HELSINGIN YLIOPISTO

Value added tax in the United Kingdom post-Brexit

A study of diversion through jurisprudence

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Abstract:

Value added tax (VAT) has a long history in Britain dating back all the way to the country's accession into the European Economic Community. After Britain's withdrawal from the European Union (Brexit), the country's domestic legislative framework governing its relationship with the European Union has changed considerably. In the field of VAT law these changes have led to a situation where British and European VAT regulations might diverge from each other mainly through jurisprudence in courts.

This thesis analyses the British legal framework for VAT jurisprudence post-Brexit and seeks to identify the potential courses of events that might lead into diversions between British and European VAT regimes. The thesis then seeks to evaluate the potential nature and effect of such diversions and their likelihood through qualitative case law analysis of jurisprudence of the Court of Justice of the European Union and the Supreme Court of the United Kingdom.

The analysis concludes that especially cases concerning the application of VAT exceptions and the interpretations of specific expressions have historically been prone to different interpretations by the European court and British courts. Potential diversions between the two VAT regimes for these parts might in practice lead into different scopes of application for the provisions on VAT exempted activities, which might cause certain industries to develop differently around the VAT exemptions in both jurisdictions. The analysis further concludes that the basic principles and concepts of European VAT law have mostly become assimilated into British law and practice, which makes it seem unlikely that British VAT jurisprudence consciously would develop the British VAT regime further away from the European one.

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Arvonlisäverotuksella (ALV) on Britanniassa pitkä historia, joka ulottuu aina maan alkuperäiseen liittymiseen Euroopan talousyhteisöön saakka. Britannian EU-eron (Brexit) jälkeen maan suhdetta Euroopan unioniin sääntelevä kansallinen oikeudellinen kehikko on muuttunut huomattavasti. ALV:n kontekstissa nämä muutokset ovat johtaneet tilanteeseen, jossa Britannian ja Euroopan unionin ALV-säännökset saattavat kasvaa toisistaan erille pääasiassa tuomioistuinten oikeudenkäytön seurauksena.

Tämä tutkielma analysoi Britannian kansallista sääntelykehikkoa Brexitin jälkeen ja pyrkii tunnistamaan mahdollisia tapahtumainkulkuja, jotka voisivat johtaa eriytymiseen Britannian ja Euroopan unionin ALV-järjestelmien välillä. Tutkielma pyrkii arvioimaan tällaisten eriytymien mahdollista luonnetta ja käytännön vaikutuksia sekä niiden todennäköisyyttä laadullisen oikeustapausanalyysin keinoin. Materiaalina hyödynnetään oikeuskäytäntöä erityisesti Euroopan unionin tuomioistuimesta ja Britannian korkeimmasta oikeudesta.

Analyysin johtopäätöksenä esitetään, että tapaukset, joissa käsitellään ALV-järjestelmän poikkeuksia ja tiettyjen ilmaisujen tulkintaa ovat historiallisesti olleet alttiita erilaisille tulkinnoille Euroopan unionin tuomioistuinten ja Britannian kansallisten tuomioistuinten toimesta. Mahdolliset eriytymät näillä alueilla voisivat käytännössä johtaa erilaisiin ALV-vapautettujen toimintojen soveltamisaloihin, mikä voisi johtaa tiettyjen toimialojen erilaiseen kehittymiseen ALV-vapautusten ympärillä Euroopan unionin ja Britannian ALV-järjestelmien piireissä. Analyysin johtopäätöksenä esitetään myös, että Britannian oikeusjärjestys ja -käytäntö ovat pääasiassa omaksuneet eurooppalaisen ALV-järjestelmän perusperiaatteet ja -käsitteet. Seurauksena on, että tarkoituksellista Britannian ALV-järjestelmän erilleen kehittämistä eurooppalaisesta järjestelmästä oikeuskäytännön avulla ei voida pitää todennäköisenä.

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Abbreviations

BFI	British Film Institute
Brexit	Britain's withdrawal from the European Union
Britain	United Kingdom of Great Britain and Northern Ireland
CFI	Cantor Fitzgerald International
CJEU	Court of Justice of the European Union
CoA	High Court of Justiciary sitting as a court of appeal
Commissioners for HMRC	Commissioners for His Majesty's Revenue and Customs
CPP	Card Protection Plan Ltd
CSC	CSC Financial Services Ltd
EEC	European Economic Community
EU	European Union
EUWA	European Union (Withdrawal) Act 2018
FCH	First Choice Holidays plc
NATO Member	Party to the North Atlantic Treaty
REULA	Retained EU Law (Revocation and Reform) Bill 2023
Sixth directive	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment
SSP	Shields & Sons Partnership
UKSC	Supreme Court of the United Kingdom
VAT	Value added tax
VATA	Value Added Tax Act 1994

VAT directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
Withdrawal day	31 December 2020
WTL	Wellcome Trust Limited

1 Introduction

1.1 Background

Value added tax ('VAT') has a long history in the United Kingdom of Great Britain and Northern Ireland ('Britain').[1] The current British legislative instrument governing VAT, the Value Added Tax Act 1994 ('VATA') was enacted in 1994, but originally VAT was introduced in the UK already in 1973 as part of the country's accession into the European Economic Community ('EEC').[2] Introducing a VAT regime had been a requirement of joining the EEC since 1967 and the enactment of the first and second value added tax directives.[3] Britain's VAT regime can therefore trace its origin back almost all the way to the birth of the European VAT regime, and its background is largely European.

Britain's VAT regime recently entered a new reality as the country decided to withdraw from the successor of the EEC, the European Union ('EU') in January of 2021 ('Brexit'). As part of the withdrawal process the British Parliament enacted the European Union (Withdrawal) Act 2018 ('EUWA'), which repealed the European Communities Act 1972, which in turn had confirmed the primacy of EU law in Britain.[4] Another effect of EUWA was the creation of so-called retained EU-law consisting of EU statutes which were retained as parts of Britain's domestic legislation. Furthermore, the Retained EU Law (Revocation and Reform) Bill 2023 ('REULA') enacted in 2023 changed the status of retained EU law in force at the end of 2023 into so-called assimilated law. The general principles of EU law are to be given no significance in the interpretation of the newly created category of assimilated law.[5]

VATA is a piece of domestic legislation enacted by the British Parliament, but it implements regulations from EU directives. As such, for these parts, it was originally categorised as retained EU law as defined by EUWA[6] and, therefore, since the beginning of 2024 it is categorised as assimilated law. For the sake of clarity, for the

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[1] This thesis does not cover the rules governing VAT in Northern Ireland and therefore the name 'Britain' will be used for the remainder of this thesis to refer to the United Kingdom instead of 'the UK' to avoid any confusion.
[2] de la Feria 2023, p. 279 and 281.
[3] ibid., p. 280–281.
[4] Zu 2023, p. 295.
[5] See UK Government 2024.
[6] Ks. Zu 2023, p. 4.

remainder this thesis the term assimilated law will be used to refer to all kinds of EU originating legislation in Britain.

When it comes to the uniformity of the VAT regimes of Britain and the EU, one of the most significant effects of EUWA was the severing of the binding effect of judgments of the Court of Justice of the European Union ('CJEU')[7] on British courts. Pursuant to EUWA Section 6(1), any judgments of the CJEU given on or after 31 December 2020 ('withdrawal day')[8] do not bind British courts in the interpretation of assimilated law. British courts are, however, still permitted to take such judgments into account pursuant to EUWA Section 6(2). In Britain, the case law of the CJEU can therefore be divided into two categories; case law preceding the withdrawal day, which is statutorily included in British domestic law, and case law given on or after the withdrawal day, which is not binding on British courts. The binding effect even of judgments preceding the withdrawal day is, however, not unconditional. The Supreme Court of the United Kingdom ('UKSC') and the High Court of Justiciary sitting as a court of appeal ('CoA') are not bound by assimilated CJEU case law pursuant to EUWA Section 6(4). Pursuant to EUWA Section 6(5), said courts are allowed to depart from such case law in accordance with the same rules that allow departing from their own case law.

Enacted in 2023, REULA was the cause of yet another significant effect. Through the Bill, EUWA Section 5 was amended to explicitly exclude the supremacy of EU law along with the general principles of EU law from the domestic legislation of Britain from the end of 2023 onwards. In the context of VAT, however, this effect is expected to be neutered by section 28 of the Finance Act 2024.[9] Sections 28(4) and 28(5) of said act in effect create exceptions for the interpretation of VAT and excise law, as pursuant to these provisions the supremacy of EU law in the context of VAT is only abolished insofar as it might be used to disapply British provisions.[10] Accordingly, the general principles of EU law still apply for the interpretation of VAT law. The Finance Act 2024

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[7] In this thesis, the abbreviation 'CJEU' is used to refer to both the Court of Justice of the European union and its predecessor the European Court of Justice.

[8] In the Act the date is referred to as the 'IP completion day', which has been defined in Section 39(1) of the European Union (Withdrawal Agreement) Act 2020, which in turn is referred to in EUWA Section 1 A(6).

[9] See Barth 02/2024.

[10] See UK Government 2023. This carve-out is in line with the guidance provided in a government policy paper, whereby it is stated that after the entry into force of REULA it will no longer be possible for any part of British legislation to be disapplied on the basis of being incompatible with assimilated EU law. The paper further states that after the entry into force of REULA, the VATA is (still) intended to be interpreted in the light of the rights and principles that currently apply in domestic British law.

does not, however, pursuant to section 28(5)(b) affect the provisions of EUWA governing the role of CJEU case law in post-Brexit Britain. Thus, it would seem that the most immediate factor causing diversion between the VAT regimes of the EU and Britain in light of the current British legal framework is jurisprudence by the courts.

The provisions of EUWA on the role of case law of the CJEU in British jurisprudence post-Brexit have been considered by the UKSC in a ruling given in July of 2024. In the case *Lipton v BA Cityflyer Ltd*, the UKSC ruled that even causes of actions accrued pursuant to EU law before withdrawal day could fall under the expression of assimilated EU law and as such, the rules governing the British courts' use of CJEU case law applies to those causes of action. The fact that the cause of action accrued before withdrawal day might, in the UKSC's opinion, be a reason to have regard to a non-binding post-Brexit judgment of the CJEU pursuant to section 6(2) EUWA.[11] Furthermore, the UKSC went on and noted that if the CJEU issued a ruling before withdrawal day, and reversed that ruling after withdrawal day, a British court would by virtue of section 6 EUWA be bound by the first ruling, but not the reversing ruling. Additionally, while the British court would pursuant to section 6(2) EUWA, be allowed to have regard to the newer ruling, it would according to the UKSC be difficult to interpret that provision as allowing a departure from the binding ruling without using the explicit power to depart from CJEU case law.[12]

According to LLM *Fabian Barth*, the ruling in *Lipton v BA Cityflyer Ltd* in practice means that British courts are allowed to depart from case law of the CJEU given prior to the withdrawal day, which pursuant to EUWA is in principle binding, even if the actions in question occurred before the withdrawal day. Additionally, according to Barth the ruling means that case law of the CJEU given after the withdrawal day cannot be used to overrule case law given before the withdrawal day without using the powers to depart which pursuant to section 6(4) EUWA are granted to the UKSC and the CoA.[13] Thus, the regulations governing the use of CJEU case law by British courts are complicated and leave a lot of discretion to the British courts themselves. Case law given after the withdrawal day is non-binding, and the higher courts are allowed to depart even from case law that is technically binding.

