A CRITICAL PERSPECTIVE OF "SUBJECTIVE VALUE" ACCORDING TO THE CJEU TO DETERMINE THE VAT TAXABLE AMOUNT IN BARTER TRANSACTION – A NEW SOLUTION

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Abstract

The decisions made by the Court of Justice of the European Union (CJEU) in respect of the Value Added Tax (VAT)-taxable value of barter transactions (consideration in kind) (van Doesum et al., 2016) in cases where the consideration has no market price (one-time and unusual service) have been considered to be incompatible with Article 73 of the VAT Directive[2] (see Englisch, 2021b; HMRC, 2021). The CJEU has justified this incompatibility by introducing the term "subjective value".[3] Before 2018, the Bundensfinanzhof (BFH)— the German Federal Fiscal Court—followed these CJEU judgments by referring to "subjective value" and referring to Section 162 of the Abgabenordnung (AO)—the German General Fiscal Code—thus producing a solution compliant with the law. In 2018, the BFH waived its position and went in an incorrect direction. The view of the U.K.'s H.M. Revenue & Customs (HMRC) department is that the question "has not been considered by the VAT Tribunals or Courts and that any cases of this kind should be submitted to the VAT Supply team" (HMRC, 2021). From a predominantly German perspective, the author demonstrates that the "subjective value" is not a satisfactory solution and suggests, de lege ferenda, the introduction of a new Article 42a into Council Implementing Regulation (EU) No 282/2011 as a new solution by which to ascertain the taxable amount in barter transactions in cases where the consideration has no market price.

1. INTRODUCTION

A. Overview of VAT in the European Union (EU)

More than 160 countries and regions in the world levy VAT, although this is not the case in the United States (Schenk et al., 2015). VAT is levied in all EU member states (van Doesum et al., 2016). The VAT Directive "establishes the current common system of VAT" in the EU [4], and provides that "the supply of goods" and "the supply of services for consideration within the territory of a member state by a taxable person acting as such" shall be subject to VAT.[5] The European Union (EU) defines the term "taxable person" as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity".[6] It states that "on each transaction, VAT, calculated on the price of the goods

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[2] Englisch (2021) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ EU L 347, 11.12.2006, at 1–118, last amended by COUNCIL DIRECTIVE (EU) 2021/1159 of 13 July 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006L0112-20210701

[3] UK: CJEU, 23 Nov. 1988, Case C-230/87, *Naturally Yours Cosmetics*, para. 16, ECLI:EU:C:1988:508. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0230

[4] Supra, fn. 2, article 1(1).

[5] Ibid., article 2(1)(a).

[6] Ibid., article 9(1).

or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components".[7]

It also states that "the taxable amount" of the supply of goods or services "shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party".[8]

In the Case of *Costa v. ENEL*, the CJEU confirmed that EU law takes precedence over the national law of member states—the doctrine of primacy of EU law (van Doesum et al., 2016. p.20. The main sources of the primary law of the EU are the Treaty on European Union (TEU)(EU, 2012a) and the Treaty on the Functioning of the European Union (TFEU) (EU, 2012b). With respect to VAT, the most important component of primary EU law is the TFEU and the most important secondary EU laws are the VAT Directive and VAT Regulation (van Doesum et al., 2016). According to Article 288 of the TFEU), the VAT Directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods" (EU, 2012b). Therefore, as van Doesum et al. note. it "must be transposed into national law in order for the rules to have effect" (p. 22). Meanwhile, according to Article 288 of TFEU, the VAT Regulation is "directly applicable in all Member States" (EU, 2012b). This is the reason why I suggest the introduction of a new provision in the VAT Regulation, rather than in the VAT Directive. According to Article 13(1) of the TEU (EU, 2012a), the CJEU is one of the EU's institutions. According to Article 19 of the TEU, the CJEU "shall ensure that in the interpretation and application of the Treaties the law is observed" (EU, 2012a). In the field of VAT, the CJEU has already ruled in approximately 850 cases.[9] Indeed, according to Schenk et al. (2015), "the EU model has the most extensive case law on VAT issues" (p. 47). According to Article 4(3) of the TEU, the "Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" (EU, 2012a). Therefore, the national court should interpret the VAT Directive in accordance with the CJEU (Englisch, 2021a).

The United Kingdom introduced VAT as a replacement for Purchase Tax on 1 April 1973, as a consequence of joining the European Economic Community (EEC). VAT is administered and collected by HMRC. The Value-Added Tax Act 1994, which currently applies in the United Kingdom, provides that:

- "VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him" (Value-Added Tax Act, 1994, s. 1.4.1). A taxable supply is defined as "a supply of goods or services made in the United Kingdom other than an exempt supply" (Value-Added Tax Act, 1994, s.1.4.2).

- "If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration" (Value Added Tax Act, 1994, s.19.2). It adds that if "the supply is for a consideration not

[7] Ibid., article 1(2)(2).
[8] Ibid., article 73.
[9] CJEU (2022), Subject matter = "Taxation". Listing preferences = Dates in descending order Documents = Documents published in the ECR: Judgments Documents not published in the ECR: Judgments, Court = "Court of Justice", Case status = "Cases closed", only Taxation- Value added tax, (accessed on 7.10.2021).

> consisting or not wholly consisting of money, its value shall be taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration" (Value-Added Tax Act, 1994, s.19.3).

On 31 January 2020, the United Kingdom withdrew from the EU. This means that the United Kingdom now essentially has supremacy over its own laws. This article deals with only the legal status that existed before Brexit.

Germany remains a member of the EU. The relevant provisions of the German Value Added Tax Act (Umsatzsteuergesetz-UStG) will be given in this article, as it is written mainly from the German perspective.

B. Starting Point[10]

A meat company and a manufacturing company exchange beef and a machine. The market price for beef is 700 euros, while the market price for the machine is 800 euros. In barter transactions, there are two taxable supplies (Englisch, 2021b) if the two parties are entrepreneurs. Here, in Supply 1 (the initial supply[11]), the meat company sells beef to the machine company; in Supply 2 (the return supply[12]), the manufacturing company sells machines to the meat company.

It should be made clear that there are two values within barter transactions: the value of supply (delivered goods/services), and the value of consideration (obtained goods/services). From the perspective of the meat company, the supply is the beef (market price: 700 euros), and the consideration is the machine (market price: 800 euros). From the perspective of the manufacturing company, the supply is the machine (market price: 800 euros) and the consideration is the beef (market price: 700 euros).

There is no specific rule regarding barter transactions in the VAT Directive, as it is not necessary (Korn, 2019). The CJEU judgment in the case of *Serebryannay vek EOOD*[13] provides that:

> barter contracts … and transactions for which the consideration is in money are … two identical situations. … [T]he consideration for a supply of goods may consist of a supply of services, and so constitute the taxable amount within the meaning of Article 73 of the VAT Directive.

Consequently, barter transactions are taxable, and the taxable amount is the same in transactions for which the consideration is money. Regarding the taxable amount in barter transactions, Annex A 13 of the Second Council Directive of 11 April 1967 (67/228/EEC)[14], which refers to Article 8(a), already provides that:

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[10] See Lippross (2017).
[11] See Doesum et al. (2016).
[12] Ibid.
[13] BG: CJEU, 26. Sept.2013, Case-C283/12, *Serebryannay*, ECLI:EU:C:2013:599. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0283
[14] Second Council Directive 67/228/EEC of 11 April 1967, OJ EU 71, 14.4.1967, 1303–1312. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31967L0228&from=EN

> The expression 'consideration' means everything received in return for the supply of goods or the provision of services, … that is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received.

Article 73 of the VAT Directive[15] provides that "the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party".

This means that the taxable amount of supply is what the supplier obtains: the value of the received goods/services (the consideration). For instance, if a fruit dealer sells one kilo of apples for five euros and the customer pays five euros, the taxable amount of the supply of apples is what the fruit dealer obtains: i.e. the value of the consideration is five euros less VAT.

In the barter transaction mentioned above, from the perspective of the meat company, the value of the delivered good is beef priced at 700 euros, while the obtained good is a machine worth 800 euros. According to Article 73 of the VAT Directive[16], the taxable amount of the supply is what the supplier obtains: the value of the consideration. Accordingly, the taxable amount of the supply of meat is 800 euros less VAT, since the good which the meat company has obtained is a machine priced at 800 euros. From the perspective of the machine company, the delivered good is a machine priced at 800 euros, and the good obtained is the beef priced at 700 euros. Consequently, the taxable amount of the supply of the machine is 700 euros less VAT, since the good which the machine company has obtained is the beef priced at 700 euros less VAT.

To summarise: in barter transactions, if a supplier exchanges his goods/services for goods/services with another party, his taxable amount is the value of what he obtains. The taxable amount of supply is the value of the consideration (the goods/services received by the supplier), and not the value of the supply (the goods/services which the supplier has delivered).

If the value of the consideration has a market price, such as beef or a machine, it is no problem to ascertain the taxable amount, since the price is the taxable amount. However, if the value of consideration has no market price, as in the case of a one-time service or an unusual service, a problem arises with regard to what the taxable amount should be.

For example, the meat company now supplies beef to the machine company in exchange for the machine company printing the beef company's logo on every machine that it sells that year. In this case, the consideration for beef is not a machine, but the action of printing a logo (the supply of a service provided by the machine company according to Article 2 (1) (c) of the VAT Directive[17]). However, there is no market price for the printing of a logo by a machine company, since this is not the company's normal business and it will only undertakes this action once.

