolition work and was, at least in part, still used as such".* In this case, the national court was forced to considering this transaction as VAT exempted. The same wording is used by the Court in the cases concerning the indirect taxes regarding the raising of capital, like the recent case of *Immobilien Linz GmbH:*[XV] *"Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, must be interpreted as meaning that the absorption by a member of a company's losses pursuant to an undertaking given by the member before the losses were sustained, the sole purpose of which was to cover such losses, does not increase the assets of that company".*

Not only does the Court give a preliminary ruling on the interpretation of concepts that are directly applicable by the national court, it also takes a further step forward. Although, the Court cannot rule on the compatibility of EU law with national provisions, the terms employed in the preliminary rulings "*Articles ….. Treaty precludes national legislation.../doesn't come within the scope of EU law..."* go beyond a simple and abstract interpretation of EU law. In practice, the decision of the CJEU is therefore directly applicable, although formally the

national court is the only body with the competence to strike down the national provisions which are in breach of EU law. As in the case of *Peter David,*[XVI] national authorities are compelled to put a stop to an administrative practice. *"Articles 167, 168(a), 178(a), 220(1) and 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national practice...".*

The need for the CJEU to know the facts and the applicable national law, together with the detailed regulations within the field of indirect taxation, weaken the position of the national court which is confined to implementing the preliminary ruling that comes from Luxembourg. In order to give a useful and effective response to the questions posed by national courts, there has been a shift in the role of the CJEU with regard to indirect taxation. Rather than being limited to an abstract interpretation of EU law, the Court solves the pending case pending before the national court.

2.3. The preclusion of answering either hypothetical questions or questions raised in artificial disputes

Finally, the case law on indirect taxation reveals the weaknesses of the concepts of *"artificial dispute"* and *"hypothetical question"* which emerged for the first time in the *Foglia v. Novello*[XVII] cases. In a transaction between two private parties relating to the sale of liquor wine from Italy to France, a French custom duty that was charged on the transaction was challenged before an Italian court. The Court declined jurisdiction to give a ruling on the grounds that *"(I)t thus appears that the parties to the main action are concerned to obtain a ruling that the French tax system is invalid for liqueur wines by the expedient of proceedings before an Italian court between two private individuals who are in agreement as to the result to be attained and who have inserted a clause in their contract in order to induce the Italian court to give a ruling on the point."*[XVIII]

From this judgment, and with the aim of demonstrating the evolution of this axiom, I can draw a distinction between the prohibition from responding to hypothetical questions and the preclusion of answering questions raised in artificial disputes.

In relation to the first preclusion, the Court has declined jurisdiction to reply to questions addressed to it which were not linked with the dispute in question, such as in the cases of *Ritter-Coulais,*[XIX] *or Lourenço Dias.*[XX] In the latter case, the CJEU refused to reply to certain questions posed concerning the compatibility of the Portuguese motor-vehicle tax with EU law on the grounds that the questions raised were manifestly irrelevant for the

purposes of deciding the case. Although, in general terms, the questions addressed to the CJEU need to be connected with the facts of the case in order to prevent the Court from giving advisory and abstract opinions, some exceptions can be found in the case law in the field of taxation. The preliminary references requested by the Swedish advisory board, the *Skatterättsnämnden,* in which the Court deals with questions related to future, planned transactions that have not yet taken place, are an example of this. In cases like *X AB and Y AB* or in *X e Y,*[XXI] the Court actually gave a preliminary ruling despite the fact that the transactions in question had not yet been performed. Despite the hypothetical nature of the transaction, the Court justified its decision to respond on the grounds that the resolutions issued by the *Skatterättsnämnden* can be challenged before the *Regeringsrätten.* Therefore, a nuance is introduced into the abovementioned preclusion from answering "hypothetical questions": only those references which are *"sub judice"* allow the Court to give a preliminary ruling. In other words, the preclusion of answering hypothetical questions, does not apply to questions concerning future transactions raised by an advisory board such as the *Skatterättsnämnden* when the resolution can be challenged before an upper court.