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[11] [2024] UKSC 24, Lipton v BA Cityflyer Ltd, paras. 107, 109 and 115. See also Barth 07/2024.
[12] ibid., para. 13. See also Barth 07/2024.
[13] Barth 07/2024.

It seems clear, that the post-Brexit legal framework of Britain grants the national courts more freedom in their interpretation and application of assimilated law. Consequently, the interpretation of VATA by British courts could in the future cause the diversion of the British VAT regime from the European regime. Considering everything mentioned above, this is most likely to happen due to the removal of the binding effect of CJEU case law on British courts. *Barth*, however, notes that the inclusion of general principles and even a degree of supremacy of EU law into the post-Brexit VAT regime of Britain make it likely that British courts will have regard to even non-binding rulings of the CJEU.[14] However, as is shown by the UKSC's ruling in *Lipton v BA Cityflyer Ltd* and the provisions of EUWA, there are certain nuances of the British legal framework which make diversion through jurisprudence likely.

First, the power to depart from case law of the CJEU makes it possible for the UKSC and CoA in certain circumstances to consciously reverse the effects of any judgments of the CJEU in Britain, even if the actions in question took place before withdrawal day. Second, even if it seems likely that British courts would have regard to non-binding case law of the CJEU, it is not guaranteed as there is no legal obligation whatsoever for them to do so. Third, as British courts pursuant to section 6(1)(b) are not allowed to refer questions to the CJEU, they are on their own in resolving issues unprecedented on the EU level and any rulings given in such matters would not bind the CJEU, which might rule in another way when eventually confronted with the same issue. Fourth, the application of any reversals of pre-withdrawal day rulings by the CJEU would be difficult in British courts and would require a decision by either the CoA or the UKSC. Furthermore, even though Britain for the moment has in place legislation ensuring a certain degree of continuum in VAT, it is as an independent state no longer bound by the requirements of EU law and is thus in theory able to repeal such legislation at any time.

The situation at hand where the CJEU and the national courts of a former Member State resolve issues related to the same rules independently and without any binding connection with each other is unique and interesting from the points of view of both tax law and EU law. From the tax law perspective, the development of the British VAT regime and the potential interpretational diversion from the EU regime offer a

[14] Barth 02/2024.

possibility to compare the practical effects of different approaches in societies and VAT regimes, the fundamental principles of which are the same. Knowledge of the British regime is also beneficial for both Finnish and European companies even in the future because despite its withdrawal from the EU, Britain remains an important trading partner for Finland and for certain transactions even Finnish companies must ensure VAT compliance in Britain in accordance with the local rules.[15] From the perspective of EU law, Brexit and the legal diversion following it are the firsts of their kind and therefore offer the first possibility to study the assimilation of EU law into the national legal regimes of its Member States. At this stage however, the final implications of Brexit and the legal diversion are not yet completely visible, which is why the theme remains a possibly important field of study even in the future.

1.2 Research questions and methods

Everything described above raises the question of how 'British' VAT has become through all these years. In other words, the question of whether British value-added taxation has assimilated the European practices in an irreversible way in a manner meaning that even the severance of the binding connection between the CJEU and British courts is not sufficient to cause a practically significant diversion between the British and European VAT regimes through jurisprudence.

Based on previous research it seems clear that British courts and the CJEU have not always agreed on all issues of interpretation concerning the Council directive on VAT ('VAT directive')[16] even before Brexit and a future diversion between the two regimes on some level has been thought of as almost certain. However, as both systems are based on the same original statute, the similarities are likely to persist.[17] Case law of British courts and the CJEU following the withdrawal day has not been researched much, even though as material it is of utmost significance when it comes to the future potential diversion between the British and EU VAT regimes, as different

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[15] See for example statistics by Finnish Customs on imports and exports by countries according to magnitude, which show that in 2024 Britain was the 7th most common destination for Finnish goods with a total share of 3,5 % of all Finnish imports. Of non-EU countries more Finnish goods were only imported to the USA and China. See also Guidance by the Finnish Tax Administration on Brexit's impact on taxation.
[16] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.
[17] See e.g. Zu – Krever 2020, p. 90.

interpretations of certain provision between these courts no longer legally bound to each other seem to be the most likely drivers of differentiation.

The research questions for this thesis are to study:

1. how the theoretical exclusion of VAT related case law of the CJEU from British domestic law affects the diversion of the two VAT regimes; and
2. whether post-Brexit VAT related case law of British courts points towards a degree of assimilation of European VAT principles and thinking into Britain's domestic law.

The questions are intended to address the potential differentiation through jurisprudence. As there is no guarantee that post-withdrawal day VAT related case law of the CJEU ever becomes British law through a British court choosing to apply it, it is relevant to review what kind of practical effects the exclusion of such decisions of the CJEU might have for the two systems. This point is addressed by the first question.

Due to the removal of the possibility of British courts to refer questions to the CJEU, British courts and especially the UKSC might also in the future have to resolve issues never resolved by the CJEU. The CJEU then, in turn, is obviously not bound by a ruling of a British court and might resolve the same issue differently when confronted with it. Furthermore, as the higher British courts are nevertheless allowed to depart even from binding judgments of the CJEU, it is relevant to review to what extent jurisprudence in British courts post-Brexit actually shows assimilation of the European VAT principles and thinking. Based on the answers it is possible estimate how likely explicit departures and different interpretations in issues first resolved by a British court actually are. This point is addressed by the second question.

The research method used to find answers to these questions is a legal analysis conducted through an empirical categorisation of VAT case law given by the CJEU after the withdrawal day as well as of case law from the UKSC given after the withdrawal day. The methods are therefore the analysis of jurisprudence and empirical legal study. Furthermore, the study has a comparative dimension when it comes to the judgments and reasonings given by the CJEU and British courts in the same issues. This method is mostly present when covering the findings of previous research and in establishing a framework for the empirical categorisation through them. The framework of the

empirical categorisation of case law will be covered in more detail in chapters 3.1 and 4.1 and the methods for the analysis of jurisprudence will be covered further in chapters 4.1 and 5.1.

As previously described, British domestic law explicitly allows deviating from CJEU case law preceding the withdrawal day for the UKSC and the CoA. Due to the limited length of this thesis, it will only be limited to analysing case law of the UKSC. The limitation also fits the purpose of this thesis, as the UKSC's attitude, it being the highest court instance,[18] towards case law of the CJEU bears the greatest significance for the diversion of British and European VAT regimes. In answering the second research question, special attention is given for whether there is any British case law related to VAT where either the UKSC has explicitly deviated from a judgment of CJEU given before the withdrawal day, or where the UKSC has utilized a CJEU judgment given after the withdrawal date.

From a temporal perspective the study has been limited to only covering case law given during the period of 2021-2023. The study therefore covers the period between the withdrawal day and the entry into force of EUWA as amended by REULA, during which the assimilated law had become British domestic law, and the general principles of EU law had not been excluded from British domestic law in any sector. This period was chosen because the provision allowing the UKSC and CoA to depart from assimilated CJEU case law was in force, but the complicated framework relating to the specific inclusion and exclusion of general principles of EU law into British law and British VAT law was not. Hence, this period offers the best window to analyse how British courts themselves viewed European principles and case law in their decision making, as they on one hand were free to deviate from them, but on the other were not yet told by the legislature which principles to set aside and in which context. During the study period the CJEU gave a total of 111 and the UKSC a total of 7 relevant VAT related judgments.[19]

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[18] See document 'Panel 9: The Supreme Court and the United Kingdom's legal system' available at https://www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf.

[19] CURIA, available at https://curia.europa.eu and The National Archives, Find Case Law database, available at https://caselaw.nationalarchives.gov.uk/structured_search. The number of British cases is further explained in footnote 221.

1.3 Structure and source material

This thesis begins by reviewing and analysing previous research around the theme in Chapter 2. Chapter 3 consists of an analysis of case law of the CJEU given before the research period and based on previous research with the objective of establishing an empirical framework for answering the first research question. The empirical framework is necessary due to the limited length of this thesis and will be used to narrow down the judgments most relevant for research question 1. Chapter 4 will consist of an empirical study of case law from the CJEU given during the study period along with specific analysis of judgments shown most relevant for research question 1. Chapter 5 contains an analysis of British VAT case law given by the UKSC during the study period to answer research question 2. The final conclusions will be provided in Chapter 6.

The topic of Brexit and VAT has not at the time of writing been the subject of extensive research, which is visible in the source materials utilised for this thesis. The various articles, studies, and literature which do exist have been utilised to introduce the background of the issue as well as to create the framework for this thesis through the literature review in chapter 2. Furthermore, the previous studies, most notably by Associate Professor *Yige Zu* of the University of Durham, have been utilised in the case law analysis of chapter 3 to set the stage for answering the research questions.

The source material utilised to answer the research questions consists mostly of case law of the CJEU and the UKSC. Additionally, certain articles, official policy papers, and guidelines by different authorities were utilised to support the analyses.

2 Earlier research and discussion on the topic

2.1 On the significance of earlier research

The diminishing significance of case law of the CJEU in post-Brexit Britain especially in the context of VAT has been the subject of several articles and smaller studies. Most of the studies are, however, from the time before the most recent amendments of EUWA through REULA, through which the applicability of the general principles of EU law in Britain was legally severed. Nevertheless, as the impact of REULA for VAT mainly applies for situations where British law would be disapplied due to European principles, the studies are still relevant in the current situation.[20] Earlier research around the topic of this thesis has suggested that the interpretation practices of British courts in relation to VATA will in the future somewhat differ from those of the CJEU and thus lead to diversion between the two VAT regimes.[21] This chapter will examine some of the more significant conclusions of earlier research around the topic and discuss certain other findings and circumstances relevant for it. Earlier research and findings offer an important framework through which it is easier to evaluate even the significance of the findings of this thesis.

2.2 British courts have previously diverged from the CJEU's interpretations concerning VAT

Associate Professor *Yige Zu* of the University of Durham and Professor *Richard Krever* of the University of Western Australia have in 2020 written an article about the diminishing significance of European jurisprudence when it comes to the interpretation of the common VAT regime in Britain. The article considers the different interpretations of British courts and the CJEU in the context of VAT treatment of certain customer loyalty reward schemes.[22] Krever and Zu focus especially on two judgments of the CJEU, and one British judgment given in relation to one of them, all of which were given before the Brexit referendum and the withdrawal day. The judgments in question are CJEU's decisions in the matters C-48/97 *Kuwait Petroleum* and joined cases C-53/09 & 55/09 *Loyalty Management (UK) Ltd* along with the

[20] See section 28 of Finance Act 2024. See also chapter 1.1 of this thesis.
[21] See eg. Zu 2023, p. 311 and Zu - Krever 2020, p. 90.
[22] Zu - Krever 2020, p. 2–4.

UKSC's judgment in the same issue, namely [2013] UKSC 42 *HRMC v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)*.

