

# CJEU 03-09-2014 GMAC UK C-589/12

By **Editors** - September 3, 2014



## **CJEU GMAC UK judgment**

*Cars sold, repossessed and resold publicly under a hire purchase agreement - Reduction of taxable amount - Direct effect*

A Member State cannot prohibit a taxable person from relying on the direct effect of the Directive for an act on the ground that he can rely on provisions of national law for another act relating to the same goods and, where these provisions are applied together, an overall tax. The result is that neither national law nor the Sixth Directive, when applied separately to those acts, produces or intends to produce them.

### **JUDGMENT OF THE COURT (Second Chamber)**

September 3, 2014 (\*)

(Reference for a preliminary ruling - VAT - Sixth Directive (77/388 / EEC) - Article 11 (C) (1), first subparagraph - Direct effect - Reduction of the taxable amount - Performance of two transactions involving the same goods - Supply of goods - Cars sold, repossessed and publicly resold under a hire purchase agreement - Abuse of rights ”

In Case C - 589/12,

REFERENCE for a preliminary ruling under Article 267 TFEU by the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), made by decision of 10 December 2012, received at the Court on 14 December 2012, in the proceedings

Commissioners for Her Majesty's Revenue and Customs

against

GMAC UK plc,

points

THE COURT (Second Chamber),

composed of: R. Silva de Lapuerta, President of the Chamber, J. L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 5 December 2013,

having regard to the comments of:

- GMAC UK plc, by R. Cordara QC,
- the United Kingdom Government, by J. Beeko, acting as Agent, assisted by K. Lasok QC,
- the European Commission, by R. Lyal, A. Cordewener and C. Soulay, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

the following

#### Judgment

1 This request for a preliminary ruling concerns the interpretation of the first subparagraph of Article 11C (1) of the Sixth Council Directive (77/388 / EEC) of 17 May 1977 on the harmonization of the laws of the Member States concerning turnover taxes - Common system of value added tax: uniform basis (OJ 2001 L 145, p. 1, 'the Sixth Directive').

2 The reference has been made in proceedings between the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') and GMAC UK plc ('the GMAC') concerning the taxable amount for value added tax ('the VAT') on supplies made by GMAC under car rental contracts.

#### Applicable provisions

#### Union law

3 Article 11A of the Sixth Directive, concerning the taxable amount for national VAT, provided:

"1. The taxable amount is:

(a) for [...] supplies of goods and services [...]: anything which the supplier or service provider obtains or is required to obtain in return for these transactions from the purchaser, the recipient or a third party, including subsidies directly the price of the transactions are related;

[...] "

4 Article 11 (C) of the Sixth Directive, paragraph 1, provided:

'In the event of cancellation, cancellation, termination or total or partial non-payment, or in the event of a price reduction after the transaction has been carried out, the taxable amount shall be reduced accordingly under the conditions laid down by the Member States.

However, in the event of total or partial non-payment, Member States may derogate from this rule. "

United Kingdom law

5 It is apparent from the order for reference that the legislation transposing Article 11C (1) of the Sixth Directive contained two sets of provisions. The first series applied in the event of a reduction of the consideration, while the second series applied in the event of total or partial non-payment where a reduction of VAT, being an exemption for bad debts, was granted.

The national provisions in the event of a reduction of the consideration

6 Since 1995, those provisions were contained in Regulation 38, read in conjunction with Regulation 24, of the VAT Regulations 1995 (1995 regulation for recording and registering VAT). In the event of a reduction in the consideration for a supply which already included VAT, the taxable person had to adjust his VAT accounts by making a negative entry for the VAT amount concerned. In this context, a reduction of the consideration was only recognized if it was proven by a credit note or a similar document. Analogous rules applied for the period from 1990 to 1995.

The national provisions for bad debts

7 For supplies made between 2 October 1978 and 26 July 1990, the 'old scheme' applied to the waiver for bad debts. For deliveries between 1 April 1989 and 19 March 1997, an exemption request could be made under the 'new scheme'. For supplies made during the overlapping period, which was between 1 April 1989 and 26 July 1990, requests could be made under either scheme.

- Old scheme

8 The old scheme was introduced by Section 12 of the Finance Act 1978 (1978 Finance Act) and continued in Section 22 of the Value Added Tax Act 1983 (1983 Value Added Tax Act, 'the VATA

1983'). .

