OPINION OF ADVOCATE GENERAL

TRSTENJAK

delivered on 12 January 2012 (1)

Case C-591/10

Littlewoods Retail Ltd and Others

v

Her Majesty's Commissioners of Revenue and Customs

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Chancery Division (United Kingdom))

(Reimbursement of VAT collected in breach of EU law — Interest — Simple interest — Compound interest — Procedural autonomy of the Member States — Principle of effectiveness — Principle of equivalence)

I – **Introduction**

1. By the present reference for a preliminary ruling from the High Court of Justice of England and Wales, Chancery Division, the Court is asked four questions concerning the obligation under European Union law to reimburse VAT collected in breach of EU law. The referring court seeks clarification in particular as to whether and, if so, to what extent a Member State which has collected VAT in breach of EU VAT legislation is required, in addition to reimbursing the VAT, also to pay interest on the principal sum.

II – **Legislative framework**

A – *National law*

2. The Value Added Tax Act 1994 ('the VATA 1994') contains national legislative provisions relating to the administration, collection and enforcement of VAT and concerning the appeals which may be brought before a specialist tribunal.

3. If a taxable person overpays VAT, section 80 of the VATA 1994 enables the taxable person to make a claim to recover the amount overpaid. So far as material, section 80 of the VATA 1994 provides as follows:

'80 Credit for, or repayment of, overstated or overpaid VAT

(1) Where a person –

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever

ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.

…

(1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of –

(a) an amount that was not output tax due being brought into account as output tax, or

…,

the Commissioners shall be liable to repay to that person the amount so paid.

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

(2A) Where –

(a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.

…

(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.'

4. Where a claim under section 80 of the VATA 1994 is successful, the taxable person may also be entitled to interest on the sum overpaid calculated in accordance with the provisions of section 78 of the VATA 1994. Section 78 provides as follows:

'78 Interest in certain cases of official error

(1) Where, due to an error on the part of the Commissioners, a person has -

(a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him, or

(b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or

(c) (otherwise than in a case falling within paragraph (a) or (b) above) paid to them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or

(d) suffered delay in receiving payment of an amount due to him from them in connection with

VAT,

then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section.

…

(3) Interest under this section shall be payable at the rate applicable under section 197 of the Finance Act 1996.

…’

III – **Facts and reference for a preliminary ruling**

5. The applicants in the main proceedings have carried on or still carry on catalogue-based home shopping businesses in the United Kingdom, in which catalogues are distributed and the goods shown in those catalogues are sold through networks of persons known as ‘agents’. The agents earned commission on sales made by or through them (‘third party purchases’), which they could take in cash, set off against their own previous purchases or use for future purchases (at an enhanced rate of commission).

6. It is common ground in the main proceedings that from 1973 until October 2004 commission on third party purchases was wrongly classified for the purposes of calculation of VAT both under European Union law and under national law, as a result of which the taxable amount was mistakenly taken to be greater than it was in respect of certain supplies and VAT was therefore overpaid.

7. Since October 2004, Her Majesty’s Commissioners for Revenue & Customs (‘the defendants in the main proceedings’) have repaid overpaid VAT of some GBP 204 774 763 to the applicants in the main proceedings pursuant to section 80 of the VATA 1994. In addition, the defendants in the main proceedings have paid simple interest of GBP 268 159 135 pursuant to section 78 of the VATA 1994.

8. The applicants in the main proceedings are claiming further sums amounting to some GBP 1 billion in aggregate. In their view, that sum is the benefit the United Kingdom received through the use of the principal amounts of tax overpaid. By judgment of 19 May 2010, the referring court ruled that, as a matter of national law, and without reference to EU law, that action must be dismissed.

9. Because the referring court has doubts on the compatibility of this outcome with the requirements of European Union law, it has referred the following questions to the Court for a preliminary ruling:

‘1. Where a taxable person has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, does the remedy provided by a Member State accord with EU law if that remedy provides only for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as section 78 of the VATA 1994?

2. If not, does EU law require that the remedy provided by a Member State should provide for (a) reimbursement of the principal sums overpaid, and (b) payment of compound interest as the measure of the use value of the sums overpaid in the hands of the Member State and/or the loss of the use value of the money in the hands of the taxpayer?