Kuwait Petroleum concerned the VAT treatment of gift vouchers given out by a petrol station chain which could be used to redeem gifts. For every 12-litre portion of fuel purchased by a customer, they received a gift voucher from Kuwait Petroleum, which could later be used to redeem goods or services of choice from a gift catalogue. Issues arose when Kuwait Petroleum had deducted the input VAT included in the goods given out as gifts and the tax authorities through their decision demanded that it pay VAT even for these goods given out without consideration. Kuwait Petroleum appealed the decision on the grounds that the price of the goods given out as gifts, VAT included, had been included in the price of the fuel already purchased by the customer and for the sale of which Kuwait Petroleum had already paid VAT.[23] The CJEU analysed the situation through general contract law and ruled that a supply for consideration takes place only if reciprocal performances are made by the purchaser and the supplier. Kuwait Petroleum had not shown that it would have agreed with customers that a portion of the consideration paid for fuel had constituted value given in return of the gift vouchers and, therefore, supplies of the goods given out as gifts were to be considered as separate supplies for consideration for which Kuwait Petroleum was obligated to pay VAT.[24]

Following the *Kuwait Petroleum* decision, British courts resolved the issue in accordance with the interpretation of the CJEU.[25] The significance of *Kuwait Petroleum* for the post-Brexit diversion between the British and European VAT regimes lies in the fact that in Britain, the decision was seen to cause double taxation in circumstances such as those of that case; first when the customer pays a higher price for fuel which includes the value of the gift voucher, and second, in the end when the customer redeems a gift.[26] For example *Nathalie Wittock* has in her later article stated that she considered the CJEU's finding of the two transactions as separate to be correct in a technical sense, but also that such a customer loyalty scheme should not have caused tax repercussions.[27] The thought that the CJEU's VAT judgments could in some

[23] Judgment of the CJEU in C-48/97 *Kuwait Petroleum*, para. 8–11.
[24] ibid., para 26-32.
[25] Zu – Krever 2020, p. 81.
[26] ibid., p. 82.
[27] Wittock 2018, p. 134.

situations lead to undesired outcomes, which arose in the aftermath of *Kuwait Petroleum*, is important to be borne in mind and understood as context for the *Loyalty Management* decisions, which will be discussed next and which are of special significance for the topic of this thesis.

The *Loyalty Management* decisions revolve around a customer loyalty reward scheme introduced in order to avoid double taxation, which due to the interpretation presented in *Kuwait Petroleum* often came to burden such schemes. The scheme was based on a separate company, Loyalty Management, offering consumers a bonus card, the use of which accumulated bonus points for them for purchases of goods from participating retailers. These points could later be used to redeem goods or services from the participating retailers. The participating retailers paid consideration to Loyalty Management for any points they awarded to consumers, whereas Loyalty Management paid consideration for the retailers for any goods redeemed with points by the consumers. The consideration paid by the retailers to Loyalty Management was greater than the one paid by Loyalty Management for the redeemed goods.[28] VAT was included in both the consideration for the right to award points supplied by Loyalty Management to the retailers as well as in the consideration for the goods given to redeeming consumers supplied by the retailers to Loyalty Management. Due to deductions, the intention was that VAT, included in the purchase prices, would ultimately only burden the purchasing consumers.[29]

Issues arose when British tax authorities denied Loyalty Management the deduction of the input VAT included in the products redeemed by consumers and supplied to Loyalty Management by retailers. The authorities' interpretation of the scheme was that the goods redeemed by consumers were in fact supplies made to consumers and only paid for by Loyalty Management on their behalf.[30] The dispute went on through the chain of British tax courts all the way up to the highest instance at the time, the House of Lords, and it was at times resolved for the benefit of Loyalty Management and at times in accordance with the view of the tax authorities. Significantly, none of

[28] Zu – Krever 2020, p. 84.
[29] ibid.
[30] ibid., p. 84.

the lower courts chose to request a preliminary ruling from the CJEU until the House of Lords ultimately did.[31]

The CJEU ruled, similarly as in *Kuwait Petroleum*, that the customer loyalty reward scheme of Loyalty Management consisted of two separate supplies to consumers; the original supply which accumulated the bonus points and the following supply made using those points.[32] The consideration paid by Loyalty Management to the retailers was to be considered consideration made by a third party for services supplied to consumers and, therefore, Loyalty Management was not entitled to make the corresponding deduction,[33] leading to it bearing the burden of VAT included in the consideration in question.

In Britain, the ruling by the CJEU was not accepted. The UKSC, which had become the highest court instance in Britain during the proceedings, decided to dismiss the appeal by the tax authorities and uphold a previous domestic ruling entitling Loyalty Management to make the deduction in question despite the ruling by the CJEU.[34] The UKSC took the view that ensuring the redeemability of the goods to be redeemed by consumers in exchange for the points by paying the consideration including the disputed input VAT was a cost of Loyalty Management's business. Generally, VAT could be charged only after the tax included in such essential business costs had been deducted and, therefore, Loyalty Management was entitled to make said deduction.[35] According to the UKSC, any other conclusion would have led to VAT being charged first for the supply of the right to redeem goods by Loyalty Management, and later for satisfying said right. By considering the consideration paid by Loyalty Management to the retailers as consideration for a service supplied to Loyalty Management instead of as consideration made for the goods on behalf of the consumers, the UKSC held that the tax authorities would receive the tax for the valued added by the transactions conducted by Loyalty Management.[36]

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[31] ibid., p. 85.
[32] Judgment of the CJEU in joined cases C-53/09 & 55/09 *Loyalty Management (UK) Ltd*, para. 42–49 and 53–55. See even Zu – Krever 2020, p. 86.
[33] ibid., para. 65.
[34] Zu – Krever 2020, p. 87.
[35] [2013] UKSC 42 *HRMC v Aimia Coalition Loyalty UK Limited*, para. 77-78.
[36] ibid., para. 85.

According to Krever and Zu, the decision by the UKSC in *Loyalty Management* is a significant precedent for how British courts could treat jurisprudence by the CJEU post-Brexit.[37] At the time, the decision marked the first time within the context of VAT that a British court had partly sidestepped a judgment of the CJEU, which in that particular case was done by formulating the issue at hand differently than how the CJEU had done.[38] The *Loyalty Management* decision of the UKSC is from the time before the withdrawal day. This means that British courts have, if necessary, in situations of contradicting interpretations found ways to apply their own reasoning instead of that of the CJEU even during Britain's membership in the EU. After the official severing of the binding effect of CJEU's jurisprudence on British courts, the threshold for the UKSC to decide on further departures is undoubtedly lower than at the time of *Loyalty Management*, which would indicate that such deviations might become more frequent in the future.

2.3 Differences in culture on statutory interpretation will possibly further the divergence

One possibly significant factor driving the divergence between British and European VAT regimes is the difference of the legal cultures in these two jurisdictions. Unlike in traditional European and EU legislation, domestic British statutes are often formulated in more detail and in a manner that leaves little discretion to the individual judges. Correspondingly, English judges have often strived for interpretation in accordance with the wording of the statutes without giving significant consideration for the context in which they were written.[39] VATA, on the other hand, is based on the VAT directive has thus been written in a European more general style including many abstract concepts.[40] Hence, it would not be inconceivable to expect that British judges no longer bound by the interpretation models obligated through judgments of the CJEU[41] might in the future choose to apply interpretation techniques more natural to their domestic legal culture than those of the EU.

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[37] Zu – Krever 2020, p. 76.
[38] ibid., p. 87.
[39] Zu 2023, s. 299.
[40] ibid., s. 300.
[41] See section 6 EUWA.

Zu has studied this particular issue in 2023 through empirical analysis. In her study she analysed all VAT related cases brought before the CJEU by British courts between 1973 and 2020 in order to find the cases where the CJEU and a British court had disagreed.[42] *Zu* further categorised these cases, called 'Reversals' in her study, into those which concerned interpretation issues and those which did not, and further categorised the interpretation issue cases into those where the issue lied in the interpretation of the provisions and those where the issue lied in the interpretation of the facts. Ultimately *Zu* reviewed each case containing interpretation issued and determined whether they were resolved through a more literal interpretation or a more purposive interpretation by both the CJEU and the British court.[43] Through her categorisation, *Zu* found that a total of 109 cases existed within the scope of her study, out of which 30 were so-called 'reversal' cases, a further 26 of which concerned issues of interpretation. In 13 of these 26 cases the issue subject to different interpretations by the CJEU and the British court concerned a provision of law instead of the facts of the case.[44]

According to *Zu*'s method it therefore seems that during Britain's membership in the EU, the courts disagreed about the meaning of the law itself in 8 % of all VAT related cases referred to the CJEU by a British court. Furthermore, according to *Zu*'s findings the CJEU chose a purposive approach in 8 and British courts in 5 of the 13 cases containing different interpretations of the law. Correspondingly British courts chose a literal approach in 8 and the CJEU in 5 of these cases.[45] Considering the aforementioned fact that British courts have traditionally favoured a more literal approach and the CJEU a more purposive approach, these findings seem somewhat surprising. This is namely because although the results indicate that British courts were more likely than the CJEU to adopt a literal interpretation and vice versa, they also indicate that in 5 of the 13 cases, that is almost 40 %, the courts disagreed with the interpretation of the law towards the direction not typical for them.

Zu's conclusion of the results of her study is that the British courts are likely to interpret provisions originating from the EU differently than the CJEU in the future. This is due

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[42] Zu 2023, p. 300.
[43] ibid., p. 301. By a 'purposive' interpretation Zu refers to an interpretation drawing from sources other than the literal meaning of its wording, such as the purpose of the provision or its historical background.
[44] ibid.
[45] ibid.

to the different legal traditions of interpretation. Even though the British courts have clearly adapted to the purposive method of interpretation, *Zu* argues that the purposes of European VAT law, which relate to the project of European integration, are no longer relevant in Britain, which leads to post-Brexit British VAT regime having different purposes than that of the EU.[46]

It thus seems clear, that the principles and the style of interpretation of the European VAT regime have, at least on some level, been assimilated into the British legal system. Interestingly the assimilation of the purposive method of interpretation into the British legal system itself might according to *Zu* drive further diversion, as the purposes of VAT after Brexit are different in the British regime than in that of the EU. Based on these findings and as a consequence of the provisions of EUWA and the Finance Act 2024, it seems likely that the future divergence could be driven more by interpretative decisions of British courts in questions which had not yet been resolved by the CJEU before withdrawal day, than by the British courts choosing to ignore case law of the CJEU preceding the withdrawal day.

2.4 Further remarks

Another interesting finding from the time after the Brexit vote but before withdrawal day was that after the vote British courts submitted approximately 22 % less questions to the CJEU than before it. For VAT cases the number of referrals from Britain in 2018 had remained on the same level as before, but compared with the trend from other countries, which shows a significant rise in the number of referrals, the difference is clear. The trend of the number of VAT referrals from other countries had, however, started rising already before the Brexit vote with the number of such referrals from Britain remaining relatively steady.[47] The conclusion to be drawn from these statistics in the context of VAT is therefore, that British courts had even before the Brexit vote submitted considerably less referrals than the courts of other Member States. This could indicate, that in the context VAT British judges were even before Brexit sceptical of the CJEU's rulings, a claim supported by the ruling of the UKSC in *HRMC v Aimia Coalition Loyalty UK Limited* and the discussions around customer loyalty schemes in

[46] ibid., p. 310-311.
[47] Wijtvliet et al. 2018.

Britain.[48] For the purposes of this thesis, however, this piece of information serves merely as additional context.