With regard to the second preclusion, the CJEU declines jurisdiction to give a preliminary ruling whenever the dispute before the national court is not genuine. In order to assess whether or not the dispute in question is genuine, the Court is limited to carrying out a subjective analysis: what were the intentions of the parties when they raised the claim that enabled the national court to request a reference for a preliminary ruling? It should, however, be noted that this subjective approach has led to contradictory and unsatisfactory responses from the Court. For instance, in *Celestini*[XXII], an Italian Court referred to the CJEU questions for preliminary references related to a dispute between an Italian producer of wine and a German undertaking which was a buyer of this wine. The questions referred by the Italian Court focused on the compatibility of EU law with German provisions that established controls for testing the conformity of the imported wine introduced with Community regulations (oxygen 16/18 method). Although, the facts of *Celestini* and *Foglia v. Novello* are quite similar – both concerning the challenging of EU Member State legislation before a court or tribunal of another Member State in a transaction between two private parties – the Court admitted the references submitted in *Celestini,* without an adequate justification: *"Admittedly, neither Celestini nor Faber, both of which contest the legality of the*

oxygen 16/18 method, brought the matter before the German courts, which alone have jurisdiction to rule on the validity of the measure whereby the German authorities declared the wine in question unfit for human consumption. However, that finding is not in itself sufficient for the reference for a preliminary ruling to be regarded as inadmissible. There is nothing in the documents before the Court which clearly shows that the parties to the main proceedings had, as was the case in Foglia, jointly fabricated a dispute as a device for obtaining a preliminary ruling from the Court". Due to the lack of an explanation as to the criteria followed by the Court in assessing the genuineness of the dispute,[XXIII] the "subjective *test"* signifies a clear breach of the minimum standards of legal certainty. Likewise, this approach has provoked peculiar decisions such as the one in *Bertini*[XXIV], in which the Court replied to the questions submitted that: *"it is difficult to see how the answers which the Court is asked to give can influence the decision in the main proceedings. It should be added that there is nothing to suggest that those proceedings constitute in reality a procedural contrivance".* The wide criterion employed in *Bertini* could result in the removal of the notion of "artificial dispute" on the grounds that if the national court asks a question for preliminary ruling, there is a reason for that and the reference should be admitted.

The above criticisms and the uncertainty created by the Court with regard to the subjective *test* reveal the failure of the notion of "artificial claim". Moreover, as the case law in the field of taxation shows, to what extent do private parties *"fabricate"* a case with the ultimate goal of obtaining a judgment of the CJEU that asserts the breach of EU law by national provisions? Since article 258 TFEU does not entitle private parties to challenge national legislation which contravenes EU law by means of the infringement procedure, the preliminary reference procedure can be a suitable tool to remedy this lack of standing. Therefore, it should be noted how private parties or individuals can, in their pleadings, influence or convince a national court to pose a question for preliminary ruling on the basis that the national provisions are contrary to EU law. How can the Court draw a conclusion as to whether the dispute is artificial or genuine when it appears from the facts that the parties have "fabricated" the case in order to seek a preliminary ruling? For instance, in *Idéal Tourisme*[XXV], a dispute about the rate of the VAT to be charged in respect of the international transport of passengers, the undertaking in question considered the transaction to be exempt from the VAT, although the relevant Belgian legislation stipulated a VAT rate of 6% for these types of transactions. The decision not to apply the rate set out in the national legislation was justified by the undertaking on the basis of the existing

exemption in respect of international air transport which was considered as exempt. Although Belgium expressed its doubts about the artificial nature of the claim, the Court admitted the reference. Since the undertaking did not comply with the Belgian legislation, it could be deduced that the aim was to bring the case before the Court and, therefore, obtain a preliminary ruling on the compatibility of the Directive with the national provisions.

In conclusion, it can be noted that this two-part axiom, which has been described as the prohibiting the CJEU from answering either hypothetical questions or questions raised in artificial disputes, has been weakened: the mere existence of the proceedings before a national court would be enough for the admissibility of the claim. The nature of this preclusion has been blurred.