3. If the answer to both questions 1 and 2 is in the negative, what must the remedy that EU law requires the Member State to provide include, in addition to reimbursement of the principal sums overpaid, in respect of the use value of the overpayment and/or interest?

4. If the answer to question 1 is in the negative, does the EU law principle of effectiveness require a Member State to disapply national law restrictions (such as sections 78 and 80 of the VATA 1994) on any domestic claims or remedies that would otherwise be available to the taxable person to vindicate the EU law right established in the Court of Justice's answer to the first 3 questions, or is it sufficient that the national court disapplies such restrictions only in respect of one of these domestic claims or remedies?

What other principles should guide the national court in giving effect to this EU law right so as to accord with the EU law principle of effectiveness?'

IV – **Procedure before the Court**

10. The order for reference dated 4 November 2010 was lodged at the Registry of the Court of Justice on 14 December 2010. The applicants in the main proceedings, the United Kingdom, the Federal Republic of Germany, the Republic of Cyprus, the Kingdom of the Netherlands, the French Republic, the Republic of Finland and the European Commission submitted written observations. The representatives of the applicants in the main proceedings, the United Kingdom and the Commission took part in the hearing on 22 November 2011.

V – **Arguments of the parties**

A – *The first, second and third questions*

11. In the view of the *Commission*, the first, second and third questions should be answered to the effect that where a taxable person has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, a remedy which provides only for reimbursement of the principal sums overpaid and simple interest on those sums is compatible with EU law in so far as that remedy provides adequate restitution or compensation for the loss of the use of the money and in so far as no more generous remedy is available, as a matter of national law, in relation to other taxes.

12. The *Governments* of the *United Kingdom*, the *Republic of Cyprus*, the *French Republic* and the *Federal Republic of Germany* answer the first question to the effect that the remedy provided by a Member State which, where VAT is collected in breach of EU law, provides for reimbursement of the principal sums overpaid and simple interest on those sums in accordance with national legislation, accords with European Union law. The *Finnish Government* also answers the first question to this effect and states that regard must be had to the principles of effectiveness and equivalence. Similarly, the *Netherlands Government* argues that European Union law does not require the Member States to pay compound interest in connection with the reimbursement of VAT collected in breach of EU law. Consequently, in the view of the Governments of the United Kingdom and the Republic of Cyprus and the Netherlands and Finnish Governments, there is no need to answer the second, third and fourth questions.

13. In answering the first, second and third questions, the *applicants in the main proceedings* take the view that the remedy which the Member States must provide for reimbursement of VAT collected in breach of EU law must compensate for the benefit the Member State has received through the use of the principal sum collected in breach of EU law. It is for the national courts to determine whether, in addition to the reimbursement of the principal sum overpaid, the remedy should also provide for payment of simple interest, compound interest or some other form of interest.

B – *The fourth question*

14. In the view of the *applicants in the main proceedings*, the fourth question should be answered to the effect that the restriction under national law in a manner contrary to EU law of the enforcement of claims stemming from EU law (as contained in section 78 and section 80 of the VATA 1994), which concerns two different national remedies, must be disapplied in relation to both of those remedies where the person entitled to receive a reimbursement would have a choice between the two remedies under national law.

15. In the view of the *Commission*, it is not necessary to answer the fourth question. If the Court were nevertheless to decide to answer that question, it should be answered to the effect that section 78 of VATA 1994 should be disapplied entirely if it were to emerge that that provision is incompatible with EU law.

VI – **Legal assessment**

A – *First, second and third questions*

16. By the first, second and third questions, the referring court is essentially seeking to clarify the way in which interest on VAT collected in breach of EU law is to be paid to the person liable for VAT who is entitled to reimbursement in a case such as that in the main proceedings. The referring court asks in particular whether, in addition to reimbursement of the principal sum overpaid, national law must provide for payment of ‘simple’ interest on that sum (first question), ‘compound’ interest (second question) or some other interest to be determined more precisely by the Court (third question).

17. The referring court understands ‘simple’ interest to mean payment of interest without capitalisation of the interest payments for previous calculation periods. ‘Compound’ interest, on the other hand, would mean capitalising the interest payments for the previous calculation periods, with the result that they become part of the basis for assessment for subsequent interest calculation periods.