Besides jurisprudence, which is at the focus of this thesis, diversion between the EU and British VAT systems might in the future also occur through changes in British tax policy, as the British VAT system is no longer bound by obligations arising from membership in the EU. In July of the 2024 a general election took place in Britain, which saw the Labour party win a majority in the British parliament over the Conservatives.[49] The new ruling party had before the election presented its policy pledges in a manifesto, which also extended to VAT policy. In the manifesto, Labour pledged to introduce VAT at a rate of 20 % for private school tuitions.[50] This pledge is a direct result of Brexit, as Article 132(1)(i) of the VAT directive obligates Member States to exempt provision of school and university education of VAT. As mentioned, this thesis will focus on diversion through jurisprudence, but it is nonetheless clear, that changing tax policy may also even in the near future lead to significant differentiation.

[48] See Krever – Zu 2020, p. 82. See also chapter 2.2 of this thesis.
[49] See BBC, UK General election 2024 results.
[50] David 2024. See also Labour Party Manifesto 2024 and Labour's fiscal plan included therein.

3 Establishing a framework for analysing case law within the study period

3.1 General remarks

For establishing a framework for analysing case law within the study period, it is helpful to understand what kind of factors have previously led into deviating decisions by the British courts and the CJEU. For this purpose, the study conducted by *Zu* in 2023 is of considerable help. As the research questions of this thesis relate to the application of VAT law, it fits the purpose to only consider cases, where the questions subject to interpretation concerned the provisions themselves and not the facts of the case. This restriction also serves to keep this thesis within the limits of what is appropriate for works of this kind. Therefore, this section of the study will carefully analyse the previous VAT case law of the CJEU, as identified by *Zu*,[51] in which British courts and the CJEU have adopted different interpretations of the law. The analysis is conducted to recognise so-called risk factors or common themes which have previously been prone to different interpretations, and which therefore could be considered catalysts for diverging interpretations. The findings of this section will later be used while analysing the case law of the CJEU given within the study period to answer the first research question.

3.2 Description and analysis of case law

As described above under Chapter 2.3, both British courts and the CJEU at times adopted a literal and at times a purposive approach of interpretation contrary to each other. The 13 cases identified by *Zu* to include diverging interpretations of the provisions of law are C-308/96 *Madgett and Baldwini*, C-260/95 *DFDS A/S*, C-349/96 *Card Protection Plan Ltd*, C-409/98 *Mirror Group plc*, C-108/99 *Cantor Fitzgerald International*, C-235/00 *CSC Financial Services Ltd*, C-307/01 *D'Ambrumenil*, C-149/01 *First Choice Holidays plc*, C-288/07 *Isle of Wight Council*, C-225/11 *Able UK Ltd*, C-592/15 *British Film Institute*, C-262/16 *Shields & Sons Partnership*, and C-459/19 *Wellcome Trust Ltd*.[52] Notably, *Zu* points out that of these

[51] See Zu 2023, appendix: decisions of the CJEU and UK courts.
[52] ibid., Notably, the previously described case C-53/09 *Loyalty Management (UK) Limited* is categorised as a case including diverging interpretations of the facts where the relevant UK court chose a purposive and the CJEU a literal interpretation.

13 cases 7 concerned exemptions that excluded certain supplies from the VAT base[53] indicating, that questions around that topic are a clear risk factor. This Chapter will cover an analysis of the above-mentioned case law in order to determine other potential risk factors useful for the purposes of this thesis.

C-308/96, *Madgett and Baldwini*

In *Madgett and Baldwini*, the question subject to interpretation was whether Article 26 of the Sixth Council directive on VAT ('sixth directive')[54], which according to its explicit wording applied to travel agents and tour operators, also applied to hoteliers. The VAT and Duties Tribunal in Britain ruled that as Madgett and Baldwini were hoteliers, Article 26 of the Sixth Directive did in fact not apply to them,[55] thus adopting a literal interpretation as pointed out by *Zu*.[56]

However, when the case later reached the CJEU, it chose a different approach than the British court. The CJEU analysed the underlying reasons for why the scheme regulated in Article 26 of the sixth directive had been enacted and concluded that applying it solely to traders who are travel agents or tour operators within the normal meanings of those terms would mean that identical services would be treated differently depending on the formal classification of the trader, which would prejudice the purpose of that provision and lead to distortion of competition. The court expanded the applicability of said provision to certain traders, such as Madgett and Baldwini, even if they were not formally travel agents or tour operators.[57]

The conclusion to be drawn in the context of the current thesis is that the decision highlights the CJEU's tendency to interpret the scopes of certain terms in accordance with the purpose of the provision, as discussed by *Zu*. In this case the purposive interpretation of the CJEU considered the effects on competition, and therefore on the internal market, of an interpretation to the contrary.

C-260/95, *DFDS A/S*

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[53] Zu 2023, p. 303.
[54] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment.
[55] Judgment of the CJEU in C-308/96 *Madgett and Baldwini*, paras. 5, 8 and 10.
[56] See Zu 2023, appendix: decisions of the CJEU and UK courts.
[57] Judgment of the CJEU in C-308/96 *Madgett and Baldwini*, paras. 21–23.

In *DFDS A/S* the questions subject to interpretation also concerned Article 26 of the sixth directive. Under subsection 2 of said provision, taxation occurred in the Member State in which the travel agent had established their business or had a fixed establishment from which services were provided.[58] DFDS A/S was a Danish company active in the shipping, travel and general transport businesses. The company had a British subsidiary, which through an agency agreement was designated as a general sales and port agent of the parent company in Britain as well as a central booking office for the UK and Ireland for all passenger services of the Danish parent company. Under these conditions the British VAT Tribunal ruled that despite the existence of a British subsidiary, DFDS A/S was not liable to pay VAT in Britain, but instead in Denmark where it was established.[59] The decision is based on a literal interpretation, as once again highlighted by *Zu*.[60]

However, when the case reached the CJEU, that court chose to interpret the provision differently. The CJEU ruled that the interpretation assumed by the VAT Tribunal advocated for by DFDS A/S did not consider the actual place where the tours were marketed and would thus not lead into a rational result for tax purposes. Furthermore, the court found that the reason for the inclusion of the criterion alternative to the place of establishment, namely that of having a fixed establishment from where services are provided, in the provision was to prepare for the diversification of travel agents' operations into different parts of the European Community. The court further ruled that the UK subsidiary of DFDS A/S constituted a fixed establishment in the meaning of Article 26 of the sixth directive and that therefore VAT was payable in Britain.[61]

The *DFDS A/S* judgment therefore provides for another example of a British court relying on a strictly literal reading of the provision and the CJEU instead considering the purpose of the provision and stretching the interpretation beyond the explicit wording. The purposive interpretation adopted by the CJEU in this case clearly paid attention to the European integration project as it gave weight on the fact that

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[58] Judgment of the CJEU in C-260/95 *DFDS A/S*, para. 3.
[59] ibid., paras. 5 and 7. As described in para. 7, Denmark had chosen to exempt services such as those provided by DFDS A/S from VAT, which might explain why the issue of where VAT was payable was important for the company.
[60] See Zu 2023, appendix: decisions of the CJEU and UK courts.
[61] ibid. paras. 22-23 and 28.

undertakings might diversify their activities and the tax law would have to adapt to that to ensure a rational result for tax purposes.

C-349/96, *Card Protection Plan Ltd*

In *Card Protection Plan Ltd*, the issue concerned the exemption from VAT of insurance transactions and related services provided by insurance brokers and agents under Article 13(B)(a) of the sixth directive. Card Protection Plan Ltd ('CPP') offered against consideration a protection plan covering the loss or theft of certain important items such as credit cards, which it organised through a block cover from an insurance company by entering the names of its own customers into the schedule of the assured at the insurance company.[62] After rulings by various lower courts the British Court of Appeals ruled that the protection plan offered by CPP was not exempt of VAT under the exemption intended for insurance transactions, because the plan only constituted a contract for a card registration service and the insurance elements were only incidental.[63]

After a referral to the CJEU, the European court issued a different ruling. The court took note of the fact that CPP was undisputedly not the actual provider of the insurance cover, but instead the holder of a group insurance policy for its customers. As such, the CJEU ruled that the supply of services by CPP to its customers constituted an insurance transaction supported by the purpose of the sixth directive, as the directive exempted insurance transactions but allowed taxation of insurance contracts. Therefore, if the term 'insurance transaction' were to be interpreted to only refer to transactions with the insurers themselves, the directive would effectively have allowed for double taxation of block insurance policies.[64]

Thus, *Card Protection Plan Ltd* provides an example of a case where the definition of an activity exempted of VAT resulted in different interpretations. Once again, the British courts relied primarily on a literal understanding of the provision, whereas the CJEU explicitly founded its interpretation on the purpose of the provision and of the legal instrument itself. From this judgment the conclusion can be made that the CJEU

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[62] Judgment of the CJEU in C-349/96 *Card Protection Plan Ltd*, para. 8.
[63] ibid. para. 12.
[64] ibid. paras. 20–23.

paid attention to the functioning of the directive and adopted an interpretation most consistent with the directive as a whole.

C-409/98, *Mirror Group plc*

In *Mirror Group plc* the question subject to interpretation concerned Article 13(B)(b) of the sixth directive and the exemption from VAT of the leasing or letting of immovable property. Mirror Group plc had entered an agreement with a landlord whereby it received GBP 12 million for entering into a lease agreement and as an inducement to take on the lease. The VAT Tribunal in Britain considered the payment of GBP 12 million to be consideration for things done in return for the inducement of said GBP 12 million and that therefore Mirror Group Plc had made a supply of services for consideration. Furthermore, the VAT Tribunal ruled that it followed from previous case law of the CJEU that a supply made by a tenant who had surrendered an existing lease to a landlord in return for a capital sum was a supply exempt of VAT. The Tribunal concluded that 'there was no proper reason for excluding from the scope of Article 13(B)(b) of the sixth directive a transaction resulting in a lease, where contrary to the usual situation it was the landlord who agreed to pay consideration for the tenant.[65]

When the CJEU weighed in on the matter, it left the question of whether Mirror Group supplied a service for consideration to the national court, but ruled that even if it did, it would not fall under the definition of leasing or letting of immovable property and was thus not exempt of VAT. The CJEU made clear that for the exemption to apply, it should be the landlord who makes a taxable supply of services and the tenant who pays consideration. The court dismissed the case law referred to by the VAT Tribunal as not applicable in Mirror Group plc's situation, as the facts of that case were different.[66]

Notably in *Mirror Group plc* it was the British court that chose a more purposive, and the CJEU that chose a more literal interpretation of the provision.[67] Although, it should be borne in mind that the ruling of the British court was influenced by a previous ruling of the CJEU, which itself extended the scope of the VAT exemption.[68] Therefore,

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[65] Judgment of the CJEU in C-409/98 *Mirror Group plc*, paras. 8 and 14–16.
[66] ibid. paras. 31–36.
[67] See Zu 2023, appendix: decisions of the CJEU and UK courts.
[68] See e.g. Judgment of the CJEU in C-409/98 *Mirror Group plc*, para. 34, where the court explains that the previous ruling was made under different circumstances but that it did extend VAT exemption to the surrendering of a previously leased immovable property along with the right to occupy it back to the landlord, when the original supply itself was exempt.

Mirror Group plc could be viewed as the CJEU correcting a wrongful application of its previous purposive interpretation. For the purposes of this thesis, it should not be viewed as an example of a British court deviating from a literal interpretation independently, but more as a failed attempt to follow the CJEU's purposive style of interpretation, thus highlighting the difficulties British courts have in adopting such interpretations.