In this circumstance, for the sake of simplicity, the tax authority would determine that the taxable amount is the value of the supply of the beef (700 euros less VAT), since the market

[15] Supra, fn. 4.
[16] Ibid.
[17] Ibid.

price of beef (700 euros) is something that the tax authority can easily obtain. However, 700 euros is the value of the supply. Apparently, this approach infringes Article 73 of the VAT Directive, according to which the taxable amount is the value of the consideration.[18] What the meat company has now obtained is a service (the printing of the meat company's logo by the machine company), so the taxable amount should be the value of this service. However, this service has no market price. This article will try to solve the problem of how the value of this service should be determined.

The CJEU's judgments with regard to the taxable amount in barter transactions can be divided into two groups: firstly, the decision that has been made in cases where the consideration has a market price; and secondly, the decision made in cases where the consideration has no market price. For the first group, the CJEU has decided, according to Article 73 of the VAT Directive[19], that the taxable amount of the supply is the value of the consideration which the supplier receives from the exchange partner in return for his supply. However, for the second group, the CJEU has ruled that the taxable amount is one of the values of the supply, and has introduced the term "subjective value". These judgments for the second group are considered to be incompatible (Englisch, 2021b; Reiß, 2018) with the wording of Article 73 of the VAT Directive[20], which has led to amendments to two successive phases of the relevant case law of the BFH. In the first phase (before the BFH decision of April 25, 2018)[21], the BFH reached a solution compliant with the law, but, in the second phase in 2018, it made a radical change and went in an incorrect direction. In this article, the author seeks to determine what "subjective value" really means, whether this term presents an acceptable solution, and what the taxable amount should be in barter transactions.

2. SUBJECTIVE VALUE IN CJEU CASE LAW

A. The Development of the Term "Subjective Value"

In CJEU case law, the definition of the term "subjective value" was developed successively by four CJEU decisions.

The term first appeared in the CJEU judgment in the 1981 case of *Coöperatieve Aardappelenbewaarplaats* (Case C- 154/80).[22] This case concerned a cooperative association which ran a cold storage depot storing potatoes for its members. Each grower that owned shares was entitled to deposit 1,000 kilograms of potatoes per year for a fee. For a financial reason, namely the pending sale of the cold storage, the association did not ask for any payment for two years. The Dutch tax authority was, however, of the opinion that "the cooperative had nevertheless charged its members something in return for a reduction in the value of their shares".[23]

The CJEU decided that "such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed

[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] BFH 25. 4. 2018, XI R 21/16, BStBl. 2018 II at 505.
[22] NL: CJEU, 5 Feb.1981, Case C-154/80, *Coöperatieve Aardappelenbewaarplaats*, ECLI:EU:C:1981:38. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61980CJ0154&from=EN
[23] Ibid. II. A, p. 448.

according to objective criteria".[24] It noted that "consequently, a provision of services for which no definite subjective consideration is received does not constitute a provision of services 'against payment' and is therefore not taxable within the meaning of the Second Directive".[25] This means that the cooperative association did not make a taxable delivery and the storage service was not taxable.

As stated previously, the Second Council Directive provides that the "expression 'consideration' means everything received in return for the supply of goods or the provision of services" (see Section 1. B), but does not explain how "everything received" should be determined.[26]

The CJEU decided that "consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria.[27] It stated that, "consequently, a provision of services for which no definite subjective consideration is received does not constitute a provision of services 'against payment'".[28]

Later, the CJEU clarified this interpretation in the case of *Elida Gibbs* (C-317/94) , and ruled that "consideration is the 'subjective' value ... the value actually received **in each specific case**".[29,30]

In the case of *Argos* (C- 288/94), the CJEU stated that "that consideration is thus the subjective value, **that is to say**[31], the value actually received, **in each specific case**[32], and not a value estimated according to objective criteria".[33]

This formulation of "subjective value" was considered to be most unfortunate (Reiß, 2018, p. 827), since it can be misunderstood as "a subjectively assessed value" in its normal sense in English as the opposite of an "objective value", which represents a value assessed according to objective criteria in the market, with no direct connection to the concrete barter transaction. In this context, the word "subjective" cannot be applied in its normal sense in English, but is used instead to describe the value determined by the parties in a concrete barter transaction (Terra & Kajus, 2017, p.808).

The consideration actually received by the specific supplier is not dependent on the market price according to an objective criterion in the market, but rather on what is actually received by the concrete supplier (a subject) in the specific barter transaction. This is why it is called a "subjective value". A "subjective value" in this context can be understood as "a value actually received by the supplier in a specific barter transaction".

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[24] Ibid., p.454, para. 13.
[24] Ibid., p. 455, para. 14.
[26] Supra, fn. 14
[27] Supra, fn. 22, p. 454, para.13.
[28] Ibid., p. 455, para. 14.
[29] Bolded by me.
[30] UK: CJEU, 24 Oc. 1996, Case C-317/94, *Elida Gibbs*, ECLI:EU:C:1996:400, para. 27. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0317&from=en
[31] Bolded by me.
[32] Bolded by me.
[33] UK: CJEU, 24 Oc. 1996, Case C-288/94, *Argos Distributors Ltd.*, ECLI: EU:C:1996:398, para.16. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61994CJ0288

"subjective value" in the normal sense in English	a subjectively assessed value
"subjective value" according to the CJEU	a value actually received by the supplier (a subject) in a specific barter transaction
an objective value	a value assessed according to objective criteria in the market

Indeed, in the case of *Coöperatieve Aardappelenbewaarplaats*[34], the CJEU did not explain how the taxable amount (the subjective value) was to be determined, since it was not necessary for it to do so. This was completely logical: if the CJEU held that the storage service was not at all taxable, then there was no need to determine the exact taxable amount.

In the case of *Naturally Yours Cosmetics* (Case C-230/87)[35], the CJEU tried, for the first time, to determine the taxable amount in barter transactions. The case concerned the taxable amount of an article delivered by *Naturally Yours Cosmetics* as a wholesaler at a lower price to beauty consultants as retailers in return for a sum of money and the arrangement of sales by the beauty consultants (a service, according to Article 24 (1) of the VAT Directive). The problem was not whether *Naturally Yours Cosmetics* received the service from the beauty consultants;[36] rather, it was how the taxable amount of the supply of the article should be ascertained.

The CJEU held that the value of the article must be "the sum of the monetary consideration and the value of the service provided by the retailer" and that "the value of that service must be regarded as being equal to the difference between the price actually paid for that product and its normal wholesale price".[37] It reached this decision by referring to "a subjective value"[38] in the CJEU decision in the case of *Coöperatieve Aardappelenbewaarplaats*.[39] The CJEU concluded that the taxable amount was a part of the wholesale price, as it was part of the value of the supply.[40]

This was apparently an infringement of Article 11(A)(1) of the Sixth Council Directive[41], according to which the taxable amount is the value of the consideration, and hence the value of the obtained service, in this case the service provided by the beauty consultants in their capacity as retailers. The taxable amount should, in my judgment, be assessed according to the time and effort invested by the beauty consultant to arrange sales. Just because there was no market price for the service of the beauty consultant (the arrangement of sales), the CJEU took the value of the delivered goods, the wholesale price, to be the taxable amount. The CJEU acted only for the sake of simplicity and only achieved a pragmatic solution (see Englisch, 2021b; see also Rothenberger, 1995).

[34] Supra, fn. 22.
[35] Supra, fn. 3.
[36] Ibid., paras. 11 and 14.
[37] Ibid., para 18.
[38] Ibid., para. 16.
[39] Supra, fn. 22.
[40] Supra, fn. 3.
[41] Sixth Council Directive 77/388/EEC of 17 May 1977, OJ EU L 145, 13.6.1977. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:31977L0388

Indeed, it made no sense that the CJEU referred to "a subjective value" in the case of *Coöperatieve Aardappelenbewaarplaats*[42], since it had not explained in that case how the taxable amount was to be determined. In the case of *Naturally Yours Cosmetics*, it did not justify why the taxable amount should be part of the wholesale price.[43]

In the *Empire Stores* case[44], a mail-order company offered an article to its established customers free of charge if they recommended a friend as a potential customer[45]—an introductory service (Terra & Kajus, 2017). By referring to "a subjective value" in the case of *Naturally Yours Cosmetics*[46], the CJEU held that the taxable amount was the price paid by *Empire Stores* as the supplier of that article.[47] This meant that the CJEU repeated, in principle, its (incorrect) approach in the case of *Naturally Yours Cosmetics*, determining the value of the delivered goods (the purchase price of the article) to be the taxable amount of the supply of the article (Lippross, 2017). The CJEU explained its decision as follows:

> 18…the consideration taken as the taxable amount in respect of a supply of goods is a subjective value, since the taxable amount is the consideration actually received and not a value estimated according to objective criteria.
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> 19 Where that value is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of the services[48] **(Empire Stores)**[49] ... attributes to[50] the services which he is seeking to obtain and must correspond to the amount which he **(Empire Stores)**[51] is prepared to spend for that purpose. Where, as here, the supply of goods is involved, that value can only be the price which the supplier **(Empire Stores)**[52] has paid for the article which he is supplying without extra charge in consideration of the services in question.[53]

This is incorrect since, according to paragraph18 of the judgment and Article 11(A)(1) of the Sixth Council Directive, the taxable amount is the consideration actually received by *Empire Stores*, not the price that *Empire Stores* paid for the article. Paragraph 19 of the judgment therefore contradicts paragraph 18 of the same judgment.

This decision of the CJEU can be seen as confusing in this regard (van Doesum et al., 2016), but the legal result is clear. The CJEU has, in the case of *Empire Stores*, determined one of the values of the delivered goods to be the taxable amount for practical reasons (the purchase price of the goods from the supplier). This was effectively a violation of Article 11(A)(1) of the Sixth Council Directive, according to which the taxable amount is the value of the service received.