18. The starting point for the answer to questions 1 to 3 is that the problem of payment of interest on VAT collected in breach of EU law was not expressly regulated either in the Second VAT Directive (2) or in the Sixth Directive. (3)

19. It should also be stated that the applicants in the main proceedings have not brought any actions for damages based on an infringement of European Union law by the United Kingdom. (4) According to the referring court, it is common ground in the main proceedings that the requirements for a State liability claim for damages under EU law are not satisfied. The main proceedings therefore concern actions for reimbursement of VAT collected in breach of EU law, which cannot be regarded as actions for damages.

20. In the light of these clarifications, the answer to questions 1 to 3 should have regard to the

settled case-law of the Court, according to which Member States are required in principle to refund charges levied in breach of rules of EU law. (5) The resulting right of the taxable person to a refund of charges levied in breach of EU law is the consequence and complement of the rights conferred on individuals by the provisions of EU law prohibiting such charges. (6)

21. The applicants have to turn to the national courts for the judicial enforcement of such claims for reimbursement stemming from European Union law. (7)

22. In the absence of relevant EU rules, it is also for the Member States to lay down the detailed procedural rules governing claims for reimbursement, always having regard to the principles of equivalence and effectiveness. (8) It is for each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing claims for reimbursement, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). (9)

23. This duty of the Member States to lay down procedural rules governing claims by natural and legal persons stemming from European Union law and the discretion thereby enjoyed by the Member States are traditionally subsumed under the expression ‘procedural autonomy of the Member States’. Admittedly, this expression is slightly misleading and imprecise. Whilst the term ‘autonomy’ appears to indicate that the Member States have broad discretion in laying down procedural rules, there is no such absolute discretion in accordance with the Court’s case-law. First of all, in this line of case-law the Court proceeds on the basis that the Member States have a duty under European Union law to facilitate in a procedural law sense the enforcement of claims stemming from EU law. (10) The decision whether or not provision is made for procedural rules on the enforcement of claims under EU law does not therefore lie in the discretion of the Member States. Second, the discretion enjoyed by the Member States in determining the applicable procedures and procedural rules is restricted by the principles of effectiveness and equivalence.

24. The concept of procedural autonomy does not therefore confer any real autonomy on the Member States, but a certain margin of discretion in the context of laying down procedural rules governing claims stemming from European Union law, the judicial enforcement of which is not regulated in detail in European Union law. (11) Furthermore, the ‘*procedural* autonomy’ of the Member States has not been limited to procedural aspects in the Court’s case-law. Rather, it also extends, to some degree, to laying down the substantive content of the claims stemming from European Union law, (12) with the result that procedural autonomy also includes a certain ‘remedial autonomy’ of the Member States. (13)

25. Although the phraseology ‘procedural autonomy of the Member States’ is thus imprecise in two respects, the concept has nevertheless become a well-noted and established one in the Court’s case-law. (14) Subject to the points of clarification I have made above, I will continue to use the expression below.

26. In the context of its case-law concerning the procedural autonomy of the Member States, the Court has already ruled several times on the payment of interest on sums collected in breach of EU law. However, in the individual judgments, it introduced different nuances on the basis of which it is possible to distinguish two lines of case-law.

27. In a first series of — mainly earlier — judgments, the Court ruled that the problem of payment of interest on sums wrongly collected under European Union law constituted an ancillary problem which must be settled in national law. In particular, the Member States have the right to settle the question of the payment of interest, including the date from which it must be calculated and the rate of interest. The Court ruled along such lines in *Roquette Frères* v *Commission* (15)

and *Express Dairy Foods*. (16) This line of case-law has also been confirmed, inter alia, in *Ansaldo Energia* (17) and in *N*. (18)

28. In a second series of — mainly more recent — judgments, on the other hand, the Court has ruled that under European Union law the taxpayer has a right to payment of interest on taxes levied in breach of EU law. This line of case-law was introduced by *Metallgesellschaft and Others*, (19) in which the Court had to deal with the case of an advance payment of tax which infringed EU law. In that judgment, it first confirmed its earlier case-law, according to which it is for national law to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated. (20) It then made clear, however, that if taxes are levied prematurely in breach of EU law, the award of interest is necessary under European Union law. In that regard, it stated in particular that the rule of European Union law which precludes the premature levying of tax entitles the taxpayer to obtain interest accrued on the advance tax payment in the period between the advance payment (in breach of EU law) and the date on which the tax became payable (in accordance with European Union law). (21)