C-108/99, *Cantor Fitzgerald International*

In *Cantor Fitzgerald International* the issue once again concerned Article 13(B)(b) of the sixth directive and the exemption from VAT of the leasing or letting of immovable property. Cantor Fitzgerald International ('CFI') had with the landlord's consent entered into an agreement with a tenant on a property, whereby CFI would assume all obligations of the previous tenant and whereby the previous tenant would compensate CFI with a sum of GBP 1,5 million. The VAT Tribunal in Britain ruled that the transaction of said GBP 1,5 million was exempt of VAT.[69]

However, when confronted with the question of whether such a transaction was exempt under the provision in question, the CJEU's answer was no. The court reiterated that an exempt letting of immovable property included the landlord of property assigning to the tenant against rent and for a certain period, the right to occupy a property and to exclude other persons from it, which was not the case with the compensation paid for CFI. According to the CJEU, transactions which are only based on or ancillary to the leases and are not affected by the landlord are not covered by Article 13(B)(b) of the sixth directive. Said provision is to be interpreted strictly.[70]

As was the case in *Mirror Group plc*, in *Cantor Fitzgerald International* the CJEU once again chose a more literal, strict interpretation in connection with the VAT exemption of letting immovable property when compared to the interpretation of the British court.[71] For the purposes of this thesis, it shows a pattern of literal and strict interpretations by the European court when it comes to VAT exceptions, which is not surprising. However, the pattern is at this point not consistent as exemplified by *Card*

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[69] Judgment of the CJEU in C-108/99 *Cantor Fitzgerald International*, paras. 7–8.
[70] ibid., paras. 21–25.
[71] See Zu 2023, appendix: decisions of the CJEU and UK courts.

Protection Plan Ltd, where the CJEU adopted a relatively broad interpretation of the expression 'insurance transaction'.[72]

C-235/00, *CSC Financial Services Ltd*

In *CSC Financial Services Ltd* the issue before the CJEU was, along with another questions, about the definition of the expression 'transactions in securities' which fell under activities exempt of VAT pursuant to Article 13B(d)(5) of the sixth directive. CSC Financial Services Ltd ('CSC') was a service provider, who on behalf of financial institutions handled in its call centre contacts with the public in relation to the sale of certain financial products. Furthermore, CSC handled inter alia the processing of application forms and checking that they had been properly filled in, but it was only allowed to provide information and not advice.[73] When confronted with the case, the VAT Tribunal in Britain ruled that CSC's activities fell under the exemption of Article 13B(d)(5) of the Sixth directive as 'necessary preliminary stages of the issue and transfer of securities.'[74] Notably, no such definition is implied in the wording of the provision.[75]

Eventually the case reached the CJEU, which chose to draw guidance from its previous ruling concerning another provision of the sixth directive. The term transaction under said other provision required, according to the previous ruling, that the action in question 'must have the effect of transferring funds and entail changes of a legal and financial character'. Furthermore, the court ruled that the explicit exclusion of management and safekeeping of shares from the VAT exemption under Article 13B(d)(5) of the sixth directive served as further indication that services of an administrative nature did not fall under the exception.[76] Lastly the court debunked the British court's deduction by concluding that essential constituent elements of an exempt transaction did not mean that the service which that element represents would

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[72] It should, however, be noted that in *Card Protection Plan Ltd* the CJEU explicitly expressed that the literal understanding of the expression was broad enough to warrant their interpretation despite the general rule of interpreting exemptions strictly. See e.g. para. 22 of said ruling.
[73] Judgment of the CJEU in C-235/00 *CSC Financial Services Ltd*, paras. 6-8.
[74] ibid., para. 12.
[75] See e.g. Zu 2023, appendix: decisions of the CJEU and UK courts, where the British court's approach was considered purposive.
[76] ibid., paras. 26–30.

be exempt.[77] Therefore, the services provided by CSC could not be considered exempt from VAT.

CSC Financial Services Ltd provides for another case, where the CJEU adopted a more literal interpretation towards defining the wording of an exemption from VAT.[78] As described earlier it is not surprising that the court chooses strict interpretations in relation to exceptions. It is however interesting that in connection with such exemptions from VAT, the British courts seem to be prone towards expansive interpretations favouring businesses conducting supplies in very close proximity to supplies explicitly exempted from VAT. Such has been the case in for example *Mirror Group plc* and *Cantor Fitzgerald International*. In a way it seems like the British courts, especially the VAT Tribunal, seem somewhat supportive of business ideas ancillary to or supportive of explicitly VAT exempted transactions taking advantage of the exceptions.

C-307/01, *D'Ambrumenil*

In D'Ambrumenil the issue concerned the interpretation of Article 13A(1)(c) of the sixth directive, pursuant to which the provision of medical care in the exercise of the medical and paramedical professions was exempt of VAT. D'Ambrumenil was a medical doctor, who together with his company DRS provided services which required both legal and medical expertise, such as arbitration and mediation services and for example conducting medical examinations of individuals for employers or insurance companies.[79] The British tax authorities concluded, that D'Ambrumenil's activities fell under the VAT exemption for medical care, which D'Ambrumenil denied in the VAT Tribunal, as he considered the exception to only apply for medical interventions in order to diagnose, treat, and cure an illness. The VAT Tribunal was inclined to agree with the British tax authorities but decided to refer the case to the CJEU.[80] Before that, however, the VAT Tribunal expressed that in its view, it was not appropriate to equate treatment with care and determined, that the purpose of the service was not an indication of whether a medical service provided by a doctor was to be defined as care.[81]

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[77] ibid., para. 32
[78] See Zu 2023, appendix: decisions of the CJEU and UK courts.
[79] Judgment of the CJEU in C-307/01 *D'Ambrumenil*, paras. 9-10 and Zu 2023, p. 9.
[80] Judgment of the CJEU in C-307/01 *D'Ambrumenil*, paras. 11-14.
[81] Zu 2023, p. 304.

The CJEU on the other hand chose the opposite direction. The court ruled, that medical interventions carried out for a purpose other than that of diagnosing, treating and curing diseases or health disorders could not be exempt of VAT and that even though medical services could constitute 'care' even if the patient was not actually ill, the services benefiting from the exception had to have as their purpose the protecting, including maintaining or restoring of human health. Considering the purpose of the services in question, it was according to the court not contrary to the to the objective of the exemption, namely reducing the cost of health care and of making it more accessible to individuals, to rule that such services were subject to VAT.[82]

As is pointed out by *Zu*, the difference in the initial interpretation of the British VAT Tribunal and the CJEU is quite striking. The VAT Tribunal explicitly refused to consider the purpose of the services and instead chose to differentiate between the different meanings of the expressions 'care' and 'treatment,' the latter of which points towards a medical intervention of a more specific nature. As the CJEU chose to emphasise the purpose of the exemption in its interpretation, the ultimate purposive approach, it is no wonder why *Zu* has chosen to treat *D'Ambrumenil* as an example of the literalistic tendencies of British courts in contrast with the purposive approach of the CJEU.[83] Bearing in mind the analysis regarding previous cases, it would, however, seem too extreme to argue that the kind of clear difference in opinion towards literalism by the British court and purposivism by the CJEU as exemplified by *D'Ambrumenil* would be the standard outcome. Moreover, it seems that *D'Ambrumenil* is a very exceptional example of the kind of arguments that both courts might have a traditional tendency towards.[84] Still, as both courts have on multiple occasions shown their capability to also adopt different interpretation methods, it does not seem reasonable to give too much weight to *D'Ambrumenil* at this time.

C-149/01, *First Choice Holidays plc*

In *First Choice Holidays plc* the question subject to different interpretations once again concerned the special VAT scheme for travel agents and tour operators regulated by Article 26(1) and (2) of the sixth directive. First Choice Holidays plc ('FCH') was an undertaking which organised packaged holidays by buying and combining various

[82] Judgment of the CJEU in C-307/01 *D'Ambrumenil*, paras. 57-59.
[83] See Zu 2023, p. 303–304.
[84] See e.g. Chapter 2.3.

component elements and letting travel agents sell the combination product to customers under agency agreements. Under the agency agreements, FCH was entitled to receive from the agents the full price indicated by a price brochure even though the agents were allowed to sell the holidays to customers for a lower price and routinely did so without without FCH having knowledge of the actual prices paid by the customers. The agents would later be compensated with a 10 % commission of the brochure price they paid to FCH.[85] The VAT treatment of the discounts given to customers ended up in court after FCH submitted a claim to the tax authorities for repayment of a lump sum based on FCH having incorrectly accounted for VAT when it came to the discounts. The tax authorities rejected the claim, but the VAT and Duties tribunal upheld it on appeal and ruled that the difference between the brochure price and the reduced price fell outside the scope of the scheme provided for by Article 26 of the Sixth Directive. The High Court of Justice confirmed the ruling and stated that the difference between the brochure price and the actual price, which the agent paid to FCH, was not an 'expense to be paid by the traveler' in the meaning of Article 26(2) of the sixth directive and should instead be viewed as a service provided by FCH to the agent, and was therefore not subject to VAT.[86]

Eventually the case reached the CJEU. The court referred to its ruling in *Madgett and Baldwini* and stated, that as an exception to the general rules on the taxable amount, Article 26 of the sixth directive was to be applied only to the extent necessary for achieving its purpose of adapting the general rules to the specific nature of the activities of travel agents and tour guides.[87] In other words, the CJEU chose a purposive approach and once again referred to the principle of strict interpretation in connection to exceptions from general rules. The CJEU further clarified, that the purpose of Article 26 of the Sixth directive did not warrant a derogation from the general rules concerning a taxable consideration for a supply under Article 11A(1)(a) of the same, which explicitly included consideration obtained even from a third party. Therefore, the phrase 'amount paid by the traveler' was not to be interpreted literally as to exclude consideration for the supply which came from a third party and thus, the difference

[85] Judgment of the CJEU in C-149/01 *First Choice Holidays plc*, paras. 6-9.
[86] ibid., paras. 11–14.
[87] ibid. paras. 21–23.

between the brochure price and the discount was subject to VAT under Article 26 of the Sixth directive.[88]

First Choice Holidays plc is another example of a case where the British court interpreted the provision of EU law literally, whereas the CJEU reviewed its purpose. Furthermore, the case is another example of the British courts showing favourability towards innovative business models, which may not explicitly fall under the language of the VAT regulations. It must be noted that this might be a side product of the literal style of interpretation, but it is nonetheless an important effect for the topic of this thesis. The CJEU on the other hand once again reaffirmed its position towards strict interpretation of exceptions from general rules and chose to view the provision in the light of its purpose. For the innovative business model of FCH this meant the extension of the applicability of VAT regulations further than the language would have indicated in order to ensure that the purpose of said regulations could not be circumvented through such innovativeness which the lawmakers could not have anticipated.