3. The interpretative criteria employed by the Court in indirect taxation

The breach of these three axioms suggests a sui generis position of the CJEU when dealing with indirect taxation issues. Due to the growing prominence of the case-specific facts and national legal settings provided by national courts, the role of the Court cannot be limited to providing an abstract interpretation of the VAT Directive or the Capital Duty Directive that enables the national court to solve the dispute at stake. Therefore, as observed, the Court goes beyond an abstract interpretation of the Directives in order to solve the dispute pending at the national level. How does this new jurisdictional interplay between the CJEU and the national courts influence the way in which the Court justifies its judgments?

This section is devoted to analyzing the interpretative criteria employed by the Court in reaching a solution in cases relating to indirect taxation. The reasoning of the Court comprises a chain of hermeneutic criteria[XXVI] that lead to the final solution. In other words, the idea is to assess the impact of the breach of the classical axioms on the reasoning of the Court in the indirect taxation field.

3.1. Interpretative criteria in VAT

In the case of VAT, as *Henriksen*[XXVII] or *Stoppelkamp*[XXVIII] clearly demonstrate, the Court usually reaches the final decision by using the following hermeneutic criteria in the following order:

i. Firstly, insofar because as the VAT Directive is drafted in multiple official languages, the task of the Court is to look up the concept to be interpreted by means of comparing the different official linguistic versions of it (semiotic criteria of interpretation).[XXIX] The comparison of the different linguistic versions of the VAT Directive entitles the Court to conclude that there is no univocal meaning of the terms employed among the different versions.[XXX] Consequently, with the aim of overcoming the contradictions encountered, the CJEU *"communitarizes"* the term. In other words, the term would have an autonomous meaning within the EU context. As in other areas of EU Law, the Court does not simply transpose the elements that shape a legal concept within the common legal traditions of Member States, but has rather sought to constructively and actively locate the legal concepts in the EU context. In the field of taxation, the communitarization of legal notions has acquired great importance, revealing the willingness of the CJEU to stimulate and achieve the common market goal, which is heralded in article 3.3 of the TFEU (ex- article 2 TEU). According to this article, any kind of hurdle that might impede the correct functioning of the common market must be removed. Inasmuch as substantial disparities between national tax laws could jeopardize the achievement of the common market objective, the Court has communitarized the notion. Whenever the CJEU defines a concept in its judgments, the idea is that the definition must fit well with the policies and objectives laid down in the Treaties.[XXXI] The terms included in EU law must be defined in the context of European integration.

ii. Secondly, the construction of this autonomous concept is built upon the two following hermeneutic criteria that can be stressed in *Stoppelkamp*:[XXXII]

- Systemic and contextual criteria. The VAT Directive must be interpreted in a coherent manner in order to ensure consistency (paragraphs 23 y 24).[XXXIII] All the concepts that are relevant to VAT – taxpayers, taxable base, taxable transactions, exemptions...- require a uniform and univocal interpretation.
- Dynamic criteria. Not only is it necessary to pinpoint the autonomous terms within the general scheme of the VAT Directive, but those terms also need to be shaped into the objectives, principles and aims defined in the Directive. According to BENGOETXEA (Bengoetxea 1993: 252) the dynamic hermeneutic criteria can be

classified into: functional (the norms are to be interpreted in such a way that they function effectively); teleological (the norms should be interpreted to achieve the pursued goals); and, finally, consequentialist (the interpretation of the norm should foresee the consequences of this interpretation). For instance, in *Stoppelkamp,* the ECJ adopts a consequentialist criterion.[XXXIV]

3.2. Interpretative criteria in the indirect taxation on the raising of capital

With regard to the indirect tax that is charged upon the raising of capital, *ESTAG*[XXXV] can be selected as a paradigmatic case in terms of the reasoning of the Court in this area. Unlike the cases commented upon in the VAT area, the ECJ takes a completely different approach, based on the understanding of the transaction in question. Recalling the words of the Court, "*the economic point of view*" guides the hermeneutic task of the Court in cases concerning the indirect taxation on the raising of capital: *"As is clear from paragraph 11 of the judgment in Case C-49/91 Weber Haus [1992] ECR I-5207, in order to decide whether or not a transaction falls within the scope of Article 4(2)(b) of Directive 69/335, it is necessary to adopt an economic approach, and not a formal one based solely on the source of the contributions".* The Court skips the semiotic/linguistic criteria[XXXVI] to adopt a hermeneutic approach that can be qualified as functional. To put it another way, rather than comparing the different linguistic versions of the Directive and, additionally, building an autonomous concept, the Court carefully examines the facts provided by the national court to determine if the transaction performed comes within the scope of the Capital Duty Directive.