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[42] Supra, fn.22.
[43] Ibid.
[44] UK: CJEU, 2. Ju. 1994, Case C-33/93, Empire Stores, ECLI:EU:C:1994:225. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61993CJ0033
[45] Ibid., para. 4.
[46] Ibid., para. 8.
[47] Ibid., the last sentence.
[48] Underlined by me.
[49] Wording in bold added by me. See van Doesum et al. (2017), : "[eds.: in this case the recipient of the services is actually the same person as the person making the supply of the goods]" (p. 219).
[50] Underlined by me.
[51] Wording in bold added by me.
[52] Ibid.
[53] Supra, fn. 44, paras. 18-19.

This was also an infringement of Article 1(2) of the VAT Directive and of the nature of VAT in general (Stadie, 2009). Article 1(2) of the VAT Directive provides that "the principle of the common system of VAT entails the application to goods and services of a general tax on consumption".[54]

It is clear that VAT is a tax on general consumption, according to Article 1 of the VAT Directive. The established customer in the case of *Empire Stores*[55] is a consumer who has paid for the article with his service (recommending a new customer). Consequently, the taxable amount of the delivery of the article should be the value of the service provided by the established customer as a consumer.[56] The price paid by *Empire Stores* to buy the article was not what the established customer as the consumer had paid (consumed).[57] Therefore, the price paid by *Empire Stores* cannot be the taxable amount for the supply of the article.[58]

The CJEU did not actually adhere to its decision in the earlier case of *Naturally Yours Cosmetics*, since it held in this new case that part of the wholesale price of the delivered goods was the taxable amount. In the case of *Empire Stores*, the CJEU concluded that the purchase price of the delivered goods was the taxable amount.[59] The CJEU had developed the definition of the subjective value in the case of *Empire Stores*: it is the amount which the supplier is prepared to spend now, which means that it is the purchase price regarding the supply of a goods (or the cost of the goods regarding the supply of a service[60])—and so it is. This is the bespoke[61] definition of the subjective value in current EU law.

The CJEU decision in the case of *Bertelsmann* (Case C-380/99)[62] concerned the supply of non-cash bonuses by the Bertelsmann book club to its existing members in return for the introduction of a new customer. The CJEU further maintained (Lippross, 2017) its incompatibility with Article 11(A)(1) of the Sixth Council Directive[63], determining that the taxable amount for the supply of a bonus was the purchase price of the bonus plus the cost of delivery[64], i.e. the value of the goods delivered. The taxable amount should, in my view, be assessed according to the time and effort invested by the existing members when introducing new customers (acting as a recruiting service). In this case, the CJEU has refined the definition of subjective value and held that it is the cost of goods/services which the supplier has paid, including all the additional costs.

The value of delivered goods/services can be divided into two categories: the purchase price and the sales price of the delivered goods/services. The CJEU first ruled in the case of *Naturally Yours Cosmetics* that the taxable amount was the sales price[65] but then, in the case of *Empire*

[54] Supra, fn. 2.
[55] Supra, fn. 44.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[59] Ibid. para. 19, derived from "…the amount which he is prepared to spend for that purpose. Where, as here, the supply of goods is…", if there the supply of goods is, there should be the supply of services.
[61] See Pfister (2015): "insbesondere" (p.31, fn.4).
[62] DE: CJEU, 3. Jul. 2001, Case C-380/99, *Bertelsmann*, ECLI:EU:C:2001:372. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0380
[63] Supra, fn. 41.
[64] Supra, fn. 62, para 25.
[65] Supra, fn. 3.

Stores, that it was the purchase price[66] and lastly, in the case of *Bertelsmann*, the total purchase price of the delivered goods.[67] Both the sales price and the purchase price were the value of the supply, not the value of the consideration. Thus, all these decisions of the CJEU infringed Article 11(A)(1) of the Sixth Council Directive.[68] According to the Correlation Table in Annex XII of the VAT Directive, Article 73 of the VAT Directive[69] replaces Article 11(A)(1)(a) of the Sixth Council Directive.[70] The contents of both articles are identical. These CJEU decisions therefore violated Article 73 of the VAT Directive.[71]

B. The Problem of "Subjective Value"

1) By determining the taxable amount in barter transactions in cases in which the consideration has no market price to be the value of delivered goods/services rather than that of received goods/services, the CJEU has essentially assumed an equivalence between the values of the supply and the consideration.[72] It makes a generalisation that if, in barter transactions, the consideration has no market price, or the value of the consideration cannot be determined exactly, the value of the supply may be used as the taxable amount (Reiß, 2019; Stadie, 2009). This generalisation must be resolutely rejected, since there is no principle of equivalence in VAT law.[73] The supplier does not have to sell their service at the usual market price in every transaction, nor is it possible for them to do so. It is usual in market economics that a supplier is able to sell their goods or services at a price below or above their cost.[74]

It is common that the entrepreneur must sell, or desire to sell, their goods/services at a discount, e.g. under liquidity pressure, due to the voluntary or compulsory relocation of a factory/office, or because of the strategic conversion of an investment focus. This happens both in sales for money and in barter transactions.[75] Each party in a barter transaction has good reason to ascribe a different value to the consideration (HMRC, 2021). The barter transaction is only a modality of payment. The assertion that the two transactions in barter transactions are equal in value (Korn, 2019) is tantamount to assuming that an entrepreneur will never suffer a loss.

2) Although the CJEU's decision in the case of *Empire Stores* concerned a situation in which the consideration had no market price, the definition of subjective value in that case was not restricted to that particular situation, since the CJEU referred only to situations "where that value is not a sum of money agreed between the parties".[76] When referring to barter transactions, the CJEU did not distinguish between a case in which the consideration has a market price and a case in which it did not have one.[77] Following the wording of the CJEU

[66] Supra, fn. 44.
[67] Supra, fn. 62.
[68] Supra, fn. 41.
[69] Supra, fn. 3.
[70] Supra, fn. 41.
[71] Supra, fn. 2.
[72] Supra, fn. 3, para. 17.
[73] See Korn (2019); BFH 7. 5. 1981, V R 47/76, BStBl. 1981 II at 495, n. 11; BFH Urteil 03.12.1953 - V 119/53 U BStBl 1954 III at. 65; Windsteig (2015); see Ruppe and Achatz (2018, § 1, n. 62).
[74] NL: CJEU, 12. Mai 2016, Case C-520/14, *Gemeente Borsele*, ECLI:EU:C:2016:334, para. 26. https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX%3A62014CJ0520
[75] For a different opinion, see Stapperfend (2021).
[76] Supra, fn. 44, para.19.
[77] Ibid.

precisely in this respect shows that a subjective value can be used in cases of barter transaction in which the consideration also has a market price.[78]

However, a general rule for using a subjective value in all cases in barter transactions does not exist, since the CJEU has applied the subjective value as the taxable amount only in cases of barter transaction in which the consideration has no market price. In cases where the consideration has a market price, the CJEU has not so far used the subjective value as the taxable amount.

The decision of the CJEU in the case of *Orfey Balgaria* (Case C-549/11)[79] concerned the construction of a building by *Orfey Balgaria* in exchange for the building right as a consideration.[80] *Orfey Balgaria* determined the taxable amount to be 302, 712.36 BGN[81], according to the open market value of the real property.[82] The Bulgarian authorities determined the taxable amount to be 684, 000 BGN, since that was the taxable value of the building right according to a certified document.[83]

The CJEU rejected the company's view that the taxable amount should be the property's open market value, since the conditions of application laid down in Article 80(1) of the VAT Directive were exhausted[84], and these conditions were not met in the case of *Orfey Balgaria*.[85] The CJEU ruled that:

> Articles 73 and 80 of that directive[86] must be interpreted as precluding a national provision, such as that at issue in the main proceedings, under which ... the taxable amount of the transaction is the open market value of the goods or services supplied.[87]

The CJEU did not clearly indicate what the taxable amount of the building should be. However, it excluded the application of Article 80 of the VAT Directive. It can be deduced that the CJEU adhered to Article 73 of the VAT Directive and determined the taxable amount to be 684000 BGN (the consideration received by Orfey according to a certified document), since the CJEU mentioned Article 73 and 80 of the VAT Directive in the same sentence.[88]

Although the CJEU had, in the case of *Orfey Balgaria*, referred[89] to the decision in the *Empire Stores* case[90], it did not pursue that decision in practice[91], and reached a correct judgment compliant with Article 73 of the VAT Directive. If the CJEU had followed the (incorrect) view

[78] Ibid.
[79] BU: CJEU, 19 Dec. 2012, Case C-549/11, *Orfey Balgaria*, ECLI:EU:C:2012:832. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62011CJ0549
[80] Ibid., para. 15.
[81] Ibid, para. 16.
[82] Ibid, paras 17 & 18.
[83] Ibid, para 17.
[84] Ibid., para. 47.
[85] Ibid., paras. 48 & 49.
[86] Underlined by me.
[87] Supra, fn. 44, para. 49.
[88] Ibid.
[89] See Lippross, (2017); Supra, fn. 44, para. 45.
[90] Supra, fn. 44.
[91] See Pfister (2015, p. 36): "Der EuGH greift allerdings...letztlich nicht auf".

in the *Empire Stores* decision[92], it would have determined the taxable amount to be the cost of the construction of the building (a value of the supply) [93], as that was what *Orfey Balgaria*, as the supplier, had paid.