C-288/07, *Isle of Wight Council*

In *Isle of Wight Council*, the question submitted to the CJEU concerned the interpretation of the second subparagraph of Article 4(5) of the Sixth directive, according to which bodies governed by public law shall be considered taxable persons in relation to such activities, where their exemption from tax would lead to significant distortions of competition.[89] Isle of Wight Council and other local authorities in Britain provided off-street car-parking facilities, a service also provided by commercial actors. Historically the local authorities had paid VAT in connection to the provision of these services, but after another ruling by the CJEU many such authorities had submitted claims for repayment of VAT, as they concluded that under the first subparagraph of Article 4(5) of the sixth directive they should not have been considered taxable persons in relation to these activities. After the tax authorities rejected these claims, some local authorities appealed to the VAT and Duties Tribunal, which ruled that the provision of the services in question by the local authorities did not warrant them to be considered taxable persons under the second subparagraph of Article 4(5) of the sixth directive, as their activity did not significantly distort competition. After an appeal by the British

[88] ibid. paras. 26–29 and 34.
[89] Judgment of the CJEU in C-288/07 *Isle of Wight Council*, paras. 1–5.

tax authorities, the High Court of Justice of England and Wales decided to refer the questions on the interpretation of the expressions 'significant' and 'would lead to' along with the question of the territorial scope of the distortion of competition to the CJEU.[90]

In its ruling, the CJEU sought to answer the questions through a purposive and systemic approach. The court noted, that as the territorial scope of the required distortion of competition was left unspecified by the directive, it would have to be interpreted considering the purpose of the provision as well as its place within the common system of VAT.[91] Through an analysis of the purpose of the provision along with consideration of general principles such as fiscal neutrality and legal certainty, the court determined that the only possible interpretation consistent with the system and purpose of the directive would be to consider distortions of competition without regard to specific local circumstances.[92] As regards to the questions on the interpretation of the expressions 'would be' and 'significant', the court adopted a strict interpretation to prevent unduly enlargement of the exceptional possibility to not consider bodies governed by public law as taxable persons. Thus, the expression 'would be' only required a distortion to potentially happen, and the expression 'significant' was to be understood as anything more than a negligible distortion, similarly to the wording of the third subparagraph of the same provision.[93]

Isle of Wight Council is a perfect example of the method of interpretation generally adopted by the CJEU. The court explicitly chose to find the meaning of the provision by reviewing it in the light of not only the provision itself, but the whole common system of VAT. The court chose not to settle for the traditional meaning of a 'significant distortion of competition', but instead adopted an interpretation consistent with the whole system. In terms of the current study this case does not offer anything significant. It does however reinforce the aforementioned findings of *Zu*, whereby British courts are more prone to a literal and the CJEU to a more purposive interpretation.

C-225/11, *Able UK Ltd*

[90] ibid., paras. 7–12.
[91] ibid., para. 25.
[92] ibid., paras. 26–39, 41, 49 and 53 in particular.
[93] ibid., paras. 61, 65 and 74–75.

In *Able UK Ltd* the controversial issue concerned Article 151(1) of the VAT directive, whereby certain supplies of goods and services within Member States party to the North Atlantic Treaty ('NATO member') or to other Member States who are NATO members, intended for the use of armed forces, or the civilian staff accompanying such armed forces, of other NATO members, when such forces take part in the common defence effort, were exempt of VAT. Able was an undertaking, which had secured a contract with the United States Department of Transportation Maritime Administration for the dismantling of thirteen vessels, which had been in the service of the United States Navy, but which had later been consigned to a reserve fleet. The vessels were to be towed from the United States to Britain where they were to be dismantled.[94]

British tax authorities considered the provision of such a service to fall outside of the exemptions concerning the North Atlantic Treaty under Article 151(1) of the VAT directive, which led to Able appealing to the first-tier Tribunal (Tax Chamber), and the court ruling that the dismantling services were in fact exempt of VAT. British tax authorities applied the decision on the grounds that Article 151(1) would only apply 'to armed forces of a State party to the North Atlantic Treaty visiting a Member State which is another party to the same treaty and only where those forces take part in an activity directly related to the common defence effort'. The Upper Tribunal (Tax and Chancery Chamber) decided to refer the matter to the CJEU and asked whether the VAT exemption would apply when the supply was not made to a part of the armed forces of a NATO member in common defence effort, or to a part of the armed forces of a NATO member stationed in or visiting Britain.[95]

The CJEU began its ruling by stating that a minor difference in the different language versions of the VAT directive did not justify an expansive reading of Article 151(1) of the directive, which as an exemption to the general rules was subject to strict interpretation.[96] Furthermore, the court determined that the purpose of Article 151(1) was to honour certain commitments made in connection NATO, but not to create a general exemption for NATO related supplies of goods and services. According to the court, the exception applied precisely when the expenditure was made 'in the interest

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[94] Judgment of the CJEU in C-225/11 *Able UK Ltd*, para. 6.
[95] ibid., paras. 7–10.
[96] ibid., paras. 13–16.

of common defence'.[97] The court further ruled, considering other NATO related provisions of the VAT directive and the previously described purpose of the provision in question, that the place where the armed forces were stationed was indeed relevant. The court determined, that to be exempt of VAT, the supplies must be made to the armed forces of another NATO member who are stationed in or visiting the Member State concerned, as other interpretations would expand the exception beyond the intention of the Union legislature.[98] Thus, the service provided by Able would not be exempt of VAT under Article 151(1) of the VAT directive.

Able UK Ltd is another model example of the CJEU's purposive approach to interpreting the VAT directive. The court explicitly highlights the principle of strict interpretation of exceptions and the obligation to interpret unclear provisions in the light of the purpose and context of the provision in question. In this particular case, however, it could be argued, contrary to *Zu*'s categorisations,[99] that the lower British court also adopted a purposive interpretation in favour of international NATO co-operation. This is because the First-tier Tribunal ruled that Able's supply of services was exempt of VAT even though the recipient was not technically taking part in the common defence effort, at least not for the part of the vessels which the supplied service concerned, as was required by the provision. It seems that the British court sought to expand the meaning of the phrase 'when such forces take part in the common defence effort' to apply to every service provided for a body that in some way or form does take part in the common defence effort, such as presumably the United States Department of Transportation Maritime Administration, even though a literal interpretation of the provision could have been more strict. This could, for the purpose of the current study, be interpreted as British courts not considering the principle of strict interpretation of exceptions to be as important as the CJEU.

C-592/15, *British Film Institute*

In *British Film Institute* the question concerned the interpretation of Article 13A(1)(n) of the sixth directive, which from the beginning of 2007 was in effect through Article 132(1)(n) of the VAT directive, and under which 'certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural

[97] ibid. paras. 17–19.
[98] ibid., paras. 23–27.
[99] See Zu 2023, appendix: decisions of the CJEU and UK courts.

bodies recognised by the Member State concerned' were exempt of VAT. The provision in question had not been implemented into British law until 1996.[100] British Film Institute ('BFI') was a non-profit body with the task of promoting cinema in Britain and it had during 1990 and 1996 paid VAT at the standard rate on supplies of rights of admission to showings of films. In 2009 BFI sought repayment of the VAT it had previously paid on the grounds that its activity had been exempt under Article 13A(1)(n) of the Sixth directive. Both the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery Chamber) held, in favour of BFI, that the exemption in question had direct effect even though it had not been implemented into domestic British law before 1996. Furthermore, the Upper Tribunal specified that the expression 'certain' in the wording of the provision meant, that the exception applied for 'those' cultural services which were supplied by bodies governed by public law or other cultural bodies recognised by the Member State. After an appeal to the Court of Appeal of England and Wales, that court decided to refer the case to the CJEU and asked clarification on whether the provision could have direct effect and whether the expression 'certain cultural services' permitted Member States any discretion in their implementing legislation.[101]

Contrary to the British courts, the CJEU found that Article 13A(1)(n) of the sixth directive did not satisfy the conditions for being of direct effect, namely those of being unconditional and sufficiently precise.[102] The court struck down the argument that the term 'certain' in this context would have to be interpreted to cover all cultural services supplied by bodies governed by public law or other cultural bodies recognised by the Member State and held, that such an interpretation would be contrary to the ordinary meaning of the term 'certain' in a manner which would lessen the effectiveness of that term in the provision in question.[103] The court further explained that the proposed interpretation would have been contrary to the principle of strict interpretation in connection with exceptions and that the literal interpretation of the term 'certain' was even confirmed by the intent of the legislature determinable from the history of the legal instrument itself. As such, the court ruled that the provision was to be interpreted

[100] Judgment of the CJEU in C-592/15 *British Film Institute*, paras. 3–5.
[101] ibid., paras. 9–11.
[102] See ibid., paras. 13 and 28.
[103] ibid., paras. 15–16.

as to allow Member States discretion in exempting 'certain' cultural services from VAT, and not as requiring the exemption of all cultural services from VAT.[104]

For the purposes of the current study, *British Film Institute* is of particular significance as it provides a clear example of the British courts adopting a purposive approach and the CJEU opting for a literal interpretation. In its reasoning, the Upper Tribunal in Britain explicitly attempted to resolve the issue through purposive approach noting, that it considered a semantic approach 'not appropriate' in the context of EU law. The Upper Tribunal instead attempted to interpret the purpose of the provision and determined it to be the avoidance of diversion between the applications of the VAT system in different Member States.[105] This interpretation was refuted by the CJEU, which held that under established case law, ensuring uniform application was not essential and that in some situations the EU legislature had in fact conferred it on the Member States to specifically determine certain terms of an exemption.[106]

Thus, it can be determined that even though British courts might attempt at departing from a literal, or semantic, approach, it is not guaranteed that they will interpret the purpose of the provision similarly to the CJEU. In this particular case, the CJEU referred to the ordinary meaning of the term 'certain', but the main arguments for the interpretation that the CJEU eventually chose were still, in effect, purposive. The court settled on its interpretation through once again applying a strict interpretation of the term in connection with an exception, a very common pattern at this point, which the British court failed to consider. Furthermore, it would seem that the historical information from the time of drafting of the provision played a significant role in the CJEU determining the intent of the legislature.

Also significantly, as is noted by *Zu*, the British Upper Tribunal had in fact paid attention to the same historical documents as the CJEU but still arrived at a different conclusion. The Upper Tribunal did note a Commission report from 1983, also referred to by the CJEU, and how it was used to argue that the original intention was to grant discretion to the Member States. However, the British court determined that said report instead supported the conclusion that Article 13A(1)(n) of the sixth directive

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[104] ibid., paras. 17, 19 and 23.
[105] See judgment of the Upper Tribunal (Tax and Chancery Chamber) in [2014] UKUT 370 (TCC), para 45. See even Zu 2023, p. 304.
[106] Judgment of the CJEU in C-592/15 *British Film Institute*, para. 18.

should be interpreted similarly to Article 13A(1)(m) of the same directive, which also used the term 'certain services' and in connection to which the CJEU had previously ruled that it did not allow for the exclusion of some services from the exemption.[107] For the purposes of the current thesis it is sufficient to understand that British courts do use the same methods and resources as the CJEU in support of their interpretations. As is pointed out by *Zu*, this particular example shows the difficulty in using historical records to support interpretation.[108] When considering the fact that the British court essentially used the methods generally used by the CJEU and even paid attention to same source materials, it can be argued that the differing interpretations in *British Film Institute* could have occurred between not only British courts and the CJEU, but between any other European courts and the CJEU as well.