9 Section 22 VATA 1983 provides:

"(1) When

(a) a person has supplied goods or provided services in exchange for a monetary consideration and charged and paid the tax on that supply of goods or service, and

(b) the person who still has to pay in full or in part has become insolvent,

then, subject to the provisions of Subsection (2) and Subsection (3), the first person is entitled to a refund of the VAT to be charged in accordance with the outstanding amount, upon request made to the Commissioners.

(2) There is no right of return under this Section unless

(a) the amount of the claim has been established during the insolvency proceedings and the amount thus proved corresponds to the outstanding amount of the consideration less the amount of the claim;

(b) the value of the performance does not exceed its free market value, and

(c) in respect of a supply of goods, ownership of the goods has passed to the recipient of the goods... '.

10 As is apparent from the order for reference, under Section 22 VATA 1983 a person was considered insolvent for the purposes of that Section if he had been declared bankrupt or had been the subject of a bankruptcy decision in connection with the management of his property. A company was considered insolvent when it went into voluntary or forced liquidation and "the circumstances showed that the company was unable to pay its debts".

- New regulations

11 Section 11 of the Finance Act 1990 (Financing Act 1990) repealed the old scheme and introduced the new scheme for supplies after 26 July 1990.

12 The new scheme applied to deliveries made after 1 April 1989 and was continued in Section 36 of the Value Added Tax Act 1994 (1994), which provides:

"(1) Subsection (2) infra applies when:

(a) a person has supplied goods or provided services in exchange for a monetary consideration and charged and paid the tax on that supply of goods or service,

(b) all or part of the consideration for this act has been written off in its accounts as bad debts, and

(c) a period of six months [instead of a two-year period under Section 11 of the 1990 Financing Act] (from the date of the transaction) has expired.

(2) Subject to what is provided hereinafter in this Section and the provisions adopted under this Section, a person is entitled to a refund of the amount of VAT to be charged in accordance with the outstanding amount, upon request made to the Commissioners.

[...]

(4) There is no right of return under Subsection (2) unless

(a) the value of the performance does not exceed its free market value, and

(b) in respect of a supply of goods, ownership of the goods has passed to the recipient of the goods or a person who has acquired title to, by or for that person.

[...] "

1992 decision on value added tax on cars

13 The United Kingdom of Great Britain and Northern Ireland allowed reductions in VAT on the sale of second-hand cars under essentially identical conditions in subsequent legislation, including the Value Added Tax (Cars) Order 1992 (1992 decision on taxation). value added on cars ('the Cars Order').

14 Under Regulation 8 of the Cars Order, when selling a used car, a car dealer had to charge VAT on a taxable amount equal to his profit margin.

15 However, Regulation 4 of the Cars Order contained specific rules for the resale of vehicles taken back by the seller:

"(1) Each of the following operations is not considered to be a supply of goods or a service:

(a) The transfer of a used motor vehicle by a person who has received it back under a financing agreement, if the vehicle is in the same condition as it was when it was taken back... "

The main proceedings and the questions referred for a preliminary ruling

16 GMAC is a company subject to VAT which is mainly active in the hire purchase of cars.

17 With a hire purchase, a user chooses a car from a car dealer and asks for private financing. He is then referred to a hire-purchase company, such as GMAC. When the three parties reach an agreement, the car dealer sells the car to the hire purchase company, which then delivers the car to the end user under a hire purchase agreement.

18 The sale of the car by the car dealer to GMAC is subject to VAT at the standard rate. The delivery of the car by GMAC to the end user under the lease purchase agreement is also subject to VAT at the normal rate. If the rental buyer defaults, GMAC will take back the car and sell it publicly. The sales proceeds are set off against the balance of the monthly installments still owed by the tenant.

19 The supply of a car under a hire-purchase contract was considered a supply of goods for the purposes of VAT. VAT was due at the time of delivery of the car by GMAC to the end user on the total amount due, excluding financial charges. When the car was subsequently taken back and sold publicly, this public sale was not considered a supply of goods or a service in accordance with Regulation 4 of the Cars Order.