29. This new line of case-law has been confirmed in *Test Claimants in the FII Group Litigation* (22) and *Test Claimants in the Thin Cap Group Litigation*. (23) Furthermore, both judgments give ample proof that the arguments developed in *Metallgesellschaft and Others* regarding advance payments of tax in breach of EU law can also be applied to cases where the levying of tax as a whole infringed EU law. This is also logical. As grounds for the interest claim under EU law as a result of advance payments of tax, the Court proceeds from the finding that because of the unavailability of sums of money as a result of a tax being levied prematurely, the taxpayer has suffered losses which are to be regarded as amounts retained by the Member State or paid to it in breach of EU law. (24) Because the levying of taxes in infringement of EU law also gives rise to unavailability of sums paid until they are reimbursed, there is no evident reason to distinguish between the taxpayer’s interest claim under EU law in the context of advance payments made in breach of EU law and such a right in the context of payments made in breach of EU law per se.

30. In the light of these considerations, Member States which have levied charges in breach of EU law must in principle, according to the Court’s more recent case-law, both reimburse the charges levied in breach of EU law and pay interest in compensation for the unavailability of the sums paid. The taxable person therefore has a right to reimbursement of the charge and a right to payment of interest. Those rights enjoyed by the taxable person are based on the provisions of EU law prohibiting the taxes levied.

31. Applying the case-law on the procedural autonomy of the Member States, it is for the Member States to lay down detailed substantive and procedural rules governing the taxable person’s interest claim under European Union law. The Member States are therefore entitled to determine the detailed rules relating to payment of interest having regard to the principles of effectiveness and equivalence. Those detailed rules include the decision whether interest is paid on the basis of a system of ‘simple interest’ or on the basis of a system of ‘compound interest’.

32. It is clear from what is stated by the referring court that the United Kingdom has fulfilled its duty under European Union law to grant the person liable for VAT who is entitled to reimbursement an interest claim. On the other hand, it is contested whether the United Kingdom has infringed the principle of effectiveness or the principle of equivalence in laying down the detailed rules governing that interest claim by granting payment of simple interest merely on the principal sum.

33. In my view, the principle of effectiveness was clearly complied with.

34. It is settled case-law that the principle of effectiveness prohibits the Member States from

rendering virtually impossible or excessively difficult the exercise of rights conferred by EU law. (25) In the context of determining the detailed rules governing an interest claim stemming from EU law, a breach of the principle of effectiveness would therefore arise only if the interest were so low that it largely deprived the interest claim stemming from EU law of substance.

35. In that connection, it is apparent from the order for reference that the United Kingdom has paid interest pursuant to section 78 of the VATA 1994 on the VAT collected in breach of EU law from the applicants in the main proceedings.

36. Interest under section 78 of the VATA 1994 is computed by reference to section 197 of the Finance Act 1996 and the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998. The broad effect of the provisions is that, since 1998, for the purposes of section 78, rates are fixed according to a formula which refers to the average base lending rates of six clearing banks; this rate is called the 'reference rate'. For periods between 1973 and 1998, the rates are specified in Table 7 to the 1998 Regulations. The interest rate applicable under section 78 is the reference rate minus 1%. Section 78 defines the 'applicable period' for which interest is payable. In the main proceedings that period begins with the date on which the Commissioners received the overpayment and ends on the date on which the Commissioners authorise payment of the amount on which interest is payable.

37. Pursuant to those provisions, the United Kingdom reimbursed to the applicants in the main proceedings the VAT which had been obtained in the period between 1973 and 2004 in breach of EU law, amounting to approximately GBP 204 774 763 together with simple interest amounting to GBP 268 159 135. Accordingly, the applicants in the main proceedings were granted a claim for payment of simple interest pursuant to section 78 of the VATA 1994, under which the amount of interest accrued over a period of around 30 years (GBP 268 159 135) exceeds the principal sum (GBP 204 774 763) by more than 25%. In my view, that interest payment pursuant to section 78 of the VATA 1994 readily complies with the principle of effectiveness.

38. On the other hand, it is not so easy to answer the question whether simple interest under section 78 of the VATA 1994 also complies with the principle of equivalence in a case such as the present one.

