1. General Introduction: Abuse, avoidance, fraud, evasion and the principle of fiscal legality

1.1. Settled case law

The settled case law of the CJEU to be discussed in this chapter explicitly provides for a refusal of rights, such as the right of deduction, in cases of abuse (avoidance) or fraud (evasion).

1.2. Material conditions

However, the refusal is not based on specific provisions of the VAT Directive. Regarding the right of deduction, the VAT Directive distinguishes between material conditions as provided for in Art. 167 and 168 of the VAT Directive and formal conditions such as an invoice being necessary in order to exercise the right of deduction under Art. 178 of the VAT Directive. Neither the material nor the formal conditions provide for a refusal of deduction in cases of abuse or fraud.

1.3. Principle of fiscal legality

Therefore, the question arises, whether the case law of the CJEU, which nevertheless provides for refusal in such situations, is in line with the principle of fiscal legality, which is also acknowledged by the CJEU. According to that principle all the essential elements defining the substantive features of the VAT regime must be provided for by law:

> The principle of fiscal legality may be regarded as forming part of the EU legal order as a general principle of law. Although that principle requires … that any obligation to pay … VAT, and all the essential elements defining the substantive features thereof must be provided for by law, that principle does not require every technical aspect of taxation to be regulated exhaustively, as long as the rules established by law enable a taxable person to foresee and calculate the amount of tax due and determine the point at which it becomes payable.[1]

2. Right of deduction

2.1. Use for taxable transactions

Example 1
A taxable person acquires goods on the pretence of use for his business in the future. In reality, he uses them for private purposes.

1 CJEU, 8 May 2019, C-566/17, *Związek Gmin Zagłębia Miedziowego*, EU:C:2019:390, para. 39.

3.3. Administrative and other sanctions not comprised by Art. 50 of the Charter

Sanctions in the form of denial of input VAT deduction due to involvement in fraud would most likely not be comprised by the *ne bis in idem* principle based on the *Italmoda* case, which however concerned Art. 49 of the Charter (section 4.3.). Further, sanctions in the form of procedures and fiscal measures aimed at recovering unpaid tax and collecting default interest are probably not of a criminal nature, regardless of the amount of the tax and interest.[90] In line therewith, Advocate General Kokott has stated, that it is however, inherent in the concept of a "penalty" that Member States must do more than simply collect VAT that is owed anyway, together with any default interest due.[91] A similar view is seen in the *Luca Menci* case, where the CJEU stated that a measure which merely repairs the damage caused by the offence is not criminal in nature (section 3.2.1.).[92] As I see it, the punitive purpose is simply lacking in these situations.

I have only found one EU case, the *BB construct* case, which establishes that the measure at issue, a guarantee, was *not* considered as criminal in nature, i.e. not protected by the *ne bis in idem* principle, thus not covered by Art. 50 of the Charter. This case illustrates some of the same points mentioned above.

In the *BB construct* case, the CJEU found that the aim of an obligation to provide a guarantee, was not enforcement, given that it was common ground that the legal person applying to be registered for VAT had not committed any offence and that the aim of the provision was to ensure the correct collection of VAT in the future.[93] The fact, that, due to its amount, the provision of such a guarantee could be a very heavy burden for the newly established legal person, did not in itself enable, that guarantee to be regarded as a criminal penalty for the purposes of Arts. 49 and 50 of the Charter.[94] I agree, as the purpose of the guarantee was not punitive,

90 Opinion of Advocate General Campos Sánchez-Bordona, 12 September 2017, C-524/15, *Luca Menci*, EU:C:2017:667, para. 50, where reference is made to ECtHR, 18 October 2001, *Finkelberg v. Latvia*, CE:ECHR:2001:1018DEC005509100.

91 Opinion of Advocate General Kokott, 30 April 2015, C-105/14, *Ivo Taricco and Others*, EU:C:2015:293, para. 84.

92 CJEU, 20 March 2018, C-524/15, *Luca Menci*, EU:C:2018:197, para. 31; and Opinion of Advocate General Campos Sánchez-Bordona, 12 September 2017, C-524/15, *Luca Menci*, EU:C:2017:667, para. 113. CJEU, 20 March 2018, C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193, para. 33; and Opinion of Campos Sánchez-Bordona, 12 September 2017, C-596/16 and C-597/16, *Enzo Di Puma and Antonio Zecca*, EU:C:2017:669, para. 60.