20 The Commissioners had always accepted that in the event of an amicable termination of a hire-purchase agreement for a car which was resold, Regulation 38 of the VAT Regulations 1995 applied, so that it had to be assumed that GMAC had made the hire-purchase in exchange for a consideration less the proceeds of the resale. However, until the judgment of the High Court of Justice (England and Wales), Chancery Division (United Kingdom) in case C&E Commissioners / GMAC (2004), they had not accepted that the same arrangement applied if, due to the tenant's inability to car was taken back by GMAC and resold publicly.

21 Since that judgment, Regulation 38 of the VAT Regulations 1995 also applies when, as a result of a breach of contract by the hirer, the car is publicly resold by GMAC. The High Court of

Justice also ruled that the Cars Order also applies, so that GMAC did not have to pay VAT on the proceeds of the public sale. In that regard, the referring court observes that the joint application of those provisions produces a 'windfall', so that ultimately less VAT is due than if the Sixth Directive had been correctly transposed.

22 GMAC then initiated a new procedure, also for the period from 1978 to 1997, based entirely on the direct effect of the Sixth Directive. GMAC's claim now relates to the part of the consideration for the delivery of the car to the user that has remained unpaid due to incapacity. That amount does not constitute a price reduction within the meaning of the first subparagraph of Article 11C (1) of the Sixth Directive. This is a partial non-payment within the meaning of this provision, namely a bad debt.

23 By letter of 20 February 2006, GMAC therefore applied for an exemption for bad debts for the period from 1978 to 1997, following the dissolution of car rental contracts with users for non-payment of the agreed sales price. The Commissioners rejected that request by decision of 18 July 2006.

24 The First-tier Tribunal (Tax Chamber) upheld GMAC's action against that decision on the ground that the legal conditions for an exemption were incompatible with EU law and GMAC's requests for exemption for bad debts did not distortions or lack of fiscal neutrality which are contrary to Union law.

25 On appeal, however, the Upper Tribunal (Tax and Chancery Chamber) considers that the joint application of Regulation 38 of the VAT Regulations 1995, as interpreted in the decision of the High Court of Justice in *C&E Commissioners v GMAC* (2004) , and of the Cars Order does not effectively apply the Sixth Directive because it results in an excessive reduction of the VAT burden which cannot be reconciled with the objective of this Directive and is therefore contrary to Union law.

26 The Upper Tribunal (Tax and Chancery Chamber) therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

"(1) To what extent does a taxable person have the right, in respect of two transactions involving the same goods, to (i) rely, in relation to one transaction, on the direct effect of a provision of the [Sixth Directive], and (ii) to rely on national law in relation to the other act, if it leads overall to a tax result which neither national law nor the [Sixth Directive] produces or is intended to produce, when they are treated separately on those two acts applied?



2) If the answer to the first question is that the taxpayer does not (or only to a limited extent) have this right in certain circumstances, what are the circumstances and what relationship should there be in particular between the two transactions in order to would be such circumstances?

3. Is it relevant to the answer to the first two questions whether or not the national treatment of a single act is in conformity with the [Sixth Directive]? "

Answer to the questions referred

The first and third questions

27 By its first and third questions, which must be considered together, the referring court essentially asks whether the first subparagraph of Article 11C (1) of the Sixth Directive is to be interpreted as meaning that, in circumstances such as in the main proceedings may prohibit a taxable person from relying on the direct effect of that provision for an act, on the ground that he may rely on provisions of national law for another act relating to the same goods and, where those provisions are applied together, an overall tax result that neither national law nor the Sixth Directive, when applied separately to those acts, produces or intends to bring about.

28 The referring court also asks whether it makes any difference whether the national law applicable to the latter act complies with the Sixth Directive.

29 According to settled case-law of the Court, individuals may invoke those provisions before a national court vis-à-vis the State in any event where the provisions of a directive are unconditional and sufficiently precise in substance, or where they have failed to comply with the directive within the national law, or if it did so incorrectly (judgment in [Almos Agrárkölkereskedelmi](#) , C - 337/13 , EU: C: 2014: 328, paragraph 31 and the case-law cited).

30 A provision of EU law is unconditional when it imposes an obligation which is not subject to any condition and which, for its implementation or functioning, does not depend on an act of the institutions of the Union or of the Member States (judgment in [Almos Agrárkölkereskedelmi](#) , EU: C: 2014 : 328, paragraph 32 and the case-law cited).