39. It should be borne in mind that, according to settled case-law, the principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar actions alleging infringement of national law. (26) For the purposes of the present case, this means that the detailed rules governing the claim for payment of interest on VAT collected in breach of EU law may be no less favourable than the detailed rules governing similar interest claims stemming from a breach of domestic law ('similar domestic interest claims'). In this connection, the equivalence of the domestic interest claims to be used for comparison requires that, in the light of their purpose and their essential characteristics, they can be regarded as similar. (27)

40. In order to answer the question of compliance with the principle of equivalence, the referring court, which alone has a direct knowledge of the detailed rules governing interest on claims for reimbursement against the State, must therefore examine whether or not the detailed rules governing payment of interest on VAT collected in breach of EU law under section 78 of the VATA 1994 correspond to the detailed rules governing similar domestic interest claims.

41. In that connection, it should be pointed out that the parties involved in the present case give different definitions of the category of similar domestic interest claims to be used for comparison.

42. In the view of the Commission, in examining the principle of equivalence, there should be a

comparison between interest on VAT collected in breach of EU law and interest payable where other taxes are levied unlawfully. According to that approach, interest on VAT collected in breach of EU law should therefore be compared with interest which is provided for under domestic law where direct or indirect taxes other than VAT are unlawfully levied.

43. The United Kingdom Government, in contrast, argues that interest on VAT collected in breach of EU law can be compared only with interest on unlawfully levied indirect taxes, but not with interest on unlawfully levied direct taxes.

44. In the view of the Netherlands Government, (28) on the other hand, in a case like the present one the principle of equivalence requires actions for the reimbursement of unlawfully collected VAT to be treated in the same way as national actions for the reimbursement of similar charges or taxes. According to that approach, it would therefore have to be determined, first of all, which taxes and charges are comparable with VAT. Subsequently, the detailed rules governing payment of interest where such similar taxes and charges are unlawfully levied must be compared with the detailed rules governing interest with regard to VAT.

45. The French Government (29) refers in this connection to the Court's case-law according to which national rules on repayment comply with the principle of equivalence if they apply without distinction to all actions, irrespective of whether they allege infringements of European Union law or of national law, with respect to the same kind of charges or dues.

46. These differing submissions by the Commission, the United Kingdom Government and the Netherlands and French Governments clearly show that it may prove particularly difficult specifically to determine similar domestic interest claims in a case such as that in the main proceedings.

47. In identifying similar domestic interest claims, the referring court must proceed from the essential characteristics of the claim under European Union law for payment of interest on unlawfully collected VAT. Claims for payment of interest on indirect taxes levied in breach of national law are similar in any case. However, the question whether the claims to payment of interest on direct taxes or charges levied in breach of national law are also to be regarded as similar domestic interest claims in a case such as the present cannot be answered *in abstracto*. (30) In so far as this question should arise de facto in the main proceedings in the context of reviewing the principle of equivalence, the referring court should make a substantiated request to the Court, by way of a fresh reference for a preliminary ruling, for further clarification regarding the similarity of the relevant domestic interest claims.

48. If, in the light of the above considerations, the referring court should ultimately conclude that there are several similar domestic interest claims in respect of which different detailed rules are laid down, there would not however already be a breach of the principle of equivalence were interest not to be charged on VAT collected in breach of EU law in accordance with the most favourable rules which apply to one or more similar domestic claims. It is namely settled case-law that the principle of equivalence is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law. (31)

49. In the light of the foregoing, the first, second and third questions must be answered to the effect that under European Union law a taxable person who has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation has a right to reimbursement of the VAT collected in breach of EU law and a right to payment of interest on the principal sum to be reimbursed. The question whether the interest on the principal sum to be reimbursed is to be paid on the basis of a system of 'simple interest' or a system of 'compound interest' concerns the detailed rules governing the interest claim stemming from European Union

law, which are to be determined by the Member States in accordance with the principles of effectiveness and equivalence.

B – *Fourth question*

50. By its fourth question, the referring court seeks clarification of the course of action required under European Union law if payment of simple interest pursuant to section 78 of the VATA 1994 on the VAT overpaid in the period between 1973 and 2004 fails to meet the requirements stemming from the principle of effectiveness under EU law.

51. As I have already stated, payment of simple interest pursuant to section 78 of the VATA 1994 on the VAT overpaid in the period between 1973 and 2004 is readily compatible with the principle of effectiveness. This finding does not mean, however, that the fourth question should be considered irrelevant. It is evident from what is stated by the referring court regarding the background to the fourth question that that question — despite the express reference to the principle of effectiveness — essentially concerns the effect of the principle of equivalence.