In *ESTAG,* the national court asked, essentially, whether *"Article 4(1)(c) of Directive ICC is to be interpreted as meaning that the expression contribution of assets of any kind used therein covers additional payments when they are made to subsidiaries of the capital company which is increasing its capital by the issue of new shares".* To answer this question, the reasoning of the court follows these steps:

i. The Court rejects a systemic hermeneutic criterion advocated by ESTAG (the undertaking party to the dispute) that suggests that the terms of the Capital Duty Directive need to be interpreted consistently within all the norms. According to this criterion, article 5 of the Capital Duty Directive, related to the taxable base must be jointly interpreted with article 4, being the article that contains the description of the taxable transactions. In light of the above, *"ESTAG claims that,*

having regard to the terms of Article 5(1)(a) of Directive 69/335, only contributions made by direct members of the capital company which receives them are subject to capital duty. Since payments such as those in issue in the main proceedings do not satisfy that criterion, they do not come within the scope of Article 4(1)(c) of that directive (paragraph 35).” This approach can also be deemed to be *formal* due to the fact that it searches for a literal/abstract interpretation of the articles of the Capital Duty Directive without questioning the nature of the transaction performed.

ii. In this regard, the economic approach should prevail over a systemic interpretation of the Capital Duty Directive (paragraphs 37-39). The facts provided by the national court are decisive to solve the dispute: *“In a situation such as that in the main proceedings, which is characterized, first, by the fact that the company which has contracted to make certain payments in order to acquire a holding in another company is the subsidiary of the company which has actually made those payments and, secondly, by the fact that such payment has discharged the liability of that subsidiary, the payment is to be regarded as having been made by the subsidiary in its capacity as a member of the company which is increasing its capital.”* Therefore, and taking into account the particular circumstances of the case, the payment of ATS 5,083,332,000 made by the holding company on behalf of its subsidiary, described as a *non-refundable shareholder's contribution,* comes within the scope of Article 4(1) of the Capital Duty Directive as an increase of a capital company. The economic understanding of this complex transaction enables the Court to set aside a systemic interpretation of the Directive handled by the undertaking[XXXVII] (paragraph. 37).

iii. Finally, this economic hermeneutic approach is linked to a teleological-consequentialist argument. By admitting the interpretation advocated by ESTAG, the effectiveness of article 4 of the Directive would be undermined, *“since a company belonging to a group could carry out a transaction coming, theoretically, within the ambit of that directive without that transaction attracting capital duty (paragraph 40)”*. In other cases, the CJEU enhances its functional hermeneutic approach to through the aims or purposes contained in the Capital Duty Directive [XXXVIII] (teleological criterion).

3.3. A heterogeneous hermeneutic approach within the field of indirect taxation

What can be asserted throughout from the comparison between of the cases involving VAT and cases those related to the taxes on the increasing of capital is that the reasoning of the Court is completely different. Although, the facts and national law settings provided by the national courts are equally important in both types of cases in enabling the Court to resolve the dispute at stake, the chain of hermeneutic criteria employed to reach the final decisions are is diverse. In other words, the breach of the abovementioned axioms of the preliminary reference procedure is transformed into different interpretative approaches within the field of indirect taxation. For instance, in the case of VAT, as *Stoppelkamp* proves, the systemic hermeneutic criterion necessitates a coherent and consistent interpretation being applied to the whole Directive. By comparison, however, in the case of taxes on the raising of capital, as *ESTAG* shows, this systemic criterion is precluded in order to uphold an economic/functional interpretative criterion.