C-262/12, *Shields & Sons Partnership*

In *Shields & Sons Partnership* the provision subject to different interpretations was Article 296(2) of the VAT directive, pursuant to which Member States are allowed to exclude from the flat-rate scheme 'certain categories of farmers', and farmers, for whom the application of the normal VAT system or the simplified procedures would not likely cause administrative difficulties.[109] Shields & Sons Partnership ('SSP') was a family farming partnership, which had applied to join the flat-rate scheme and had its application accepted. Subsequently, SSP had continued its activities under the flat-rate scheme until British tax authorities concluded that SSP had from the use of the flat-rate of 4 % during the years gained an advantage of almost GBP 375,000 compared to if it had been subject to normal VAT arrangements. The authorities thus cancelled SSP's certificate to apply the flat-rate due to flat-rate compensation substantially exceeding the input tax which otherwise would have been deductible. The British First-tier Tribunal (Tax Chamber) upheld the decision of cancellation after SSP's appeal, but on a subsequent appeal to the Upper Tribunal (Tax and Chancery Chamber), that court decided to refer the matter to the CJEU. The issues referred for clarification concerned whether Article 296(2) of the VAT directive provided an exhaustive list of situations

[107] See Zu 2023, p. 304–305 and judgment of the Upper Tribunal (Tax and Chancery Chamber) [2014] UKUT 370 (TCC), para 46.
[108] Zu 2023, p. 305.
[109] Judgment of the CJEU in C-262/12 *Shields & Sons Partnership*, paras. 1 and 4.

where farmers could be excluded from the flat-rate scheme, and the interpretation of the expression 'category of farmers' in Article 296(2).[110]

The CJEU began its reasoning by explaining that as an exception, the flat-rate scheme in principle should be applied only to the extent necessary to achieve its objectives, which included the administrative simplification in connection to the offsetting of input VAT paid by the farmers when acquiring goods and services to practice their activities.[111] Under these circumstances, the court stated that neither the objective of the flat-rate scheme nor the context of Article 296(2) of the VAT directive indicated that the purpose of the legislature would have been to allow other grounds of exclusion besides those mentioned in the provision. Furthermore, the court reasoned, that as the flat-rate percentages were set globally be each Member State using macroeconomic statistics, it would not be justified to exclude an individual farmer on the basis of advantages obtained using those percentages, even though Article 299 of the VAT directive prohibited Member States from setting flat-rates which would result in excessive refunds. The conditions laid down by Article 296(2) of the VAT directive were therefore exhaustive.[112] Regarding the interpretation of the expression 'categories of farmers', the CJEU ruled that the principle of legal certainty required that such categories are determined on the basis of objective, clear and precise criteria, through which the farmers in question can themselves determine whether they belong to the category or not. Therefore, it was not possible to categorise farmers excluded from the scheme based on a criterion which did not permit individual assessment of one's situation, such as basing the categorisation on the concept of 'an amount substantially more than another'.[113]

Shields & Sons Partnership showcases the use of general principles in the reasoning of the CJEU. Even though the court settled for quite a literal interpretation of Article 296(2) of the VAT directive in that it determined the list of conditions exhaustive,[114] the court once again reiterated its principle of determining the intent of the legislature through the purpose and context of the provision in question. This time the result was literal, but as has been shown earlier in this Chapter, e.g. in *Able UK Ltd*, sometimes

[110] ibid., paras. 16–22 and 30.
[111] ibid., paras 36–37.
[112] ibid., paras. 38–39 and 44.
[113] ibid. paras. 48–50.
[114] See Zu 2023, appendix: decisions of the CJEU and UK courts.

the same reasoning leads to more purposive outcomes. This underscores the complexity and individuality of interpreting EU law, as was further shown in *British Film Institute*. It does simply not seem possible to determine generally applicable guidelines of interpretation when it comes to the VAT directive, but instead the interpretations must be made while bearing in mind the multiple general principles of EU and VAT law, such as legal certainty as shown by this case, and combining them with the system and purpose of the common VAT system in order to find a balance. For the purpose of this thesis, *Shields & Sons Partnership* shows once more that provisions containing language with multiple potential meanings, such as 'categories of farmers' may, unsurprisingly, lead to different interpretations. This is especially true considering the aforementioned complexity and individuality of interpreting EU law, as many different interpretations may reasonably be justified through slightly different weights given to different principles while conducting the balancing act that is interpretation of EU law.

C-459/19, *Wellcome Trust Ltd*

In *Wellcome Trust Ltd* the issues of interpretation concerned Article 44 of the VAT directive, pursuant to which as the place of supply of services supplied to a taxable person acting as such shall be considered the place where the taxable person has established their business, the place of the fixed establishment to which the services were provided, or in the absence of the two aforementioned, the permanent address or the usual residence of the taxable person.[115] Wellcome Trust Limited ('WTL') was a trustee of a charitable trust, which received income from overseas investments through services supplied to it by investment managers within and outside of the EU. Since 2010 WTL had accounted for input VAT for these services supplied to it under the reverse charge mechanism due to the assumption that the place of supply for the services was Britain. However, between 2016 and 2017 WTL submitted claims for refunds on the argument that it had overaccounted for the output tax, as it did not, in relation to the services supplied to it, 'act as' a taxable person in the meaning of Article 44 of the VAT directive.[116] The First-tier Tribunal (Tax Chamber) confirmed WTL's arguments and deemed the British implementation of Article 44 of the VAT directive to be non-compliant with the directive, as it assigned Britain as place of supply for

[115] Judgment of the CJEU in C-459/19 *Wellcome Trust Ltd*, paras. 1 and 9.
[116] ibid., paras. 16 and 20–21.

supplies made to taxable persons acting in a business capacity. On appeal to the Upper Tribunal (Tax and Chancery Chamber), that court determined that the dispute could only be resolved through a clarification of the expression 'a taxable person acting as such' in the meaning of Article 44 of the VAT directive, which would resolve the question of the place of supply.[117]

In essence, the question submitted to the CJEU was whether Article 44 of the VAT directive was to be interpreted as to include the acquiring of services by a taxable person carrying a non-economic activity for the purposes of that activity as supplies made to a taxable person acting as such.[118] The CJEU first notes, that even though the expression 'a taxable person acting as such' is also included in Article 2(1) of the VAT directive, even though under previous case law the expression in that provision means acting for the purposes of economic activity, and even though the CJEU has previously ruled that WTL's activity in particular is not economic activity, none of these factors lead to the conclusion that the expression in Article 44 should have to be interpreted similarly.[119] Instead, the court noted that under Article 43(1) of the VAT directive, it seemed to have been the intent of the legislature to issue different meanings for the expression 'a taxable person acting as such' in the different provisions of the VAT directive, whereby a taxable person could be acting as such even when they act for purposes of non-economic activities. The court then, however, explains that as a taxable person does not act as such in the meaning of Article 2(1) when acting in a private capacity, the same must be true, even though the definitions are not equal, for a taxable person acting as such in the meaning of Article 44, as that provision is an exception and therefore its definition for the purpose of that provision could not extend beyond that. The court eventually ruled that a taxable person acts as such in the meaning of Article 44 of the VAT directive even when carrying non-economic activities if said activities are conducted in a business, instead of private, capacity.[120]

Wellcome Trust Ltd is another example of the difficulty of interpreting EU law, which underscores the need to individually interpret every issue. In this particular case, the meaning of the expression 'a taxable person acting as such' had already been resolved in connection to another provision of the VAT directive, which, as noted by the CJEU,

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[117] ibid., paras. 24–27.
[118] ibid. para. 28.
[119] ibid., paras. 29–34.
[120] ibid., paras. 36–44 and 51.

usually means that the same interpretation applies for other provisions including the same terms as well.[121] In this instance, the CJEU again refered to the intent of the legislature and the purpose of individual provisions, which may justify adopting different meanings for the same terms even within the same sector. For the purposes of the current thesis, the significance of *Wellcome Trust Ltd* is that it once again shows that cases containing interpretation of the scopes of specific expressions are, once again unsurprisingly, at risk to become subjects for different interpretations.

3.3 Identified risk factors for deviating interpretations

Based on the case law discussed above, two distinct risk factors for deviating interpretations can be identified. They are:

1. the case concerns a VAT exemption or another exception; or
2. the case concerns the interpretation of the scope of a specific word or expression.

Out of all thirteen cases where a British court and the CJEU have arrived at different conclusions on points of law, that is to say the provisions themselves, these two defining factors seem to be present in every single one. Therefore, it would be reasonable to argue that both of these factors within a VAT case bear a real risk of different interpretations by a British court and the CJEU and thus, case law of the CJEU given after the withdrawal date including either of these two factors bear the highest risk of becoming case law, which never ends up applying in Britain due to the local courts choosing not to utilise the option provided for by EUWA to take them into account. Such case law never being applied in Britain would cause differentiation between the two systems. These two factors therefore provide a tool for analysing how the two VAT systems might have started to differentiate during the study period of 2021-2023.

The case law analysis above also underscores the potential practical implications of the differentiation. For example, the identified tendency of British courts to show favourability towards innovative business ideas in terms of their applicability for a VAT

[121] See ibid., para. 35, where the court notes that the requirement of consistency and unity usually requires that the terms used within the same sector are given the same meaning.

exemption might in the future cause British VAT law to become more incentivising towards such innovative, or from another perspective tax evading, business schemes, which would avoid VAT liability due to the semantic interpretation of the language and scope of the provisions.

Another interesting point of observation is that the CJEU often used general principles or particularities of EU law, such as fiscal neutrality, legal certainty, the internal market and the project of European integration as basis for interpretation.[122] As pointed out by *Zu*, these factors might lose their weight as arguments in post-Brexit Britain.[123] This might be especially true from the beginning of the year 2024 with the entry into force of the amendments introduced by REULA, which in the context of VAT remove the possibility to disapply British rules based on such general principles of EU law.

Nonetheless, the analysis of case law conducted in the previous Chapter provides the tools necessary to analyse the case law of the CJEU and the UKSC given within the study period to answer the research questions of the current thesis. The following Chapter will focus on jurisprudence of the CJEU in the light of the risk factors defined in this Chapter.

[122] For example, in *Shields & Sons Partnership*, *DFDS A/S*, and *Madgett and Baldwini* to name a few.
[123] See Chapter 2.3 and especially Zu 2023, p. 310–311.

4 Jurisprudence of the Court of Justice of the European Union within the study period

4.1 On the methodology of this Chapter

As has been described above, the research question relevant for this chapter is how the technical exclusion of VAT related case law of the CJEU given after the withdrawal day from British domestic law affects the diversion of the two VAT regimes. As previous studies have shown, it is likely that the differences in statutory interpretation will lead to different interpretations of the same law in similar cases in the CJEU and British courts.[124] Furthermore, as it is statutorily established that judgments of the CJEU given on or after the withdrawal day are not binding on British courts,[125] it seems clear that newer case law of the CJEU offers an opportunity to evaluate the diversion potentially caused by the statute in question. As such judgments do not bind British courts, the legal rules included therein cannot be expected to automatically become British law. Consequently, in essence every new VAT judgment of the CJEU is a factor driving the diversion between the two VAT regimes unless a British court decides to utilise the CJEU's decisions, which they are permitted but not obligated to do.[126]

The likeliness of British courts choosing to utilise decisions of the CJEU has been estimated to be high,[127] but this will be evaluated through case law analysis and discussed further in Chapter 5 as part of the second research question.