93 CJEU, 26 October 2018, C-534/16, *BB construct*, EU:C:2017:820, paras. 32–33. I. Lejeune & L. Vermeire, *Analysis of the case law of the European Union on VAT regarding Art. 47 to 50 of the Charter and the use thereof in national case law*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Value Added Tax 2017* (Vienna: Linde, 2018) p. 90.

94 CJEU, 26 October 2018, C-534/16, *BB construct*, EU:C:2017:820, paras. 32–33. I. Lejeune & L. Vermeire, *Analysis of the case law of the European Union on VAT regarding Art. 47 to 50 of the Charter and the use thereof in national case law*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Value Added Tax 2017* (Vienna: Linde, 2018) p. 90.

1. Abuse vs Fraud in VAT: legal basis and legal consequences

Starting with the excellent paper by Judge Wäger[1], in particular his plea for a better balance between the principle of fiscal legality and the principle of prohibition of fraud or abuse, I would like to make three comments on his contribution. These concern firstly, the evolution of the case law of the CJEU, secondly, the interaction between VAT and direct taxation, and finally some limitations applicable in the fight against fraud or abuse.

1.1. Evolution

The case law of the Court of Justice is now crystal clear: fighting against abuse or fraud is clearly an obligation for the Member States. The Court has repeatedly said that EU Law cannot be relied on for abusive or fraudulent ends. In the famous judgement *Halifax*[2] the Court has said that the principle of prohibiting abusive practices also applies to the sphere of VAT[3] adding that *"preventing possible tax evasion, avoidance and abuse is an objective recognized and encouraged by the 6th Directive"*.[4]

After having established a prohibition, the case law has progressively created an obligation to enforce it. In its judgment in *Åkerberg Fransson*[5], the Court decided clearly that *"every Member State is obliged to take all legal and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion"*.[6]

For the taxpayer, it became clearer that it was the responsibility of the national authorities and courts to refuse the benefit of the rights laid down by the sixth Directive[7] not only when

> tax evasion had been carried out by the taxable person itself but also where a taxable person knew or should have known that by the transaction concerned it was participating in the transaction involving evasion of VAT carried out by the supplier or by another trader acting upstream or downstream in the supply chain,[8]

adding that this refusal should take place *"even in the absence of provisions of national law providing for such refusal"*.[9]

1 See Wäger, pp. 3 et seq.
2 CJEU, 21 February 2006, C-255/02, *Halifax*, EU:C:2006:121.
3 CJEU, 21 February 2006, C-255/02, *Halifax*, EU:C:2006:121, para.70.
4 CJEU, 21 February 2006, C-255/02, *Halifax*, EU:C:2006:121, para.71.
5 CJEU, 26 February 2013, C-617/10, *Åkerberg Fransson*, EU:C:2013:105.
6 CJEU, 26 February 2013, C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para.25
7 CJEU, 18 December 2014, C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 49.
8 CJEU, 18 December 2014, C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para.50.
9 CJEU, 18 December 2014, C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 62.

2.3. The US Supreme Court's Repudiation of the Double Jeopardy Analysis Underlying *Kurth Ranch* (1997)

Just three years after its decision in *Kurth Ranch*, the Court repudiated the reasoning of the *Halper* case on which *Kurth Ranch* heavily relied in *Hudson v. United States*.[14] In a case involving a criminal indictment of bank officers for misapplication of bank funds for which monetary penalties and occupational disbarment had previously been imposed, the Court rejected a double jeopardy argument based on the allegedly "*punitive*" nature of the civil punishment. In so doing, the Court observed that "***Halper*** *marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature.*"[15] "*Instead*," the Court continued, "*it focused on whether the sanction, regardless of whether it was civil or criminal, was so grossly disproportionate to the harm caused as to constitute punishment.*"[16]

The Court in *Hudson* found that *Halper*'s deviation from long-standing double jeopardy principles was "*ill-considered*" and that focusing on whether a particular sanction was "*punitive*" was "*unworkable … since … all civil penalties have some deterrent effect.*"[17] The proper inquiry, according to the Court, reflecting its long-standing interpretation of the Double Jeopardy Clause, was whether the person has been subjected to "*multiple* ***criminal*** *punishments for the same offense.*"[18] Hence the focus of the inquiry should be on whether the legislature considered a particular remedy to be a civil or a criminal sanction.