The lack of a homogenous interpretative approach can be clearly explained through the distinctive normative framework that the Court is required to deal with. While the VAT Directive contains a general and exhaustive regulation that considerably restricts the room for manoeuvre of the national legislator, the provisions contained in the Capital Duty Directive still require need to be implemented and detailed in the through national legislation. Thus, in the cases concerning the taxes on the raising of capital, the Court must interpret the questions posed by the national court within the context of the aims and purposes set out in the Capital Duty Directive. Because the Court needs to understand the transaction undertaken by the parties in the case of taxes on the raising of capital, a semiotic interpretative criterion of the Directive does not make sense. In VAT cases, however, the Court is required to take note of the nuances derived from the text of the VAT Directive drafted in the official languages and the final normative text implemented in the Member States. Therefore, it is only logical to start with the semiotic hermeneutic criterion, in the case of VAT-related disputes, to start with the semiotic hermeneutic criterion.

To sum up, the break breach of the axioms of the preliminary reference procedure has provoked a fragmentary approach to in the interpretative task of the Court.

4. Conclusion: towards a new, hierarchical model of cooperation

As commented in section two of this article, the preliminary reference procedure was built under a scheme of dialogue in "equality *of arms"*. The meaning of this jurisdictional cooperation between the Court and the national courts thus implied that each court performed its own task: whereas the CJEU interpreted EU Law, the monopoly of on the drafting of the questions for preliminary reference exclusively belonged exclusively to the national court. Indeed, pursuant to this rigid framework of dialogue, it transpired that whenever the Court perceived that the questions requested by the national court were drafted in an erroneous way or when the terms employed by the national court were imprecise or obscure, article 101.1 of the Rules of Procedure (ex. article 104.5 of the former Rules of Procedure) merely provided for a mechanism to request clarifications from the referring body.

Is this theoretical scheme still applicable to the case law concerning indirect taxation? The breach of the axioms of the preliminary reference procedure paved the way for a substantial shift in the meaning of cooperation. Rather than a rigid scheme of distribution of roles between the national courts and the CJEU, the preliminary reference system is moving towards a *"constructive cooperation model"*.[XXXIX] Such a constructive cooperation is rooted in the "*effet utile*" doctrine that pursues a useful answer to the questions posed by the national court and enables the Court to go beyond an abstract interpretation of EU law. Obviously, this new model of constructive cooperation entails a hierarchical element that strengthens the role of the CJEU as a court of last resort, thereby resembling the role of a Supreme Court at the national level. The role of the national courts, which poses the question for preliminary reference, is thus limited to implementing the judgement handed down by the Court.

The diverse hermeneutic interpretation criteria employed by the CJEU in the cases within the field of indirect taxation reveals that there is not a unique approach to the interpretation of the Directives. The substantial differences between the VAT Directive and the Capital Duty Directive demand a completely different hermeneutic approach, although in both cases, the Court takes into consideration the facts provided by the relevant national court and resolve the case at stake in both domains.

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I Capital duty is an indirect tax, which interferes with the free movement of capital. This Directive acknowledges that the best solution would be to abolish the duty, seeing it as harmful to business development within the European Union (EU). However, the loss of revenue which would result from the immediate application of such a measure is unacceptable for certain Member States. Accordingly, those Member States that charged the duty as of 1 January 2006 may continue to do so under strict conditions. See: http://europa.eu/legislation_summaries/taxation/l25098_en.htm.

II Case C-13/68, *Salgoil,* [1968] 661; Case C-100/64, *Van der Veen,* [1964] 1105; Case C-20/67*, Kunstmühle Tivoli*, [1968] 293; Case C 20/64, *Albatros,* [1965], 29, paragraphs 34-35.

III Joined Cases C-320/90 – C-322/90, *Telemarsicabruzzo,* [1993] I-393, paragraph 8.

IV *"Ce préliminaire parfois nécessaire étant acquis, il est possible pour la Cour de passer à l'abstraction communautaire. En d'autres termes, il s'agit de dégager de la gangue de la formulation les éléments théoriques qui sont susceptibles de se ranger dans les catégories ou les concepts du droit communautaire"* (Bergerès 1985: 158).

V It is necessary to underline this progressive process to intervene into the national court's sphere of competence. Firstly, the Court has started to reject references raised by national bodies (setting up a control of admissibility); and secondly, the Court tries to monitor the use by national supreme courts of the procedural exception called "*acte clair"* (i.e. the *Köbler* doctrine).

VI C-248/11, *Nilaş and Others*, [not yet reported], dated 22 March 2012, paragraph 31.