52. In order to gain a better understanding of the fourth question, it is first necessary to examine the different bases for the claims for payment of interest on VAT collected in breach of EU law which are at issue in the main proceedings. It is evident from the order for reference, in particular, that, aside from the claim for simple interest under section 78 of the VATA 1994, two other domestic claims or remedies are at issue. Specifically, these are the so-called ‘mistake-based claim’ and the so-called ‘Woolwich claim’. According to the referring court, these two claims based on common law are barred as a result of the applicability of section 78 of the VATA 1994.

53. In the event that, in the context of the answers to the first to third questions, the exclusion of those claims under common law as a result of the applicability of section 78 of VATA 1994 should prove to be contrary to European Union law, the referring court suggests that a solution compatible with EU law could be achieved if the applicants in the main proceedings were allowed to make a Woolwich claim, whilst the mistake-based claim remained barred.

54. Against that background, by its fourth question the referring court essentially asks for clarification whether, if it is found that section 78 and section 80 of the VATA 1994 are contrary to European Union law, a failure to apply the restriction contained therein in relation to the Woolwich claim in the main proceedings could lead to payment of interest which is compatible with European Union law or whether the restriction contained in section 78 and section 80 of VATA 1994 should remain disapplied in respect of all the claims or remedies under common law.

55. In their written and oral observations, the applicants in the main proceedings have argued in this regard (32) that the claims under common law which are relevant in the main proceedings are covered by the principle of concurrency of remedies meaning that if all the necessary conditions are met, the claimant may decide to assert whichever of the claims he chooses. Both claims under common law — the mistake-based claim and the Woolwich claim — which the applicants in the main proceedings may choose, are subject to a six-year limitation period. In the case of the Woolwich claim, the period already begins to run from the date of payment, whereas in the case of the mistake-based claim it runs from the date on which the claimant discovered the unlawfulness of his payment or could with reasonable diligence have discovered it. Because the applicants in the main proceedings consider that they asserted their claims within the six-year period from the date of discovering the mistake, they have a particular interest in relying on the mistake-based claim in the main proceedings.

56. In order to answer the fourth question, consideration must be given to the principle that it is for the Member States to determine the detailed rules governing payment of interest on taxes

levied in breach of EU law, in accordance with the principles of effectiveness and equivalence. In that connection, I have already concluded that the simple interest on the VAT collected in breach of EU law fixed by the United Kingdom pursuant to section 78 of the VATA 1994 complies with the principle of effectiveness. (33)

57. The question whether that simple interest pursuant to section 78 of the VATA 1994 and the associated exclusion of more extensive claims under common law also comply with the principle of equivalence, must be answered by the referring court in accordance with the abovementioned criteria. (34) In the context of the fourth question, that court is required, in particular, to determine the question whether a taxable person who is claiming back similar taxes or charges levied in breach of national law, together with interest, may select the basis for the interest claims at will under common law or, as the case may be, in accordance with statutory provision, and may therefore, if all the necessary conditions are met, decide in favour of the Woolwich claim, the mistake-based claim or another claim, thereby also determining himself the detailed rules governing payment of interest.

58. If the referring court should conclude in that regard that the detailed rules governing payment of interest on VAT collected in breach of EU law are less favourable than the detailed rules governing similar domestic interest claims, because the taxable person can determine the limitation period and the other characteristics of the similar domestic interest claims through the choice of claim, whereas that is not the case for interest on VAT collected in breach of EU law, it would be required to apply the more favourable rules, governing similar domestic interest claims, also to payment of interest on VAT collected in breach of EU law, thereby allowing the taxable person a free choice of claim.

59. In order to ensure the full effectiveness of European Union law, the referring court would be obliged, in that case, to refrain from applying, if need be, the national rules preventing payment of interest on VAT collected in breach of EU law in accordance with the more favourable rules which apply to similar domestic interest claims, and to apply the national provisions laying down more favourable rules for similar domestic claims to the interest claims stemming from European Union law. (35) That obligation follows directly from the direct effect and the primacy (36) of the European Union legislation from which the interest claim of the person liable for VAT who is entitled to reimbursement stems.