The Court in *Hudson* offered guidance as to how to make this determination, noting that the following criteria (derived from an earlier opinion that it quoted) provided "*useful guideposts*":

1. *"[w]hether the sanction involves an affirmative disability or restraint";*
2. *"whether it has historically been regarded as a punishment";*
3. *"whether it comes into play only on a finding of scienter";*
4. *"whether its operation will promote the traditional aims of punishment-retribution and deterrence";*
5. *"whether the behavior to which it applies is already a crime";*
6. *"whether an alternative purpose to which it may rationally be connected is assignable for it"; and*
7. *"whether it appears excessive in relation to the alternative purpose assigned."*[19]

14 522 US 93 (1997).
15 *Hudson v. United States*, 522 US 93, 100 (1997).
16 *Hudson v. United States*, 522 US 93, 101 (1997).
17 *Hudson v. United States*, 522 US 93, 102 (1997).
18 *Hudson v. United States*, 522 US 93, 99 (1997) (emphasis in original).
19 *Hudson v. United States*, 522 US 93, 99-100 (1997) (quoting *Kennedy v. Mendoza-Martinez*, 372 US 144, 168-169 [1963]).

7. Conclusion

In order to fight VAT fraud new obligations and bureaucratic controls have been and are being introduced. Platforms are treated as "deemed suppliers" under certain circumstances and both payment service providers and platforms have to keep records and transfer data sets about their transactions to the tax authorities. Furthermore, a number of other amendments to the RAC VAT have been introduced that provide tax authorities with access to more information. This will provide tax authorities with additional sets of data that should allow them to identify those who try to escape their VAT obligations and thereby gain an unfair market advantage.

A number of different points have been identified by tax authorities as reasons for the lack of effectiveness in the fight against e-commerce VAT fraud: lack of resources (people, money and even tools) for tax authorities compared to the volume of transactions to be verified; lack of willingness to cooperate between Member States' tax authorities; lack of cooperation between customs and tax authorities; absence of tools to enforce the VAT rules on remote suppliers from outside the European Union and lack of cooperation from big platforms and marketplaces.[174] These points have been addressed by the recent amendments to the RAC VAT. For example, the obligation for PSPs to record and transfer payment data to the tax authorities might allow the identification of remote suppliers. However, an automatic matching of payment data with VAT declarations or other available data might not be easy as the information stored on the transactions is limited. The payment data does not allow the authorities to clearly assess VAT liability but merely provides tax administrations with a hint as to who might be liable to pay VAT. Additional investigations would be necessary to assess the VAT obligations and to enforce the collection of VAT payments. In spite of the fact that the possibilities for fraudsters to circumvent the application of the reporting obligation remain open as the location of the payee is determined by the identifier, e.g. the IBAN used, and even though payments with cryptocurrencies are not covered, it is expected that the payment data will nevertheless add an additional source of data for the tax administration to find out about VAT fraud.

Both for taxpayers and intermediaries, the amendments to the administrative cooperation provisions might impose an additional burden to collect data and explain their circumstances where the information could be misleading. Although there are understandable reasons for strengthening administrative cooperation in VAT, taxpayers' rights should not be forgotten. Whereas the CJEU has repeatedly

174 See European Commission, Impact Assessment Accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers and Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud, SWD(2018) 488, 12 Dec. 2018, at p. 61.

It is not entirely clear whether the above represents a general rule, because under Bulgarian law the termination of a lease contract does not have retroactive effect. This means that the lessor remains entitled to payment of unpaid obligations under the leasing terms that became payable before termination of the contract.