VII *"…la clarification du contexte juridique national, qui est determinant, devient un aspect substantiel de toute la procédure préjudicielle et même de l'arret de la Cour"* (Rodríguez Iglesias 1987: 596).

VIII Case C-444/10*, Schriever*, [not yet reported] dated 10 November 2010, paragraph 32; also, see the way the factual context determines the judgment of the Court in Case C-572/07, *RLRE Tellmer Property,*[2009] I-10333

IX *Schriever* (n VIII), paragraph 32.

X Case C-35/09, Speranza, [2010] I-06581, paragraphs 37-38.

XI Case C-130/93, *Lamaire*, [1994] I-3215, paragraph 10.

XII *"...che la questione sollevata raramente si limita alla richiesta di mera interpretazione della norma comunitaria, coinvolgendo sovente anche la compatibilità con quest' ultima della norma interna, e, dall'altro, che la sentenza della Corte puó, per il contenuto che la caratterizza nello specifico caso, porsi come immediatamente decisoria della controversia pendente dinanzi ai giudici nazionali, oppure essere fonte di ulteriori accertamenti di fatto in capo al giudice nazionale"* (Melis 2005: 401); *"The functions of the ECJ and the national courts are distinct. The first is limited to the interpretation of Community Law and to deciding whether actions by the Community or its institutions are valid. The latter has to apply Community Law (as interpreted and explained by the ECJ) to the facts of the case. This functional separation between interpretation and application is not as strict in practice as it may be in theory, because the ECJ renders its ruling within the factual context of the referred case. The facts and circumstances may be so specific that the ECJ's preliminary ruling may not be generally applicable"* (van Brederode 2009: 61). See also Nucera 2010: 62 and Scuffi 2005: 6529.

XIII Case C- 231/89, *Gmurzynska-Bscher*, [1990] I-4003; Case C-66/99, *Wandel*, [2001] I-00873.

XIV Case C-326/11, *Komen,* [not yet reported] dated 12 July 2012.

XV Case C-492/10, *Immobilien Linz GmbHm,* [not yet reported] dated 1 December 2011.

XVI Joined Cases C-80/11 and C-142/11, *Mahagében kft and Peter David,* [not yet reported] dated 21 June 2012.

XVII Case C-104/79, *Foglia v Novello*, [1980] 00745; Case C-244/80, *Foglia v Novello,* [1981] 03045.

XVIII Case C-104/79, *Foglia v Novello*, [1980] 00745, paragraph 10.

XIX Case C-152/03, *Ritter-Coulais*, [2006] I-01711.

XX Case C-343/90, *Lourenço Dias,* [1992] I-04673.

XXI Case C-200/98, *X AB and Y AB*, [1999] I-8264, paragraph 22; Case C-436/00, *X e Y,* [2002] I-10829.

XXII Case C-105/94, *Celestini,* [1997] I-2971, paragraphs 23-26.

XXIII See also Case C-150/88, *Provide,* [1989] I-3891, paragraph 12*: "the documents before the Court do not allow any doubt as to the genuineness of the dispute in the main proceedings or, therefore, the propriety of the request for a preliminary ruling."*

XXIV Joined cases C-98, 162, 258/85, *Bertini,* [1986], 01885, paragraph 8.

XXV Case C-36/99, *Idéal Tourisme,* [2000], I-6049, paragraph 22.

XXVI For the purpose of this article, I adopt the classification of hermeneutic criteria defined by Bengoetxea 1993: 262: *"Justificatory arguments do not appear in isolation; they mutually support each other, and the final, law-applying or law-interpreting decision is justified not by this or that particular argument, but rather by the cumulative weight of all the*

arguments brought together in the Court's opinion as a coherent, mutually supporting structure"; See also Bengoetxea, MacCormick and Moral Soriano 2001.

[xxvii] Case C -173/88, *Henriksen*, [1989] 02763.

[xxviii] Case C-421/10, *Stoppelkamp,* [not yet reported] dated 1 July 2010.