The most recent CJEU decision relating to the taxable amount of barter transactions is the case of *A Oy* in 2019.[94] *A Oy* provided a demolition service to its customer.[95] The consideration consisted of an amount of money and the supply of recyclable scrap metal.[96] The CJEU held that the taxable amount of the supply of services (demolition) was the money paid by the customer, plus the value of the supply of scrap metal, represented by a reduction in the price charged for the demolition service by *A Oy*.[97] The decrease in price was based on an estimate of the amount of money for which the recyclable scrap metal could be sold.[98] The CJEU stated that: "A tries to estimate in advance the quantity of such goods and the price likely to be obtained on their resale ...so that the price of the demolition services contract proposed to the client is as competitive as possible." [99]

The total demolition service provided by *A Oy* can be divided into two parts:

Part 1: *A Oy* provided its customer with part of a demolition service in exchange for money.
Part 2: *A Oy* provided its customer with part of a demolition service in exchange for the supply of recyclable scrap metal.

***A Oy* provides a demolition service**		**Consideration provided by customer**
Part 1	Part of the demolition service in exchange for money.	Money
Part 2	Part of the demolition service in exchange for the recyclable scrap metal.	The recyclable scrap metal

Part 1 was not a barter transaction, since the consideration was money.
Part 2 was a barter transaction. A barter transaction concerns two taxable transactions, if both of the participants are taxable persons according to Article 9 of the VAT Directive.[100] This

[92] Supra, fn. 44.
[93] See Pfister (2015, p. 36): "...in keinerlei Zusammenhang zu den Kosten der von Ofrey erbrachten Leistungen steht".
[94] BU: CJEU, 10 Jan. 2019, C-410/17, *A Oy*, ECLI:EU:C:2012:832. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CJ0410
[95] Ibid., para. 33.
[96] Ibid., para. 38: "that the service supplier, namely a demolition company, in addition to receiving monetary payment from its client for carrying out demolition works, acquires, pursuant to the demolition contract, recyclable scrap metal that it may then sell on."
[97] Ibid., para. 47: "the taxable base of the supply of services which is the subject matter of a demolition contract, such as that at issue in the main proceedings, is constituted by the price actually paid by the client and by the value attributed by the service provider to the recyclable scrap metal…".
[98] Ibid., para. 47: "as reflected in the amount of the reduction of the price charged for the supply of services".
[99] Ibid., para.17.
[100] Ibid., para. 62 (1), the Court (Ninth Chamber) hereby rules: "however, subject to value added tax only if it is made by a taxable person acting as such."

meant that the demolition service in Part 2 involved two taxable transactions(see van Doesum et al. 2015, p. 217):

- Supply 1—the initial supply (van Doesum et al., 2015): *A Oy* provided its customers with part of the demolition service in exchange for the supply of recyclable scrap metal.
- Supply 2—a return supply (van Doesum et al., 2015): the customers provided *A Oy* with recyclable scrap metal in exchange for part of the demolition service.

Therefore, there are actually three transactions in CJEU Case *A Oy*:

A demolition service in exchange for money

Transaction 1: *A Oy* provided its customers with part of the demolition service in exchange for money.

A barter transaction (involving two transactions)

Transaction 2: The initial supply(van Doesum et al., 2015): *A Oy* provided its customers with part of the demolition service in exchange for the supply of recyclable scrap metal.

Transaction 3: A return supply(van Doesum et al., 2015): the customers provided *A Oy* with recyclable scrap metal in exchange for part of the demolition service.

In transaction 2, where *A Oy* provided its customers with part of the demolition service, the consideration was the supply of the recyclable scrap metal by the customer. The CJEU did not state what the taxable amount was for this part of the demolition service and said only that:

> A tries to estimate in advance the quantity of such goods and the price likely to be obtained on their resale, and that price is **factored**[101] in to the calculation of the price when preparing the quote for the demolition services, so that the price of the demolition services contract proposed to the client is as competitive as possible.[102]

However, the CJEU has not explained how this price was factored into the calculation. *A Oy* has two possible ways of ascertaining the taxable amount: it could be their cost of the part of the demolition service or the sale price of the recyclable scrap metal. The method that *A Oy* would choose can be derived from the CJEU's statement above.[103]

According to the decision in the case of *Empire Stores*, the taxable amount is a subjective value, and a subjective value is what the supplier has paid for the delivered goods.[104] Using the subjective value, *A Oy* should determine the taxable amount to be his cost[105] of the part of the demolition service (the subjective value), since the cost is what *A Oy* had paid as the supplier.

[101] Bolded by me.
[102] Supra, fn. 94, para.17.
[103] Ibid.
[104] Supra, fn. 44.
[105] See Terra & Kajus (2017, p. 757): "(where the supply of services is involved … the value can only be the cost price which the supplier incurred for those services)".

However, the CJEU had clearly stated that "A tries to estimate … the price likely to be obtained on their resale … so that the price of the demolition services … is as competitive as possible".[106] *A Oy*'s aim was to obtain the contract for demolition. Therefore, they would sell the recyclable scrap metal at as high a price as possible so that they could keep their offer price for the demolition services as low as possible. The scrap metal has a market price.[107] Apparently, *A Oy* was likely, therefore, to focus on the sale price, not their cost.[108] The sale price was what *A Oy* could obtain from the sale of the recyclable scrap metal and represented the value of the consideration.[109] Consequently, the taxable amount of the part of the demolition service provided by *A Oy* was the value of the consideration which *A Oy* could receive in the market by selling the recyclable scrap metal.[110] This is compatible with Article 73 of the VAT Directive.

In summary, it can be seen that the CJEU applied the subjective value (costs of the supplier) as the taxable amount only in cases in which the value of the consideration in barter transactions had no market price.[111] The CJEU made these decisions for practical reasons or for the sake of simplicity[112] and only as an exception. In the case of *Orfey Balgaria* in which the received goods/services had a market price, the CJEU adhered to Article 73 of the VAT Directive and decided that the taxable amount was the value of the consideration.[113] In the case of *A Oy*, in which the received good had a market price, the CJEU decided indirectly that the taxable amount was the market price (the value of the consideration).[114] It can be concluded that the CJEU has no intention to dispense with Article 73 of the VAT Directive.

3) According to the consistent jurisprudence of the CJEU, the barter transaction and the transition in which the consideration is money are similar situations.[115] The barter transaction is only a subcase of the taxable supply against the consideration (Korn, 2019). Following the principle of neutrality, the two should therefore be treated equally. In the case of *Goldsmith*[116], Advocate La Pergola stated that:

> the principle of nondiscrimination … demands that barter transactions be treated **in the same manner**[117] as money transactions**. Fiscal neutrality**[118] specifically

[106] Supra, fn. 94.
[107] Supra, fn. 94, para. 17: "That waste consists partly of goods that A may resell to companies who purchase recyclable scrap metal".
[108] Supra, fn. 94.
[109] Ibid.
[110] Ibid.
[111] See Spilker (2019, p.731): "denn hier liegt hier ein Ausnahmefall vor".
[112] See HMRC (2016): "It is probable that it will be easier to identify costs incurred by the newspaper in providing the advertising service than the costs incurred by the other trader".
[113] Supra, fn. 94.
[114] Supra, fn. 94.
[115] Supra, fn. 79., para. 33; Supra, fn. 13, para. 39; Supra, fn. 93, para. 36; DE: CJEU, 16. Sept. 2020, Case C-528/19, *Mitteldeutsche Hartstein-Industrie*, ECLI:EU:C:2020:712, para. 45 (https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0528).
[116] UK: CJEU, 3. July 1997, Case C-330/95, *Goldsmiths*, ECLI:EU:C:1997:339. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61995CJ0330
[117] Bolded by me.
[118] Bolded by me.

> requires equal treatment for those different economic activities in order to avoid distortions of the more general Community VAT system.[119]

If the consideration is in kind, it should be valued. The value of the supply can be serviced as a basis of the estimation, since the supplier would consider whether he enters into a barter transaction on the basis either of the purchase price or of the costs which he has paid. The supplier would consider a possible profit or a possible loss, depending on the market situation. The subjective value, according to the judgment of the CJEU in the case of *Empire Stores*[120], is the purchase price (van Doesum et al., 2016) of the supply. This is incorrect, since neither profit nor loss is considered. The CJEU has assumed, mistakenly, that a supplier can always sell his goods or service in excess of the purchase price of his goods. This contradicts the reality, since the price depends on the market and thus fluctuates. In the case of *Scandic Gåsabäck*, the CJEU stated that: "the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a 'transaction effected for consideration'".[121]

According to Kolozs (2009), "certain market sectors are sometimes forced to sell their products at a lower price than the purchase price (p. 210). These sectors include "IT stores, software producers, fashion designers" and "clothing and shoe stores" (Kolozs, 2009, p. 210). Therefore, the subjective value introduced by CJEU does not reflect the economic reality.

In the case of transactions in which the consideration is money, the entrepreneur can freely set the price (the taxable amount) depending on the market situation, since Article 80 of the VAT Directive[122] only applies to a delivery or service to recipients where the supplier has family or other close personal ties to the recipients. Should the entrepreneur enter into a barter transaction, his taxable amount according to the subjective value of the CJEU can only be his expense, even if he exchanges his goods or service at a value lower than his expenses, and even if he has no family or other close personal ties to the recipients of the supply. The subjective value minimises the taxable amount, so Article 80 of the VAT Directive[123] would apply automatically to any barter transaction.

This makes the barter transaction unattractive for the supplier when compared to transactions where the consideration is money and denies the supplier the opportunity to freely choose this type of transaction. In the case of *Goldsmiths*, the CJEU ruled that:

> no distinction between consideration in money and consideration in kind is drawn in either Article 11A(1)(a) or Article 11C(1) … Since the two situations are, economically and commercially speaking, identical, the Sixth Directive treats the two kinds of consideration in the same way.[124]

and that:

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[119] OPINION OF ADVOCATE GENERAL LA PERGOLA delivered on 27 February 1997 in case of *Goldsmiths*, para. 28, ECLI:EU:C:1997:94. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61995CC0330
[120] Supra, fn. 44.
[121] SWE: CJEU, 20. Jan. 2005, Case C-412/03, *Scandic Gåsabäck*, ECLI:EU:C:2005:47, para. 22. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0412
[122] Supra, fn. 2.
[123] Ibid.
[124] Supra, fn. 116, para. 23.