The above analysis raises the question, how the period of time between the termination of the contract and the end-date laid down in the contract should be assessed. One would expect that this period should be regarded as a period which is covered by the concept of "cancellation" in Art. 90(1) of the VAT Directive. However, here, the provisions in the contract on the compensation for damages play a role. This is because the CJEU considers that the compensation payments should be regarded as compensation for the transaction which is the subject-matter of the leasing contract. The main reason for this, is that the compensation in the event of premature termination is provided for in the contract itself and and amounts to the total that would have been paid during the remaining term of the lease. Under such circumstances, as the CJEU puts it, the "*termination does not affect the economic reality of the contractual relationship*".[48] We interpret this as meaning that parties do not factually depart from the subject-matter which forms the nucleus of the contract.[49]

The result of this analysis is that as long as the compensation has not been paid, and uncertainty with regard to any forthcoming payments exists, the period of time between the termination of the contract and the end-date of the contract is also to be regarded as a situation of non-payment. This may be depicted as follows:

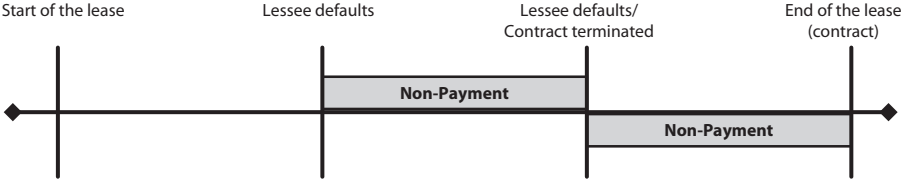


Figure 2: Defaulting debtor, termination of the contract does not affect economic reality of the contractual relationship

Bulgaria did not explicitly implement the provision on non-payment as provided for in Art. 90(1) of the VAT Directive. However, the CJEU had already ruled in *Almos* that if a national provision transposing Article 90(1) of the VAT Directive does not mention total or partial non-payment, it must be considered as the implementation of (the derogation contained in) Art. 90(2).[50] This means that tax-

48 Ibid. paras. 73 and 75.

49 See, on the concept of economic reality: A. van Doesum, *Economic Reality in EU VAT*, in: B. Jansen (ed.), *De internationalisering van het belastingrecht / The Internationalization of Tax Law* (Shaker Publishing BV, 2016), pp. 75 et seq.

50 CJEU, 15 May 2014, C-337/13 *Almos Agrárkülkereskedelmi Kft*, EU:C:2014:328, para. 24.

1. Introduction and list of cases

This chapter analyses decisions concerning the application of VAT exemptions that were dealt with by the Court of Justice of the European Union (CJEU[1]) during 2019.

The application of VAT exemptions still seems to be a controversial issue at the EU level. During the relevant period, several cases on VAT exemptions were brought to the CJEU. In this respect, the authors have decided to focus on the following decisions:

- Exemption for activities in the public interest:
  - Joined Cases C-4/18 and C-5/18 (*Winterhoff*): Exemption for universal postal service provider – Art. 132(1)(a) of the VAT Directive – Private operator providing the service of formally serving court or administrative authority documents;
  - Case C-700/17 (*Wolf-Henning Peters*): Exemption for hospital and medical care – Art. 132(1)(b) and (c) of the VAT Directive – Provision of medical care in the exercise of the medical and paramedical professions – No confidential relationship between the person providing the care and the patient;
  - Case C-400/18 (*Infohos*): Exemption for independent groups of persons – Art. 132(1)(f) of the VAT Directive– Supplies of services to members and non-members;
  - Case C-449/17 (*A&G Fahrschul-Akademie GmbH*): Exemption for school and university education – Art. 132(1)(i) and (j) of the VAT Directive – Driving school tuition provided by a driving school;
- Financial and insurance services
  - Case C-235/18 (*Vega International Car Transport*): Exemption for granting and negotiation of credit– Art. 135(1)(b) of the VAT Directive – supply of fuel cards;
  - Case C-692/17 (*Paulo Nascimento Consulting*): Exemption for Transactions relating to the granting, negotiation and management of credit – Art. 135(1)(b) and (d) of the VAT Directive – Assignment for consideration, to a third party, of a position held in enforcement proceedings for recovery of a debt recognized by a judgment;
- Exemption on international transport
  - Case C-291/18 (*Grup Servicii Petroliere SA*): Exemptions related to international transport – Art. 148(1)(a) and (c) of the VAT Directive – Concept of 'vessels used for navigation on the high seas'.