60. It should nevertheless also be reiterated at this juncture that the principle of equivalence is not to be interpreted as requiring Member States to extend their most favourable domestic rules to similar claims concerning payment of interest on VAT collected in breach of EU law. (37) If it should therefore emerge that taxable persons who are entitled to reimbursement may determine the limitation period and the other detailed rules relating to payment of interest only in respect of certain similar domestic interest claims through the choice of claim, whereas that is not the case in relation to other similar domestic interest claims, the Member State may also refuse to grant a free choice of claim for payment of interest on VAT collected in breach of EU law.

61. In the light of the foregoing, the fourth question must be answered to the effect that if the referring court should conclude that the detailed rules governing payment of interest on VAT collected in breach of EU law at issue in the main proceedings are less favourable than the detailed rules governing similar domestic interest claims and that there is therefore a breach of the principle of equivalence, it is obliged to interpret and apply the national rules in such a way that interest is paid on the VAT collected in breach of EU law in accordance with the more favourable rules which apply to similar domestic claims.

VII – **Conclusion**

62. On the basis of the above considerations, I propose that the Court answer the questions referred for a preliminary ruling as follows:

(1) Under European Union law a taxable person who has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation has a right to reimbursement of the VAT collected in breach of EU law and a right to payment of interest on the principal sum to be reimbursed. The question whether the interest on the principal sum to be reimbursed is to be paid on the basis of a system of 'simple interest' or a system of 'compound interest' concerns the detailed rules governing the interest claim stemming from European Union law, which are to be determined by the Member States in accordance with the principles of effectiveness and equivalence.

(2) If the referring court should conclude that the detailed rules governing payment of interest on VAT collected in breach of EU law at issue in the main proceedings are less favourable than the detailed rules governing similar domestic interest claims and that there is therefore a breach of the principle of equivalence, it is obliged to interpret and apply the national rules in such a way that interest is paid on the VAT collected in breach of EU law in accordance with the more favourable rules which apply to similar domestic claims.

1 – Original language of the Opinion: German. Language of the case: English.

2 – Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16).

3 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1997 L 145, p. 1).

4 – It is settled case-law that European Union law does not preclude an action for damages based on an infringement of European Union law coexisting with an action for the recovery of sums unduly paid; see Case C-94/10 *Danfoss and Sauer-Danfoss* [2011] ECR I-9963, paragraph 32.

5 – Case C-310/09 *Accor* [2011] ECR I-8115, paragraph 71; Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraph 93; and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84.

6 – See Case C-94/10 *Danfoss and Sauer-Danfoss*, cited above in footnote 4, paragraph 20; Case C-398/09 *Lady & Kid and Others* [2011] ECR I-7375, paragraph 17; Case C-264/08 *Direct Parcel Distribution Belgium* [2010] ECR I-731, paragraph 45; Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20; and Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12.

7 – The TFEU grants individuals a right of direct action before the European Court of Justice only in certain very specific proceedings, such as the right for natural and legal persons to institute proceedings under the fourth paragraph of Article 263 TFEU, Article 268 TFEU or Article 270 TFEU. See also, in this connection, Basedow, J., 'Der Europäische Gerichtshof und das Privatrecht', *Archiv für die civilistische Praxis*, Vol. 210 (2010), p. 157, 192 et seq., who regards the inability of private actors to bring disputes relating to rights stemming from European Union law before a European Union court as an unsatisfactory inconsistency between EU procedural and substantive law.

8 – See Case C-94/10 *Danfoss and Sauer-Danfoss*, cited above in footnote 4, paragraph 24; Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17; Case C-147/01 *Weber's Wine World and Others*, cited above in footnote 5, paragraph 103.

9 – See for example Case C-310/09 *Accor*, cited above in footnote 5, paragraph 79; Case C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 25; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 111; and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 203.

10 – See already in that regard Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, which is regarded as a leading judgment on the concept of the procedural autonomy of the Member States in the Court's case-law. In that judgment, which concerned the compatibility with European Union law of periods prescribed in national law for the judicial enforcement of claims stemming from EU law, the Court linked the concept of the procedural autonomy of the Member States with the principle of sincere cooperation between the European Union and the Member States now laid down in Article 4(3) TEU. In particular, it inferred from this concept that it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of European Union law. That duty of the Member States is intended to ensure the full effect of European Union law and is closely connected with the principle of effective judicial protection and the fundamental right to an effective remedy under Article 47 of the Charter of Fundamental Rights. With regard to that connection between the Member States' duties under Article 4 TEU, ensuring the full effect of European Union law, the principle of effective judicial protection and the fundamental right to an effective remedy under Article 47 of the Charter of Fundamental Rights, see for example Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 41 et seq.