> A distinction…**discourages traders from entering into barter contracts**[125], although such contracts are not, in financial or commercial terms, in any way different from transactions in which the consideration is expressed in money, and consequently restricts traders' freedom to choose the contract which they consider to be most suited to satisfying their economic interests.[126]

The concept of subjective value introduced by the CJEU leads to inequality between the tax treatment of transactions in which the consideration is money and the tax treatment of barter transactions. It is regarded as contrary to the system (Probst, 2019) and violates the principle of neutrality (Ruppe & Achatz, 2017).

3. PROBLEM IN GERMAN TAX LAW

There are special rules for barter transactions in dUStG (the German VAT Act): Section 3 (12) dUStG for the definition and Section 10 (2) (2) dUStG for the taxable amount.

The BFH is in a much better position than the CJEU to ascertain the taxable amount in barter transactions in those cases where the value of the consideration has no market price. This is for two reasons. Firstly, the BFH can estimate the value of the consideration according to Section 162 AO (German General Tax Code): "Where the revenue authority cannot determine or calculate the tax base, the revenue authority shall estimate it. All circumstances which have an impact on the estimation shall be taken into account".[127]

Secondly, the BFH can rely on its settled case law and derive the information from the value of the supply to determine the value of the received goods/services (Treiber, 2021).

Before the CJEU introduced the concept of subjective value, the BFH had made a decision according to Section 162 AO (German General Tax Code) and its settled case law.

A. The Consideration has no Market Value

The BFH is required to apply these rules, following the decisions of the CJEU, according to Article 4(3)(2) TEU (see Englisch, 2021a; EU, 2012a). After the CJEU's introduction of subjective value, in all cases where the consideration has no market prices, the BFH made further decisions according to Section 162 AO (German General Tax Code) and its settled case law, but referred, in addition, to the "subjective value" in the CJEU judgment in the case of *Empire Stores*.[128] Indeed, the concept of subjective value introduced by the CJEU has not changed the judgment of the BFH in this respect since, in all relevant cases, the BFH held that the taxable amount was the purchase price, expenses, and cost. According to the CJEU, the subjective value is what the supplier has paid, while the purchase price, expenses, and cost are

[125] Bolded by me.
[126] Supra, fn. 116, para. 25.
[127] DE: Abgabenordnung in der Fassung der Bekanntmachung vom 1. Oktober 2002 (BGBl. I at 3866; 2003 I, at 61), die zuletzt durch Artikel 1 des Gesetzes vom 21. Dezember 2019 (BGBl. I, at 2875) (German General Tax Code in the version of the announcement of October 1, 2002 (Federal Law Gazette I, at 3866; 2003 I, at 61), was last amended by Article 1 of the Law of December 21, 2019 (Federal Law Gazette I, at 2875)). Translation of Section 162, para. 1, by the Federal Ministry of Finance (https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html).
[128] Supra, fn. 44.

also what the supplier has paid. Therefore, all decisions made by the BFH have actually been compliant with the subjective value, according to CJEU. For example:

a) The BFH's decision on March 28, 1996[129], concerned a barter transaction of goods in exchange for a service. A housewife invited guests to her home and held a party. At the party, she let a dealer sell his goods. The dealer gave her some of the goods as a reward for holding the party. The holding of the party by the housewife had no market price. The BFH decided that **the purchase price** of the gifts delivered by the dealer was the taxable amount of the supply of the gift.[130]

b) The BFH's decision of July 10, 1997[131], concerned a barter transaction of a service in exchange for a service. A brewery rented out a property to a landlord for a property owner, managed the property, and secured the rent. The consideration was that the property owner had to allow advertising for this brewery (such as its logo and photos of its beer) to be displayed on his property and the landlord was obliged to sell the beer of the brewery. The problem was how to determine what the taxable amount of the service of the brewery should be (finding the landlord for the property owner, placing advertising in the house, managing the house, and securing the rent). The service provided by the property owner (giving permission to display advertising at his property and obliging the landlord to sell the brewery's beer) had no market price. The BFH determined that **the expenses** incurred by the brewery as a provider of the service could be an indication of the taxable amount.

c) The BFH's ruling of June 10, 1999[132], concerned a company that gave its director private use of a company car. The BFH held that there was a barter transaction in which the free use of the car was exchanged for the director's working performance, and that the taxable amount of the service (the use of the car) was, therefore, the director's working performance. The value of the working performance could be estimated by **the cost** of using the car.[133]

d) The BFH's decision of April 16, 2008[134], concerned a barter transaction of a service against goods (a car). The activity of an advertising company was to rent advertising space on cars. A local community allowed the advertising company to use a car free of charge, but the advertising company had to place advertisements from the local community on the car and drive it for five years. After five years, the advertising company would become the owner of the car. In this case, the local community delivered a car to the advertising company and the consideration was a service of the advertising company (driving a car with advertisements for five years). There was no market price for driving a car featuring advertising for five years, so the BFH decided that the taxable amount of the delivered car was **the purchase price** of the car (the value of the delivered goods).

e) The BFH's ruling of July 11, 2012[135], concerned a barter transaction between a publisher and a medical association, involving the production of a journal in exchange for a right. The publisher printed the medical journal for the medical association free of charge and, in return,

[129] BFH 28. 3. 1996, V R 33/95, BFH/NV 1996, 936, at 29.
[130] Ibid., at 29, unter 2.
[131] BFH 10. 7.1997, V R 95/96 BStBl. 1997 II at 668, unter II. 3, n. 27.
[132] BFH 10. 6. 1999, V R 87/98, BStBl. 1999 II at 580.
[133] BFH 10. 6. 1999, V R 87/98 BStBl. 1999 II at 580, unter 2 a).
[134] BFH Urteil v. 16.04.2008 - XI R 56/06 BStBl 2008 II S. 909.
[135] BFH 11. 7. 2012, XI R 11/11 BStBl. 2018 II at 146, unter II. 3 b), n. 36.

received the right to place advertisements in that magazine. The right to place advertisements in a medical magazine had no market price. The BFH held that the FG (German Financial Court) of Saxony had correctly ascertained the production **costs** of the magazines (the value of the delivered goods) to be the taxable amount of the print of the journal.

B. The Consideration has a Market Value

Before 2018, in cases of barter transaction in which the consideration had a market value, the BFH and German tax authority took the market value of the consideration to be the taxable amount, following Section 9 of the Bewertungsgesetz (the German Valuation Act)[136], even after the CJEU had introduced the concept of subjective value. This conformed with Article 73 of the VAT Directive. For example:

a) The BFH's decision of August 1, 2002[137], was based on the following situation: Company R and P allowed a non-profit air-sports club to use, free of charge, a balloon bearing its company logo, as well as a vehicle. The company bore all of the costs, such as the gas required to fly the balloon, and the vehicle. The consideration was that the non-profit air-sports club flew the balloon 30 times a year as an advertising activity and made a media echo (i.e. improved the media presence of the company). The BFH held that the non-profit air-sports club had advertised R and P, and that the consideration was the use of the balloon and vehicle.[138] This was a barter transaction of a service (advertising) in exchange for a service (use of the balloon and vehicle) and the supplier was the non-profit air-sports club. The BFH confirmed the judgment of the FG (German Financial Court) Cologne that the taxable amount of the advertising service provided by the non-profit air-sports club was the value of the services received (the costs of R and P).[139] In this case, the BFH correctly determined the taxable amount to be the value of the consideration (the costs of R and P), in accordance with Section 10 (2) (2) dUStG[140] and Article 73 of the VAT Directive (Englisch, 2021b). Although the BFH had referred to the CJEU's concept of subjective value[141], it did not actually adhere to the CJEU's decision. If the BFH had followed this decision, it would have used the subjective value as the taxable amount. The subjective value, according to the CJEU, is what the supplier had paid, so in this case it should have been the costs of the non-profit air-sports club, since the club was the supplier of the service (advertising).

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[136] Bewertungsgesetz in der Fassung der Bekanntmachung vom 1. Februar 1991 (BGBl. I S. 230), das zuletzt durch Artikel 2 des Gesetzes vom 16. Juli 2021 (BGBl. I S. 2931) geändert worden ist. (The German Valuation Act in the version of the announcement of February 1, 1991 (Federal Law Gazette I p. 230), last amended by Article 2 of the law of July 16, 2021 (Federal Law Gazette I p. 2931) has been changed. https://www.gesetze-im-internet.de/bewg/BewG.pdf.

[137] BFH 1. 8. 2002, V R 21/01, BStBl. 2003 II at 438.

[138] Ibid, II. 1. b): "Der Kläger erbrachte die Werbeleistungen auch gegen Entgelt…in Gestalt tauschähnlicher Umsätze…. Das Entgelt…bestand in der Überlassung fahrbereiter Ballone zur Nutzung".

[139] BFH 1. 8. 2002, V R 21/01 BStBl. 2003 II at 438, unter II. Anfangen.

[140] DE: Umsatzsteuergesetz in der Fassung der Bekanntmachung vom 21. Februar 2005 (BGBl. I at 386), das zuletzt durch Artikel 3 des Gesetzes vom 21. Dezember 2019 (BGBl. I, at 2886) (German Value Added Tax Act in the version of the announcement of February 21, 2005 (Federal Law Gazette I, at 386), the last through Article 3 of the Law of December 21, 2019 (Federal Law Gazette I, at 2886).