1 The abbreviation "CJEU" is used to refer both to the Court of Justice of European Union (as it has been since the entry into force of the Treaty of Lisbon on 1 December 2009) and to the Court of Justice of the European Communities (as it previously was).

3.1.2. Legal analysis and commentary

The *Vega International Car Transport* case concerns the interpretation of Art. 135(1)(b) of the VAT Directive.

The referring court asked whether Art. 135(1)(b) of the VAT Directive was to be interpreted as meaning that the provision of fuel cards by Vega International to Vega Poland, for refuelling the vehicles they transport, could be characterized as a service of granting credit, which is exempt from VAT, or as a complex transaction, the main objective of which is the supply of fuel and thus a supply of goods as defined in Art. 14(1) of the VAT Directive.

The CJEU provided a basis for its decision by stating that the principles enshrined in case C-185/01, *Auto Lease Holland* apply to Art. 135(1)(b) of the VAT Directive as well. The provisions contained in Art. 135(1)(b) are in essence the same as those laid down by Art. 13(B)(d) of the Sixth Directive, therefore the jurisprudence of the CJEU issued with reference to the former Directive is relevant for interpreting the VAT Directive.[47]

The CJEU first analysed whether the sale of fuel in exchange for fuel cards consisted in a supply of goods to Vega International pursuant to Art. 14 of the VAT Directive.

To this end, the Court examined whether Vega International obtained the right to dispose of the fuel. In case C-185/01, *Auto Lease Holland*, the Court took the view that a leasing company does not have the right to dispose of the vehicle as the owner and for the same reason it does not have any right to dispose of the fuel that has been bought by the lessee at fuel stations.[48]

Similarly, in the present case, Vega International does not dispose of the fuel in respect of the purchase as if it were the owner. That fuel is purchased by Vega Poland directly from the suppliers and at its sole discretion. Vega Poland decides, in particular, on the fuel purchasing arrangements in so far as it may choose, from among the service stations of the suppliers indicated by Vega International, at which service station to refuel.[49]

In the light of the above, the supply of fuel cards for consideration (equal to the 2% mark-up applied by Vega International on the costs for fuel) should be deemed a supply of services relevant for VAT purposes according to Art. 24 of the VAT Directive.[50] In this respect, the CJEU focuses on the nature of the services provided.

It stems from the EU jurisprudence that the exemption for the granting and negotiation of credits laid down by Art. 135(1)(b) of the VAT Directive is defined in terms of the nature of the services provided and not in terms of the person sup-

47 CJEU, 15 May 2019, C-235/18, *Vega International Car Transport*, EU:C:2019:412, para. 24.
48 CJEU, 6 February 2003, C-185/01, *Auto Lease Holland*, EU:C:2003:73, para. 34.
49 CJEU, 15 May 2019, C-235/18, *Vega International Car Transport*, EU:C:2019:412, para. 36.
50 CJEU, 15 May 2019, C-235/18, *Vega International Car Transport*, EU:C:2019:412, paras. 38–40.

3.3.2. Different situations demanding a direct recovery claim

In light of *Kollroß and Wirtl,*[12] it becomes clear that the direct recovery claim of a recipient of goods or services does not exist immediately if something goes wrong. In cases in which the recipient has made a payment on account of the purchase of an item and the delivery of that item does not follow, the recipient is entitled to an input VAT deduction (regardless of the fact that the supplier has failed to deliver the item) and is not entitled to a direct recovery claim. From this, it follows that if the recipient of goods or services has been burdened with input VAT incorrectly or wrongly from the outset, he is not entitled to deduct input VAT. An incorrectly granted input VAT deduction must also be reversed if the recipient is entitled to a direct recovery claim against the tax authorities due to the inability of the supplier to repay the unjustifiably calculated VAT. On the other hand, an input VAT deduction granted to the recipient for a down payment should remain even if the goods and services are not actually supplied and the payee of the down payment proves to be unable to repay it.