11 – See, in particular, Kakouris, C.N., 'Do the Member States possess judicial procedural "autonomy"?', *C.M.L.Rev.* 1997, p. 1389 et seq. See also Van Gerven, W., 'Of Rights, Remedies and Procedures', *C.M.L.Rev.* 2000, p. 501, 502, who proposes, among other things, replacing the expression 'procedural autonomy' with the expression 'procedural competence' of the Member States. See also Delicostopoulos, J., 'Towards European Procedural Primacy in National Legal Systems', ELJ 2003, p. 599 et seq., who advocates, in this connection, a combination of national procedural competence and primacy of EU procedural law.

12 – See Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 90 et seq., in which the Court had recourse inter alia to the concept of procedural autonomy in order to answer the question which measures or sanctions the Member States must provide for in order to deal with the infringement of rights stemming from European Union law at issue in that case. See also Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 50 et seq., and Case C-180/04 *Vassallo* [2006] ECR I-7251, paragraph 35 et seq.

13 – See Trstenjak, V./Beysen, E., 'European Consumer Protection Law: Curia semper dabit remedium?', *C.M.L.Rev.* 2011, p. 95, 104 et seq.

14 – With regard to the role of the procedural autonomy of the Member States in the system of European law of civil procedure, see also Wagner, G., in Stein/Jonas, Kommentar zur Zivilprozessordnung, 22nd edition, Tübingen 2011, introduction to Article 1, paragraph 68 et seq.

15 – Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraph 11 et seq.

16 – Case 130/79 *Express Dairy Foods* [1980] ECR 1887, paragraph 16 et seq.

17 – Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025, paragraph 28.

18 – Case C-470/04 *N* [2006] ECR I-7409, paragraph 60.

19 – Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727.

20 – Ibid., paragraph 86.

21 – Ibid., paragraphs 87 and 89.

22 – Cited above in footnote 9, paragraph 202 et seq.

23 – Cited above in footnote 9, paragraph 112.

24 – See, in particular, Case C-446/04 *Test Claimants in the FII Group Litigation*, cited above in footnote 9, paragraph 205.

25 – See Case C-310/09 *Accor*, cited above in footnote 5, paragraph 79, and Case C-262/09 *Meilicke and Others* [2011] ECR I-5669, paragraph 55.

26 – See Case C-542/08 *Barth* [2010] ECR I-3189, paragraph 19; Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 33; and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 62.

27 – See Case C-118/08 *Transportes Urbanos y Servicios Generales*, cited above in footnote 26, paragraph 35; Case C-246/09 *Bulicke*, cited above in footnote 9, paragraph 28; and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 49.

28 – Written observations of the Netherlands Government, paragraph 21.

29 – Written observations of the French Government, paragraph 55.

30 – See also, in this connection, Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 43 et seq., where the Court concluded, in assessing the comparability of direct and indirect taxes, that the system of direct taxation as a whole is not related to the value added tax system.

31 – Case C-246/09 *Bulicke*, cited above in footnote 9, paragraph 27; Case C-118/08 *Transportes Urbanos y Servicios Generales*, cited above in footnote 26, paragraph 34; Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 45; and Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia and Others*, cited above in footnote 17, paragraph 29.

32 – Written observations, paragraph 34 et seq. and 112 et seq.

33 – See point 33 et seq. of the present Opinion.

34 – See point 38 et seq. of the present Opinion.

35 – See for example Case C-256/09 *Purrucker* [2010] ECR I-7375, paragraph 99; Case C-233/08 *Kyrian* [2010] ECR I-177, paragraph 61; and Case C-443/03 *Leffler* [2005] ECR I-9611, paragraph 51.

36 – With regard to the primacy and direct effect of European Union law, see Opinion 1/09 of 8

March 2011 [2011] ECR I-2099, paragraph 65, and Opinion 1/91 of 14 December 1991 [1991] ECR I-6079, paragraph 21.

37 – See the case-law cited in footnote 31.