31 The first subparagraph of Article 11 (C) (1) of the Sixth Directive defines the cases in which Member States are to reduce the taxable amount under the conditions which they determine themselves. Thus, that provision requires Member States to reduce the taxable amount and, consequently, the VAT payable by the taxable person, where the taxable person does not receive all or part of the consideration after the conclusion of an agreement (Goldsmiths, C - 330/95, EU : C: 1997: 339, paragraph 16).

32 Thus, while this article leaves the Member States a margin of discretion in determining the measures necessary to determine the amount of the reduction, this does not alter the fact that the obligation to reduce the taxable amount in the cases referred to in that article is and is unconditional. This provision therefore fulfills the conditions for direct effect ( [Almos Agrárkölkereskedelmi](#) , EU: C: 2014: 328, paragraph 34).

33 As explained by the referring court in its request for a preliminary ruling, the questions put to the Court were raised by the fact that, in the main proceedings, the United Kingdom tax authorities considered that the taxpayer could not simultaneously claim a 'windfall' and to the provisions of the first subparagraph of Article 11C (1) of the Sixth Directive, in particular because the joint application of Regulation 38 of the VAT Regulations 1995, of the Cars Order and of this Directive produces, overall, a taxable result which is neither neither national law nor this Directive, if applied separately to such acts, brings about or intends to bring about.

34 According to the United Kingdom Government, in a situation such as that at issue in the main proceedings, the VAT charged to the end-user and payable to the tax authorities is not calculated on the consideration that the taxable person actually receives in exchange for the supplies of goods. However, direct effect is not a principle of Union law that can be used to achieve a result contrary to what the Directive aims to achieve. That government therefore considers that the taxable person cannot rely on national law for one act and the direct effect of the first subparagraph of Article 11C (1) of the Sixth Directive for the other act.

35 That line of argument cannot be accepted.

36 As is apparent from paragraph 32 of this judgment, the first subparagraph of Article 11C (1) of the Sixth Directive has direct effect, so that, in circumstances such as those in the main proceedings, the answer to the question whether a taxable person such as GMAC: after delivery of a good under a lease-purchase agreement, the right to have the taxable amount lowered in this provision is granted, depending on the fact that GMAC's customers fail to fulfill all or part of their payment obligation under that agreement.

37 Admittedly, that provision expresses a fundamental principle of the Sixth Directive, according to which the taxable amount is the consideration actually received, which results in the tax authorities being unable to receive more than the taxable person has collected for VAT purposes. ( [Almos Agrárkölkereskedelmi](#) , EU: C: 2014: 328, paragraph 22 and the case-law cited).

38 However, it is clear from the file submitted to the Court that if the public sale of the car taken back from the hire buyer were not exempt from VAT under national law, the consideration received for each transaction would be subject to VAT. The taxable amount would then be equal

to the amounts paid by the rented buyer and the amounts paid by the buyer at the public sale. Therefore, in accordance with the principle recalled in the previous paragraph of this judgment, the taxable amount would correspond to the consideration actually received by GMAC.

39 It should be recalled, however, that the Court has consistently held that a Member State which has not adopted implementing measures prescribed by a directive in time cannot plead breaches of its obligations under the directive to individuals (see, in particular, *Rieser Internationale Transporte*, C - 157/02, EU: C: 2004: 76, paragraph 22 and the case-law cited).

40 Consequently, the fact that, under national law, the public sale of the car was not classified as a supply of goods or a service cannot, in the end, result in the taxable person losing the right to a reduction of the taxable amount in the event of total or partial non-taxation. -payment of the price, in accordance with the first subparagraph of Article 11C (1) of the Sixth Directive.

41 Moreover, it should be recalled that, in accordance with the fundamental principle inherent in the common VAT system, which results from Article 2 of the First Council Directive (67/227 / EEC) of 11 April 1967 on the harmonization of the laws of the Member States relating to sales tax (OJ 1967 71, p. 1301), and from Article 2 of the Sixth Directive, VAT is payable on every production or distribution transaction, after deduction of the VAT directly taxed on the various elements of the price (see in particular, judgments in *Midland Bank* , C - 98/98, EU: C: 2000: 300, paragraph 29, and *Zita Modes* , C - 497/01, EU: C: 2003: 644, paragraph 37).