[141] Ibid, II. 3. a).

b) The BFH judgment of April 15, 2010[142], held that a barter transaction existed in part between a GmbH & Co. KG and its limited partners (two credit institutions).[143] GmbH & Co. KG provided its limited partners with credit analysis services and received a reimbursement of its costs and the deployment of personnel from the limited partners in return.[144] The BFH decided correctly that the taxable amount of part of the supply of credit analysis services (services provided by GmbH & Co. KG) was the service received (the cost of the deployment of personnel by the credit institutions), according to Section 10 (2) (2) dUStG and Article 73 of the VAT Directive.[145] The BFH only indirectly referred to the CJEU's decision involving subjective value in the case of *Empire Stores*[146], as it ruled that the taxable amount was determined in accordance with the BFH's decision on April 16, 2008.[147] However, the BFH did not actually adhere to this CJEU decision. If it had done so, it would have used the subjective value as the taxable amount. The subjective value, according to the CJEU, is what the supplier had paid so, in this case, it should have been the costs of GmbH & Co. KG since it was the supplier of the service (credit analysis).

The BFH's judgment of April 25, 2018[148], concerned a car dealer who sold a new car, receiving both cash and a used car from the customer in exchange. Even though the consideration (the used car) had a fair market price, the BFH confirmed the judgment of the FG (German Financial Court) Lower Saxony that the taxable amount of the delivery of the new car was the sale price[149] of the new car (the value of the delivered goods) (Reiß, 2018). The BFH totally abandoned the view that it had taken in previous decisions, justifying this radical change by referring to a subjective value[150] in the CJEU case of *Empire Stores*.[151] This decision has been heavily criticised in the literature (Spilker, 2019).

In my opinion, this decision of the BFH included two clear mistakes. Firstly, it completely infringed Article 73 of the VAT Directive, according to which the taxable amount should be the consideration (in this case, cash and the value of the used car).[152] Secondly, the BFH did not actually apply the subjective value, as defined by the CJEU in the case of *Empire Stores*[153], since a subjective value, according to that case, is what the supplier had paid (the purchase price of the goods). Had the BFH used the subjective value as the taxable amount, it should have used the purchase price paid by the car dealer for the new car as the taxable amount, not the sale price of the new car. It is clear that the BFH had used the sale price of the new car as

[142] BFH 15. 4. 2010, V R 10/08 BStBl. 2010 II at 879, unter II. 2, n. 20.
[143] Ibid, Gründe I. 2.: "Unternehmensgegenstand der Klägerin war…die Erbringung von Dienstleistungen ...für die Kommanditisten der Klägerin".
[144] Ibid, Gründe I. 6: "…da der Wert der Personalgestellung durch die Kommanditisten an die Klägerin zum Entgelt gehöre", Gründe, II. 17: „"…liegen entgeltliche Leistungen der Klägerin an ihre Kommanditisten vor, …im Rahmen eines tauschähnlichen Umsatzes…".
[145] BFH 15. 4. 2010, V R 10/08 BStBl. 2010 II at 879, unter II. 4, n. 37.
[146] Supra, fn. 44.
[147] BFH-Urteil in supra note 138, Gründe, II. 37: "…bemisst sich das Entgelt nach … (BFH-Urteil in BFHE 221, 475, BStBl II 2008, 909, unter II.3.b)".
[148] Supra, fn. 22.
[149] Niedersächsisches Finanzgericht 11. Senat, Urteil vom 26.05.2016, 11 K 10290/15, ECLI:DE: FGNI:2016:0526.11K10290.15.0A: "3. …berichtigte Umsätze in Höhe von…" , "4…. des ursprünglichen Neuwagenverkaufs nicht mindere…", "20. …nach dem Wert der Neufahrzeuge…".
[150] BFH 25. 4. 2018, XI R 21/16 BStBl. 2018 II at 505, unter II. 2. d).
[151] Supra, fn. 44.
[152] Supra, fn. 2.
[153] Supra, fn. 44.

the taxable amount, since the original judgment of the FG (German Financial Court) Lower Saxony was about the correction of the taxable value of new cars when sold.

4. PROBLEM IN AUSTRIAN LAW

As with the German VAT Act, there are special rules for barter transactions in öUStG (the Austrian VAT Act[154]): see Section 3(10) and Section 3a(2) öUStG 1994 for the definition; and Section 4(6) öUStG 1994 for the taxable amount. The taxable amount is the market price of the consideration, according to Section 4.6.1 öUStR 2000 (the Austrian VAT regulation[155]); while the market price of the consideration is determined according to Section 10(2) öBeWG[156] 1955 (the Austrian tax valuation law).

For example, the decision of VwGH (the Austrian Supreme Administrative Court) of March 28, 1958 (Auer et al., 2019; Muehlehner, 1994) concerned a barter transaction in which a right to use water was waived in return for the free delivery of electrical energy. The taxable amount of waiving this right was the value of the consideration and the consideration was the free delivery of electrical energy. The VwGH decided that the taxable amount was the local normal market price of electrical energy, which was an objective value (Muehlehner, 1994). The Austrian specialist literature is aware that this view was incompatible with the CJEU ruling on *Empire Stores* (Auer et al., 2019; Muehlehner, 1994) after 1994. However, the VwGH ruled that if the consideration did not have a market price, the value of the consideration was derived from the value of the service provided (Muehlehner, 1994).

The Austrian financial administration still holds the view, presented in Section 4.6.1 öUStR 2000, that the taxable amount of barter transactions is the market price of the consideration, and it avoids using the phrase "subjective value". At the same time, the Austrian financial administration has applied the CJEU judgments in the case of *A Oy*[157] and the case of *Empire Stores*[158] as individual cases in Section 4.6.3 öUStR 2000, according to which the taxable amount is a subjective value (the cost of the supplier).

The BFG (Austrian Federal Finance Court) decision of February 11, 2019[159], concerned a barter transaction. A car dealer allowed a journalist to drive a car free of charge for 15 days as a test vehicle and bore the entire cost. The consideration was that the journalist wrote a newspaper report on the test drives. Since the value of the consideration had no market price, the BFG decided that the taxable amount was a subjective value—the costs of the car dealer (Spilker, 2019).

To summarise, the Austrian financial administration, the BFG (Austrian Federal Finance Court) and the VwGH (Austrian Supreme Administrative Court) all decided that the taxable amount of a barter transaction was, in principle, the value of the consideration, which was the

[154] Bundesgesetz über die Besteuerung der Umsätze 1994 (amended on 25.3.2021), RIS - Umsatzsteuergesetz 1994 - Bundesrecht konsolidiert, Fassung vom 21.05.2021 (bka.gv.at).
[155] Umsatzsteuerrichtlinien 2000 (amended on 10.12.2020), Umsatzsteuerrichtlinien 2000 (bmf.gv.at).
[156] Bewertungsgesetz 1955 (amended on 29.10. 2019), RIS - Bewertungsgesetz 1955 - Bundesrecht konsolidiert, Fassung vom 21.05.2021 (bka.gv.at).
[157] Supra, fn. 94.
[158] Supra, fn. 44.
[159] BFG RV/7101000/2016. https://360.lexisnexis.at/d/entscheidungen-findok/bfg_rv71010002016/u_finanz_BFG_2019_lnat_cases_vt_123116__e91c0f3760, (accessed on 6.10.2021).

market price according to objective criteria. If, however, the value of the consideration had no market price, the taxable amount of the barter transaction was applied as a subjective value, following the CJEU's decision in the case of *Empire Stores*[160], i.e. the cost of the supplier (Spilker, 2019). Indeed, the Austrian decisions matched those of Germany before the latter's radical change in 2018.

5. PROBLEM IN THE UNITED KINGDOM

HMRC's view of barter transactions where the consideration is not money is as follows:

> Non-monetary consideration has to be valued by reference to a subjective value that the parties must be regarded as having assigned to the consideration.
>
> A difficulty arises when each party has good reason for ascribing a different value to the consideration. The question of discrepant or equivalent values applying to supplies within a barter transaction has not been considered by the VAT Tribunals or Courts and any cases of this kind should be submitted to the VAT Supply team. (HMRC, 2021)

It is clear that HMRC presupposes an equivalence of the values between the supply and the consideration in barter transactions, and decides that the taxable amount is the subjective value that both parties in a barter transaction have assigned to the consideration. However, according to HMRC's wording, this is different from the CJEU's concept of subjective value, as presented in its *Empire Stores* judgment[161], according to which the supplier (one party) has assigned a value to the consideration. Since both HMRC and the CJEU presuppose an equivalence of value between the supply and the consideration, they therefore achieve an identical result and determine the taxable amount to be the purchase price.

However, HMRC is conscious that asymmetry between the value of the supply and the consideration is possible, and is awaiting a decision on this matter from the VAT Tribunals or Courts.[162]

6. LOOKING FOR A NEW SOLUTION – DE LEGE FERENDA

A. Comparison of the CJEU and BFH Decisions

Before the radical change in 2018, the BHF estimated (Stapperfend, 2021) the taxable amount, according to Section 162 AO (German General Tax Code), in cases where the consideration has no market price, referring additionally to subjective value, as defined in the CJEU's judgment of *Empire Stores*.[163] In this estimate, a value of one's (the company's) own performance served as an indication of the value of the consideration, according to settled BFH case law.

This complied with German law, but not with Article 73 of the VAT Directive, since the BFH used the value of the supply, instead of the value of the consideration as the taxable amount.

[160] Supra, fn. 44.
[161] Supra, fn. 44.
[162] HMRC, supra note 2.
[163] Supra, fn. 44.