[xxix] *"With regard to linguistic criteria of interpretation, it is worth noting that the standard of the proper meaning of the words encounters a supplementary difficulty in Community law. Community provisions, in fact, are drafted in all the official languages of the European Union, which currently amount to 23 official languages for 27 Member States. It is clear that such linguistic complexity may produce not one but several '"ordinary meanings'" and raise serious interpretative questions when the different language versions are not entirely in accord with one another. How to choose? Which is the '"most official'" language of the Community?"* (Itzcovich 2009: 551).

[xxx] Case C-421/10, *Stoppelkamp,* [not yet reported] dated 1 July 2010, paragraph 22*:"However, it must be stated that the concept in question featured, prior to the amendments introduced by Directive 2000/65, not only in the German-, but also, in particular, in the Spanish-, Danish-, English-, French-, Italian-, Dutch-, Portuguese- and Swedish-language versions of Article 21(1)(b) of the Sixth Directive. Following the entry into force of that amending directive, all of those language versions now employ, in contrast to the German-language version, the concept corresponding to that of 'taxable person who is not established within the territory of the country';* In addition, Case C-169/04, *Abbey National plc*, **[**2006] I-04027, paragraph 41; Case C-152/02, *Terra Baubedarf*, [2004] I-05583, paragraph 34.

[xxxi] See the key importance of systemic and teleological methods of interpretation in Paunion and Lindroos-Hovinheimo 2010. See also Azoulai 2009b: "*L'interprétation autonome est une modalité de l'interprétation téléologique…Mais, plus souvent, ce qui ressort de la jurisprudence est une constante volonté d'encadrer la signification et la portée des notions inscrites dans le droit communautaire".*

[xxxii] *"With regard to linguistic criteria of interpretation, it is worth noting that the standard of the proper meaning of the words encounters a supplementary difficulty in Community law. Community provisions, in fact, are drafted in all the official languages of the European Union, which currently amount to 23 official languages for 27 Member States. It is clear that such linguistic complexity may produce not one but several "ordinary meanings" and raise serious interpretative questions when the different language versions are not entirely in accord with one another. How to choose? Which is the "most official" language of the Community?"* (Itzcovich 2009: 551).

[xxxiii] Case C-421/10, *Stoppelkamp*, [not yet reported] dated 1 July 2010: *"23.That concept, unlike that used in the German-language version of the Sixth Directive, not only features in other provisions of the latter, including Article 17(4), but has also been defined in a separate provision of European Union law. 24.Article 1 of the Eighth Directive defines the concept of 'taxable person not established within the territory of the country' (judgment of 16 July 2009 in Case C244/08 Commission v Italy, paragraph 26)".*

[xxxiv] Case C-421/10, *Stoppelkamp,* [not yet reported] dated 1 July 2010, paragraph 34.

[xxxv] Case C-339/99, *ESTAG,* [2002] I-08837, paragraph 37. In addition, this interpretative approach is reproduced in Case C-36/86, *Dansk Sparinvest,* [1988] 00409, paragraph 14; Case C-71/00*, Develop Baudurchführungs- und Stadtentwicklungs GmbH*, [2002] I-08877, paragraphs 21-27.

[xxxvi] In Case C-35/09, *Speranza*, [not yet reported] dated 1 July 2010. The Court skirts the semiotic criteria of interpretation.

[xxxvii] The refusal of the systematic hermeneutic approach of the Directive is also put forward in Case C-138/00, *Solida Raiffeisen Immobilien Leasing GmbH and Tech Gate Vienna Wissenschafts- und Technologiepark GmbH,* [2002] I-08905, paragraph 34: *"Second, having regard to the scheme of Directive 69/335, the wording of Article 4 thereof, concerning its material scope, must prevail over that of Article 5, relating to the basis of assessment of capital duty, where it is a matter of deciding the conditions which a transaction has to satisfy in order to come within the scope of that directive."*

[xxxviii] Case C-50/91, *Commerz-Credit-Bank AG - Europartner v Finanzamt Saarbrücken,* [1992] I-05225, paragraph 11: *"It is apparent from the preambles to those directives that the purpose of the fiscal derogation is to avoid transfers of assets between companies being impeded by tax obstacles, in order to facilitate the reorganization of undertakings, in particular the grouping within one undertaking of various entities carrying on identical or complementary activities."*

[xxxix] This term is coined in Weitzel 1994 : 83-87.

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