42 Accordingly, in the event of total or partial non-payment, the amount of the taxable amount of the car rental contract must be aligned with the consideration which the taxable person actually receives under that contract. The consideration received by that taxable person which a third party has paid under another act, in this case the public sale of the car returned by the rented purchaser, does not affect the conclusion that that taxable person can rely under the lease contract the direct effect of the first subparagraph of Article 11C (1) of the Sixth Directive.

43 It follows from the foregoing that the question whether the national law applicable to public sale complies with the Sixth Directive is irrelevant in determining whether a taxable person such as GMAC derives the rights which he derives from Article 11C (1) the first paragraph of the Sixth Directive is well founded.

44 The United Kingdom Government also argues that a selective reliance on the direct effect of that provision in order to enforce a situation where the result sought by the legislation in question is not achieved is an abuse.

45 In this regard, it should be noted that, in paragraphs 74 and 75 of [Halifax](#) and Others (C - 255/02, EU: C: 2006: 121), the Court held, in particular, that for the purposes of establishing an abuse of VAT despite the formal application of the conditions imposed by the relevant provisions of the Sixth Directive and the national legislation transposing this Directive, the acts in question must have the effect that, contrary to the purpose of those provisions, tax advantage is granted and it is apparent from a number of objective factors that the essential aim of the transactions in question is solely to obtain that tax advantage.

46 It is for the national court to determine, in accordance with the rules of evidence of national law and to the extent that the effectiveness of EU law is not affected, whether the essential elements of abuse are at issue in the main proceedings. However, the Court may, in its preliminary ruling, make further clarifications, where appropriate, to guide the national court in its interpretation (see, in particular, [Halifax](#) and Others, EU: C: 2006: 121, paragraphs 76 and 77 and the case-law cited).

47 It should be noted that, as the Government of the United Kingdom points out, that the objective pursued by the Sixth Directive cannot be achieved, it is the result of a 'windfall' resulting solely from the application of national law. As is clear from paragraph 38 of this judgment, the tax advantage at issue arises essentially from the non-taxation of the public sale of the car taken back from the leased purchaser under Regulation 4 of the Cars Order.

48 In addition, the Court has held that an economic operator may be guided by a number of factors in choosing between exempt and taxable transactions, including tax considerations related to the objective VAT system. After all, when a taxable person can choose between different transactions, he has the right to structure his activity in such a way as to limit the amount of his tax liability (see *RBS Deutschland Holdings*, C - 277/09, EU: C: 2010: 810, paragraph 54 and the case-law cited there).

49 In the light of the foregoing considerations, the answer to the first and third questions must be that the first subparagraph of Article 11C (1) of the Sixth Directive must be interpreted as meaning that in circumstances such as those in the main proceedings, a Member State cannot prohibit an action from relying on the direct effect of this provision on the ground that it may rely on provisions of national law for another act concerning the same goods and, where these provisions are jointly applied, an overall tax result is achieved which is neither national nor does the Sixth Directive, if applied separately to such acts, bring about or seek to bring about.

The second question

50 In view of the answers to the first and third questions, there is no need to answer the second question.

Cost

51 As regards the parties to the main proceedings, the proceedings must be regarded as an incident arising there, so that the national court has to decide on the costs. Costs incurred by others for submitting their observations to the Court are not recoverable.

The Court (Second Chamber) hereby rules:

Article 11C (1), first subparagraph, of the Sixth Council Directive (77/388 / EEC) of 17 May 1977 on the harmonization of the laws of the Member States concerning turnover taxes - Common system of value added tax: uniform basis, it must be interpreted that, in circumstances such as those in the main proceedings, a Member State cannot prohibit a taxable person from relying on the direct effect of that provision for an act on the ground that he can rely on provisions of national law for another act relating to the same goods and the joint application of those provisions gives rise to a tax result in the aggregate that neither national law nor the Sixth Directive (77/388), when applied separately to those transactions, triggers or intends to trigger.

signatures

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\* Language of the case: English.

[ECLI: EU: C: 2014: 2131](#)

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#### Related



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May 15, 2014  
In "Court of Justice"



CJEU 15-10-2002 Commission-  
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October 15, 2002  
In "Court of Justice"

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