In theory, the BFH's decision was also not completely compliant with the CJEUs decision in the case of *Empire Stores*.[164] This is because the CJEU held that the taxable amount is the subjective value, and the subjective value was what the supplier had paid for the (i.e. its own) supply (purchase price). The distinction between the BFH and the CJEU is that, while the BFH estimates the taxable amount, the CJEU determines it. It should be borne in mind that the taxable amount estimated on the basis of the value of the supply could be higher as well as lower than the amount paid by the supplier. Therefore, the decision of the BFH was closer to the economic reality than that of the CJEU.

Since the BFH held, in all relevant settled cases, that the taxable amount was the purchase price, expenses and cost (see 3.A), and that all of these amounts were what the supplier had paid, all the decisions of the BFH were actually compliant with the subjective value according to the CJEU. As a result, the relevant cases of BFH conform both to German law and to the decision of the CJEU.

Indeed, before the radical change in the BFH judgment of April 25, 2018, the BFH and the CJEU acted in a similar way. They determined one of the values of the supply to be the taxable amount, when the value of the consideration had no market price.

From a legal point of view, there is a significant distinction between the different approaches taken by the BFH and CJEU. The BFH's approach has a legal basis, since the BFH can estimate the taxable amount according to Section 162 AO (German General Tax Code). This enables it to take the value of the supply as the basis of the estimation of the taxable amount, in which case the consideration has no market price, even though Section 10 dUStG (Article 73 of the VAT Directive) states that the taxable amount is the value of the consideration.

Since there is no rule in the VAT Directive that is comparable to Section 162 AO (German General Tax Code), which enables an estimation of the taxable amount, the CJEU is unable to use the value of the supply as the basis of the estimation of the taxable amount in cases where the consideration has no market price. It seems that the absence of a comparable regulation to Section 162 AO (the German General Tax Code) caused the CJEU to create the concept of subjective value in order to determine the taxable amount to be the value of the supply when the value of the consideration has no market price, just because the value of the supply is easily available.

In fact, using the subjective value as a means, the CJEU has only achieved a result which the BFH had reached much earlier, using Section 162 AO (German General Tax Code) and its settled case law. This reveals a systemic deficit in European tax law; there is no general rule that allows an estimation of the taxable amount.

The BFH's judgment on April 25, 2018[165], represented a radical change (See 3. B. 2). According to this decision, the taxable amount of the supply should always be the value of the supply, regardless of whether or not the consideration has a market price. This decision completely infringed Article 73 of the VAT Directive. The BFH justified this judgment by citing the use of subjective value in the CJEU's decision in the case of *Empire Stores*.[166] The BFH mistakenly over-interpreted the concept of subjective value and went in a completely

[164] Ibid.
[165] Supra, fn. 145.
[166] Supra, fn. 44.

wrong direction. The reason for this could be that the BFH did not appear to discover the true reason for the CJEU's introduction of subjective value, which was that no rule comparable to Section 162 AO (German General Tax Code) in the VAT Directive, which allowed for the use of the value of the supply as the taxable amount, existed.

Indeed, in its case law, the CJEU had estimated the taxable amount. In the case of *Skarpa* (Case C-422/17)[167], the CJEU agreed to estimate[168] the profit margin based on the actual total costs of the services provided. This produced the taxable amount, using Article 308 of the VAT Directive. However, this article is only a special rule for travel agents. A general rule for estimating the taxable amount, whose scope of application is comparable to the scope of application in Section 162 AO (German General Tax Code), cannot be derived from this CJEU decision. The CJEU justified the special rule for travel agents as follows: "[T]he essential aim of the rules of that special scheme is to avoid the difficulties to which economic operators would be exposed by application of the normal principles of the VAT Directive…".[169]

If the taxable amount for travel agents can be estimated for the sake of simplicity, other values could also be estimated. This implies that the German view, i.e. Section 162 AO (German General Tax Code), could be introduced into the VAT Directive.

This would not be a new development. The CJEU Case of *RPO* (C-390/15)[170] concerned the question of a violation of the general principle of equality, implied by the different treatment of books that were physical objects and books transmitted by electronic means. The CJEU applied an examination scheme which it had first used in 2008 in a decision about greenhouse gas emission certificates.[171] The EU Grand Chamber previously described this decision as permanent case law.[172] This examination scheme first considered the objective comparability of two subjects based on their regulatory context and then, if necessary, devoted a possible justification to it. In establishing this examination scheme, von Danwitz, the German judge at the CJEU, who was the reporter at the time, contributed his German understanding derived from the case law of the German Federal Constitutional Court.[173] With the ruling in the case of *RPO*[174], a fundamental decision now exists for EU tax law and, in particular, for VAT law.[175] German law had therefore enriched EU law.

The VAT Directive needs a new article comparable to Section 162 AO (German General Tax Code) de lege ferenda, according to which the taxable amount can be estimated. This new rule should also provide the basis of the estimation. In the circumstances under discussion the

[167] PL: CJEU, 19 Dez. 2018, Case C-422/17, *Skarpa*, ECLI:EU:C:2018:1029. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CJ0422
[168] Ibid., the last paragraph.
[169] Ibid., para. 28.
[170] PL: CJEU, 7 Mar. 2017, Case C-390/15, *RPO*, ECLI:EU:C:2017:174. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62015CJ0390
[171] FR: CJEU, 16. Dec.2008, Case C-127/07, *Arcelor Atlantique et Lorraine*, ECLI:EU:C:2008:728. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CJ0127
[172] Supra, fn. 167, para. 42.
[173] See Lars Dobratz, Die Beschränkung des ermäßigten Steuersatzes für Bücher auf Lieferungen auf physischem Träger ist mit dem Grundsatz der Gleichbehandlung des Unionsrechts vereinbar – Keine Notwendigkeit einer erneuten Parlamentsanhörung wenn die finale Richtlinienfassung in ihrem Wesen nicht vom Wortlaut des Richtlinienvorschlags abweicht, UR 10/2017, at 393 (400).
[174] Supra, fn. 170.
[175] Supra, fn. 173.

consideration has no market price, so the basis of the estimation can only derive from the value of the supply.

B. Replacement for the Term "Subjective Value"

Indeed, the idea of determining the taxable amount to be the value of the supply as an exception is not an invention of the CJEU. This approach already exists in the VAT Directive. According to Article 80 of the VAT Directive, the taxable amount is the open market value. Article 72 of the VAT Directive provides that: "'open market value' shall mean the full amount that … a customer … would have to pay, under conditions of fair competition, to a supplier at arm's length".[176]

According to Article 72(1) of the VAT Directive, the open market value represents the value of the supply[177] and may be applied to determine the taxable amount in barter transactions where the consideration has no market price.

In fact, the BFH has suggested that a value of the consideration could be determined according to the open market value, in accordance with Article 80 and Article 72 of the VAT Directive.[178] It finally had to abandon this idea, however, since the scope of application of Article 80 of the VAT Directive was exhaustive, according to the CJEU judgement in the case of *Orfey Balgaria*.[179] However, in the case of *Balkans and Sea*[180], the CJEU provided that the taxable amount cannot be the open market value in cases other than those listed in Article 80 of the VAT Directive, "in particular where the taxable person has a full right of deduction of VAT".[181] This means that it was still possible that the taxable amount could be the open market value when the taxable person did not have the full right of deduction of VAT. This showed that the CJEU obviously did not regard the extension of the scope of Article 80 of the VAT Directive as absolutely taboo.

The idea of open market value already existed in the original version of the Sixth Council Directive (1977)[182], in Article 11 Part A (1) d, with regard to Article 6 (3) and Article 11 Part B (1) b. Article 80 of the VAT Directive was introduced in 2006 in the Sixth Council Directive as Article 11 Part (7) and then in the VAT Directive from 2007 (Treiber, 2021). The purpose of open market value, according to Article 11 Part A(1)(d) of the Sixth Directive was the prevention of distortions of competition. This also followed Article 3 of the Sixth Directive. The purpose of the open market value in Article 80 of the VAT Directive is to prevent tax evasion or avoidance. The wording shows that Article 11 Part A(1)(d) of the Sixth Directive pursues a different aim from Article 80 of the VAT Directive. It is explicitly demonstrated that Article 80 of the VAT Directive only applies if the purchaser or the provider is not entitled to a full VAT deduction. The distortion of competition in Article 11 Part A(1)(d) of the Sixth Directive does not, in my opinion, depend on an entitlement to the deduction of VAT.

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[176] Supra, fn.2.
[177] See Berger et al. (2018, p.392): "…üblichen Preis des Gutes oder der erbrachten Dienstleistung…".
[178] BFH, Urt. v. 25.4.2018 XI R 21/16 BStBl. 2018 II at 505, unter II 2 f).
[179] Supra, fn. 79,, para. 47.
[180] BU: CJEU, 26 Apr. 2012, Case C-621/10 and C-129/11, *Balkan and Sea*, ECLI:EU:C:2012:248. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0621
[181] Ibid., para. 52.
[182] Supra, fn. 41.

The open market value in Article 11 Part B(1)b of the Sixth Council Directive served as a substitute taxable amount for the importation of goods (repealed by Directive 91/680/EEC) (Gunacker-Slawitsch, 2015). Open market value did not apply in only a single article. In the VAT Directive, Article 72 has a special and preceding position.[183] Article 72 of the VAT Directive is a single regulation in Title VII. 1. Chapter 1. This indicates that the open market value, according to Article 72 of the VAT Directive, is defined independently in the VAT Directive, the application of which was not, and is not, restricted to one single article and can be applied in other cases.

According to Article 72(1) of the VAT Directive, the open market value is the total amount that the customer has to pay in order to receive the goods or services under arm's length conditions of fair competition. It follows that the open market value is an objective value of the supply, since the amount at arm's length is a value assessed according to objective criteria. Consequently, the open market value cannot be the taxable amount in a barter transaction in cases where the consideration has no market price. This is because the taxable amount should be a value related to the individual barter transaction. It is thus a subjective value according to the CJEU judgment in the case of *Empire Stores*, "not a value estimated according to objective criteria".[184]

However, the open market value according to Article 72 (1) of the VAT Directive can be the taxable amount in a barter transaction where the consideration has no market price in normal market circumstances, when no special circumstances arise. The open market value itself can be higher or lower than the purchase price (or cost), depending on the market situation.