Against this background, one may think of alternative situations in which input VAT may be charged wrongly from the outset. Such a situation may arise if both the supplier and the recipient have not correctly applied the place of supply rules and the correct place of supply rule would have triggered the application of the reverse charge mechanism. If it were to become impossible or excessively difficult to recover the input VAT paid in error to the supplier, would the recipient of the goods and services be entitled to claim recovery directly from the tax authority?

And what if both parties to the taxable supply assume that the transaction falls within the scope of VAT and is subject to tax, but in truth, it is VAT exempt? In such a situation, the input VAT will have been paid in error, and thus the recipient may not be able to claim an input VAT deduction. Should the recipient be granted a direct recovery claim against the tax authority where it may be impossible or excessively difficult to seek recovery from the supplier?

3.3.3. Conflicts with Member State national insolvency law

The direct recovery claim is built on the idea that the supplier is no longer able to recover the wrongly paid input VAT in full, and thus the recipient of the supply of goods and services should be entitled to claim reimbursement directly from the tax authority *instead of* the supplier of the goods and services. The CJEU conveys the right to recover input VAT (which should not have been paid) from the supplier to the recipient. Such a transfer of the claim raises the question of whether the recipient's direct recovery claim automatically prevents the supplier from seeking reimbursement of the mistakenly paid VAT. If the supplier's right of recovery were to subsist, Member States would lose revenue because both the sup-

12 CJEU, 31 May 2018, C-660/16 and C-661/16, Kollroß and Wirtl, ECLI:EU:C:2018:372.

1. Introduction: 50 years of VAT Case Law

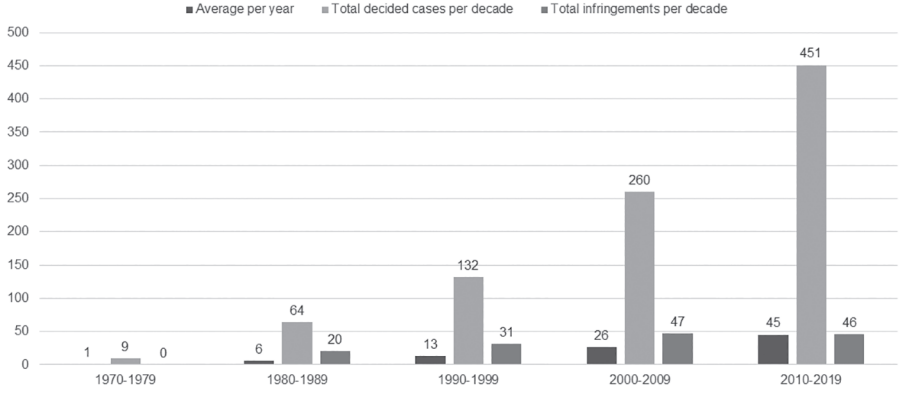
The Court of Justice of the European Union ("CJEU") plays a key role in the development of VAT case law and the development of the EU VAT system. It ensures that the VAT Directive and the principles are interpreted and applied in a unified way in all EU Member States and that they, as well as EU Institutions, comply with the Directive and its principles.

In January 2020, the CJEU entered its 51st year of VAT case law.

Over the past decades, the case law of the CJEU has become more and more important. The Court provides taxpayers, Member States and even the European Commission with guidance on how to interpret the VAT Directive. Judges in the national courts of Member States, in doubt about how to apply/interpret the VAT Directive, refer cases, often at the request of taxpayers. Additionally, the European Commission – in its role of guardian of the correct application/interpretation of EU law – also refers cases to the CJEU when it is of the opinion that Member States are infringing the EU VAT law.

The graph below (**Fig. 1**) illustrates the number of cases (preliminary questions and infringement procedures) concerning VAT that were brought before the CJEU in the period from 1970 until 31 December 2019.

Fig. 1: Number of cases decided per decade (1970–31 December 2019)



The graph shows that there was a very large increase in the number of cases in the period 2000 to 2009. In the decade from 1990 to 1999, 176 cases were referred to the CJEU. In the years from 2000 to 2009 that number increased by 157, making a total of 333 cases in that decade. The big increase in cases during that period can be attributed to the accession to the European Union of 8 Member States (see below).

During the years 2010–2019, another 209 cases were referred to the CJEU.