In the CJEU case of *Skripalle*, Mr Skripalle owned some housing and let these properties to a limited company, the shareholders of which were his adult son and his wife.[185] The rent was lower than his cost, but corresponded to normal market rents for comparable properties in the area.[186] The judgment of the CJEU held that if there is no risk of tax evasion, Article 80 of the VAT Directive does not apply, despite the closely related connection, within the meaning of Article 80(1) of the VAT Directive, between the supplier and the recipient.[187] This means that the consideration may be less than the purchase price if the agreed consideration represents the market value, despite the close relationship between the supplier and the recipient. This should also apply to the barter transaction.

If special circumstances arise in an individual barter transaction, the taxable amount should be estimated, so that the open market value can act as the basis of the estimate. This means that an estimate should be made in two stages. First, the open market value should be determined and then any possible special circumstances in the individual barter transaction should be considered.

Regarding the decision of CJEU in the case of *Empire Stores*[188], the open market value of the article that *Empire Stores* offered to its established customers without charge should first have

[183] See Englisch (2021, Kap. 5, n. 5.63): "systematische Methode".
[184] Supra, fn. 44, para. 18.
[185] DE: CJEU, 29 May 1997, Case C-63/96, *Skripalle*, ECLI:EU:C:1997:263, para.3. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61996CJ0063
[186] Ibid., para. 5.
[187] Ibid., para. 31.
[188] Supra, fn. 44.

been determined. The open market value is the taxable amount. It can be the purchase price of the article if the open market price is the same as the purchase price, or can exceed or be lower than the purchase price of the article, depending on the market situation. In the case of *Empire Stores*, there are no special circumstances, so the taxable amount is the open market price. A special circumstance is conceivable, for example, if the term of usage of the article that *Empire Stores* offered were to expire in one week's time. In this case, the taxable amount of the supply of the article should be lower than the open market price. It is also possible that the taxable amount exceeds the open market value—for instance, if *Empire Stores* unexpectedly receives an order for large quantities of this article and temporarily has insufficient reserves. *Empire Stores* then suggests to an established customer that it supplies them with another article, but the customer insists on having this particular article because they prefer it. As a result, *Empire Stores* reluctantly sends the customer the original article. In this specific circumstance, the taxable amount could surpass the open market value.

Extending the scope of Article 80 of the VAT Directive to include barter transactions in which the consideration has no market price de sententia ferenda could only demonstrate that the taxable amount is the open market value. However, the open market value does not take the special circumstances of specific cases into account. Consequently, an extension of the scope of Article 80 of the VAT Directive does not make much sense, and a new rule about the taxable amount in a barter transaction in cases in which the consideration has no market price should be introduced de lege ferenda.

If the lawmaker of the VAT Directive wishes to regulate every detail, this would create an illegible volume, as the regulation would already be out of date when it is proclaimed (Kirchhof, 1987). Therefore, the new rule about the taxable amount in a barter transaction in cases where the consideration has no market price should contain a general clause stating that all circumstances that are important for the estimation must be considered.

7. CONCLUSION

1) According to Article 73 of the VAT Directive, the taxable amount shall be the consideration received by the supplier. When the consideration is in kind, it must be given a value. The CJEU and the BFH have determined the value of the consideration to be the market price of the consideration in cases where the consideration has a market price.

2) A problem arises when the consideration has no market price. In Germany, this problem is easy to solve since Section 162 AO (German General Tax Code) allows the taxable amount to be estimated. This enables the BFH to use the value of the supply as the basis of the estimation. However, there is no rule in the VAT Directive comparable with Section 162 AO (German General Tax Code). The CJEU is therefore unable to use the value of the supply as the taxable amount in the same circumstances.

3) In these circumstances, the CJEU created the concept of subjective value to determine the taxable amount of barter transactions where the consideration has no market price. According to the CJEU's decision in the case of *Empire Stores*[189], the subjective value is the amount which the supplier has paid for the goods (their purchase price). The subjective value represents the

[189] Supra, fn. 44.

value of the supply. This is an infringement of Article 73 of the VAT Directive, according to which the taxable amount is the value of the consideration received.

This is a violation of Article 1(2) of the VAT Directive and also of the nature of VAT as a general tax on consumption by the customer (Stadie, 2009). The value of goods purchased by the supplier is not what the customer has paid, but what the supplier has paid.

The subjective value does not reflect the economic reality, since neither a profit nor a loss is considered. The CJEU has mistakenly assumed that a supplier can always sell his goods or service for a higher value than the purchase price of his goods. However, the price depends on the market and can fluctuate.

4) According to the consistent jurisprudence of the CJEU, a barter transaction and a transaction in which the consideration is money amount to the same situation. The barter transaction is only a subcase of the taxable supply against the consideration. Due to the principle of neutrality, the two should be treated equally.

In the case of transactions where the consideration is money, the entrepreneur can freely set the price (the taxable amount) depending on the market situation, since Article 80 of the VAT Directive only applies to supply to recipients with whom the supplier has family or other close personal ties. If the entrepreneur enters into a barter transaction, their taxable amount can only be their expense, according to the CJEU's definition of the subjective value, even if they exchange their goods or service at a value below their expenses, or if they have no family or other close personal ties to the recipients of their supply. The subjective value minimises the taxable amount. Article 80 of the VAT Directive should automatically apply to any barter transaction.

The subjective value leads to unequal treatment between transactions where the consideration is in money and barter transactions, and it therefore violates the principle of neutrality.

The subjective value is not a satisfactory method of ascertaining the taxable amount in barter transactions where the consideration has no market price.

5) Indeed, even after its introduction, the CJEU ascertained the subjective value (the purchase price of the supply) to only be the taxable amount in cases where the consideration has no market price. In cases where the consideration has a market price, the CJEU held that the taxable amount is the value of the consideration, according to Article 73 of the VAT Directive. Obviously, the CJEU has no intention of abandoning Article 73 of the VAT Directive, and has applied the subjective value only in exceptional cases.

6) Before 2018, in cases where the consideration has a market value, the BFH held that the taxable amount was the value of the consideration, according to Article 73 of the VAT Directive.

In the case of April 25, 2018[190], the BFH took a radical turn by over-interpreting the subjective value. Despite the fact that the consideration (the used car) had a market price, the BFH determined the sale price of the new car (the value of the supply) to be the taxable amount.

[190] Supra, fn. 148.

This means that the BFH no longer distinguishes between those cases where the consideration has a market price and those where it does not. The taxable amount should be the value of the supply in all barter transactions. This entirely violated § 10 (1) (2) of the dUStG and Article 73 of the VAT Directive.

The reason for this could be that the BFH seemed not to understand why the CJEU had introduced the subjective value. The CJEU had only done this because there is no rule comparable to Section 162 AO (German General Tax Code) in the VAT Directive which enables it to use the value of the supply as the taxable amount.

This decision of the BFH caused a controversy in Germany about the issue of ascertaining the taxable amount in barter transactions where the consideration does not have a market price. This controversy prompted a search for a new solution, as well as the writing of this article.

7) The VAT Directive should include a new article comparable to Section 162 AO (German General Tax Code) de lege ferenda, according to which the taxable amount can be estimated. The new rule also should make it clear what the basis of the estimation is. Since, in the relevant circumstances, the consideration has no market price, the basis of the estimation can only be derived from the value of the supply.

8) The idea of determining the taxable amount as the value of the supply in exceptional circumstances is not the invention of the CJEU, but already exists in the VAT Directive. According to Article 80 of the VAT Directive, the taxable amount is the open market value, following Article 72 of the VAT Directive. The open market value, according to Article 72(1) of the VAT Directive, represents the value of the supply.

Application of the open market value, according to Article 72 of the VAT Directive, was not and is not restricted to a single article. This creates the opportunity for further application of the open market value.

The open market value cannot be directly used as the taxable amount in a barter transaction in cases where the consideration has no market price, since it is assessed according to objective criteria.

However, it can be the taxable amount in normal market situations. If special circumstances arise in individual barter transactions, the taxable amount should be estimated, so that the open market value can become the basis of the estimation. The open market value itself can be higher or lower than the purchase price (or cost), depending on the market situation.

9) Article 80 of the VAT Directive already has unlimited scope. Extending its scope further to include barter transactions in which the consideration has no market price de sententia ferenda could only result in the finding that the taxable amount in such cases is the open market value. However, the open market value does not take the special circumstances of each case into account. Extending the scope of Article 80 of the VAT Directive in this respect does not, therefore, make sense. Consequently, a new rule should be introduced de lege ferenda concerning the taxable amount in case of barter transaction where the consideration has no market price.

10) With regard to the agreement of the 27 member states of the EU, which may present difficulties, this paper proposes that a new Article 42a should be introduced into Council Implementing Regulation (EU) No 282/2011.[191] This would allow the taxable amount to be determined in barter transactions where the consideration has no market price, and is therefore proposed de lege ferenda:

Proposed Article 42a of Council Implementing Regulation (EU) 282/2011:

In barter transactions, if the consideration, which the supplier has received or will receive from the customer or a third party in return for the delivery, cannot be determined, the taxable amount can be the open market value according to Article 72 Sentence 1. This applies only if no special circumstances are found, following due diligence from a prudent business person. If the individual case involves special circumstances, the taxable amount must be estimated, with the open market value, according to Article 72 Sentence 1, serving as the basis of the estimate. All the circumstances that are important for the estimate must be considered.

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