The most appropriate method to answer the first research question within the confines of the current study is therefore to analyse VAT related case of law of the CJEU given after the withdrawal day to determine what the potential exclusion of those decisions from British domestic law would mean for the two VAT regimes in practice.[128] However, as the CJEU has given 111 VAT judgments within the study period defined in Chapter 2.1,[129] it is necessary due to the limited length of this thesis to further limit the

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[124] See Zu 2023 and Chapter 2.3 of the current study.
[125] See EUWA Section 6(1).
[126] See EUWA Section 6(2).
[127] Barth 02/2024.
[128] This analysis constitutes qualitative research. See Alasuutari 2021, Chapter 14.2 where the author notes that a research question concerning the analysis of the contents of the data is of a qualitative nature.
[129] This number explicitly includes only judgments of the Court of Justice in closed cases with value added tax as the subject matter

material subject to more in-depth analysis in this chapter.[130] Thus, an empirical categorisation further described below was conducted on all 111 relevant judgments in order to determine the material most suitable for the purposes of this thesis.

As has been described in chapter 3, the identified risk factors for deviating interpretations of provisions by the CJEU and British courts are that the case concerns an exemption from general VAT rules (variable C1), and that the case concerns the interpretation of the scope of a specific word or expression (variable C2). These risk factors can thus be used to identify the cases most susceptible to different interpretations and thus most relevant for this thesis. These risk factors were therefore considered as variables for the empirical quantitative categorisation with the purpose of narrowing down the relevant data.[131] As these risk factors were identified through an analysis of case law concerning only different interpretations regarding provisions of law, it was deemed appropriate that the research material selected for this chapter also only covers judgements concerning provisions of law. Thus, the material selected for this chapter contains all of the VAT judgments given by the CJEU during the study period, which according to the empirical analysis concern the interpretation of a provision and fulfil both risk factor conditions, which are the variables of interest for the purposes of this thesis.[132] Thus, this Chapter includes both a quantitative method in determining the relevant data from a wide selection, and a qualitative method in analysing select portions of that data.

As established above, the source material or data used in this chapter was filtered from the 111 VAT judgments given by the CJEU during the research period. To avoid selection-bias, all 111 judgments were considered and evaluated in the light of the aforementioned objectively determined risk factors.[133] Thus, the material includes all cases relevant for researching the narrow point of view chosen for the purposes of this thesis. The filtering was conducted empirically through categorising each case according to the factors described in the previous paragraph and its results are

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[130] See e.g. Alasuutari 2021, Chapter 14.2, where the author notes that conducting quantitative research, such as here, often requires narrowing the topic to a certain point of view and determining which factors are of interest for that point of view.
[131] ibid., Chapter 14.3 where the author asserts that variables are the measurable characteristics which vary in the source material and of which information is wanted. For the purpose of this thesis the risk factors identified in Chapter 3.3 fulfil this designation.
[132] See previous footnote.
[133] See Zu 2023, p. 300.

displayed in full in Appendix I. The categorisations were made according to the questions referred to the CJEU by a national court in each case. This method was inspired by that used by *Zu* in her study on the differences in statutory interpretation of VAT law between the EU and Britain, and it was further adapted for the purposes of this thesis.[134]

The first portion of the categorisation consisted of determining whether a particular judgment concerned a provision of the VAT directive or something else. In her 2023 study, *Zu* utilised a differentiation of CJEU judgments into those concerning the provisions and those concerning the facts. She noted that many of the CJEU's VAT decisions concerned, instead of the interpretation of the provisions themselves, questions on how complex facts and circumstances should be understood within the language of the provisions of the VAT directive.[135] This differentiation by *Zu* was utilised in the empirical categorisation conducted for this Thesis to find the cases which concern a provision. The categorisation conducted for this thesis featured the wider designation "Other" as an alternative for the designation "Provision", as several of the cases analysed in the tabulation concerned, in addition to facts as described by *Zu*, for example customs, other regulations, general principles or infringement procedures related to VAT. All such judgments were categorised as "Other". Furthermore, the categorisation utilised the risk-factors identified in chapter 3 as variables C1[136] and C2. This framework for categorisation was then used on each of the 111 judgments to identify those deemed both to concern a provision and to include both risk-factors. As an end result, the categorisation should reveal the cases most likely to be interpreted differently by the CJEU and a British court, and thus most likely not to become optionally utilised by a British court.

The results of the empirical categorisation indicate that 11 judgments of the CJEU bear the greatest risk of becoming interpreted differently by British courts. Thus, they were

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[134] ibid.
[135] ibid., p. 302.
[136] For the sake of clarity, it should be noted that variable C1 does not include provisions in Articles 46-59a of the VAT directive concerning the place of supply, as those, according to the CJEU, do not constitute exceptions. See e.g. judgment of the CJEU in C-532/22 *Westside Unicat*, paras. 32–33. Furthermore, variable C1 does not cover the provisions on VAT groups for the same reason. See e.g. judgment of the CJEU in C-269/20 *Finanzamt T*, para. 42. However, regarding the rules on places of supply, in judgment of the CJEU in 593/19 *SK Telecom*, para. 30, the court determines that point (b) of the first paragraph of Article 59a of the VAT directive is in fact a derogation, and thus that particular point will be covered by the variable C1.

chosen for closer analysis for the purpose of answering the first research question. The judgments in question are C-365/22 *Belgian State*, C-42/22 *Generali Seguros*, C-620/21 *MOMTRADE RUSE*, C-330/21 *The Escape Center*, C-515/20 *B AG*, C-513/20 *Termas Sulfurosas de Alafache*, C-228/20 *I GmbH*, Joined Cases C-58/20 and C-59/20 *K and DBKAG*, C-907/19 *Q-GmbH*, C-593/19 *SK Telecom*, and C-373/19 *Dubrovin & Tröger – Aquatics*.[137]

As described above, the closer analysis will be conducted through a qualitative analysis. Nieminen et al. describe the three main elements of qualitative analysis of case law as being the definitions, the narrative, and the composition. Definitions include the contextualisation of the case on a societal level and its judicial conceptualisation, narrative means the description of the facts of the case and their framing within historical or societal developments, whereas composition means the structures of the legal argumentation.[138] The closer analysis of each case in this chapter will focus on the two risk factors identified previously, the substance of the CJEU's decisions in the judgments, and the practical effects of their legal rules on the substance of VAT law both in the EU and Britain. Thus, the analysis will mostly cover the qualitative elements of definitions and narrative, as one of the variables and points of interest relates to interpretations of certain expressions, which in the context of case law falls under judicial conceptualisation. Furthermore, the larger objective of the analysis is to evaluate the effects of these judgments in the context of Brexit, irrefutably a historical and societal development, which also provides the societal framework for the purpose of the analysis. Still, as noted by Nieminen et al,, as there is no universally applicable way of conducting qualitative analysis of case law, the method of this chapter is highly specific for its research question, as is often the case.[139]

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[137] Of the judgments given during the study period analysed in the empirical categorisation, three were referred to the CJEU from Britain. These were cases C-695/20 *Fenix International*, C-607/20 *GE Aircraft Engine Services* and C-156/20 *Zipvit*. The CJEU had jurisdiction to issue a judgment in these cases pursuant to Articles 86 and 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, which allowed the CJEU to issue a judgment in all cases referred to it by British courts before withdrawal day. See judgment of the CJEU in C-695/20 *Fenix International*, paras. 3-5 and in C-607/20 *GE Aircraft Engine Services*, paras. 3-5. The UKSC's judgment after the CJEU's ruling in *Zipvit* was also given during the study period and will be discussed in Chapter 5.

[138] See Nieminen et al. 2021, Chapter 13.

[139] ibid., Chapter 13.1.

4.2 Description and analysis of case law

This section of the study contains a closer analysis of the cases selected in accordance with the empirical categorisation described in the previous chapter. The complete results of that categorisation are found in Appendix I.

C-365/22 *Belgian State*

In *Belgian State*, a Belgian court referred to the CJEU a question concerning the interpretation of Article 311(1)(1) of the VAT directive, pursuant to which the expression 'second-hand goods' means movable tangible property that is suitable for further use as it is or after repair, other than works of art, collectors' items or antiques and other than precious metals or precious stones as defined by the Member States. As supplies of such second-hand goods are subject to a special scheme of VAT on profit margin pursuant to Article 313 of the VAT directive, and as the question submitted to the CJEU concerned the scope of the expression 'second-hand goods'[140], the case, in essence, contains both risk factors.

The substance matter of *Belgian State* concerned whether end-of-life motor vehicles purchased by undertakings from taxable dealers of second-hand goods with the purpose of selling them for parts constituted second-hand goods in the meaning of Article 311(1)(1) of the VAT directive.[141] The CJEU, referring to previous case law and the purpose of the special margin scheme, decided that definitively end-of-life motor vehicles acquired by an undertaking for the purpose of selling their parts did constitute second-hand goods qualifying for the margin scheme, if the vehicles still included the parts which maintained the functionalities that they possessed when new, and if the vehicles remained in the same economic cycle because of that reuse of parts.[142] The CJEU thus refuted the original opinion of the national Belgian court, which had determined that as the vehicles were explicitly sold for parts, they could not be reused

[140] Judgment of the CJEU in C-365/22 *Belgian State*, para. 14.
[141] ibid.
[142] ibid., paras. 23 and 28. In paragraph 23 the court explains that the interpretation eventually chosen was in accordance with the purpose of the margin scheme, which was to avoid double-taxation, which another interpretation in in this case would have caused in the form of VAT for the components to bes old as parts being included in the sale price of the supplier and the inability of both the supplier and the purchasing undertaking to deduct the VAT paid on the components, which would later on be sold as parts.

as such, which according to that court was a precondition for the applicability of the marginal tax scheme.[143]

For the VAT regime of the EU, *Belgian State* represents a purposive, expansive, interpretation of the expression 'second-hand goods' in connection with the margin tax scheme. As mentioned, the margin scheme is intended for avoiding double-taxation. More specifically, the scheme is designed to address the problems related to situations where the value of a suppliers' service, the basis for calculating VAT, relies on the margin between payments made and consideration received, such as when selling pre-used goods. Without the margin scheme, which allows collecting VAT on the profit margin only, the entire value of these pre-used goods would be subject to tax, which would not correspond with the value added by the supplier.[144] For the British VAT regime the absence of a court ruling such as the one given in *Belgian State* would therefore mean that the scope of the margin scheme would be more limited than in the EU. This could potentially lead to double taxation in Britain in circumstances such as those described in *Belgian State* and, furthermore, would require any multinational undertakings operating within sectors covered by the margin scheme in both Britain and the EU to take the differing scopes of the scheme into account causing administrative burden.

C-42/22 *Generali Seguros*

In *Generali Seguros*, a Portuguese court referred to the CJEU questions concerning the interpretation of Articles 135(1)(a) and 136(a) of the VAT directive.[145] Article 135(1)(a) obligates Member States to exempt from VAT insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents, whereas Article 136(a) obligates exempting from VAT supplies of goods used solely for an activity exempted under, among others, Article 135, if those goods did not give rise to deductibility. As the provisions concern VAT exemptions and as the questions referred concern the interpretation of the scope of the expression 'insurance and reinsurance transactions', the case contains both risk factors.[146]

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[143] See Lindholm – Stenius 5/2023, p. 508.
[144] See Schenk et al. 2015, p. 254 and Article 315 of the VAT directive.
[145] Judgment of the CJEU in C-42/22 *Generali Seguros*, para. 20.
[146] ibid.

The substance matter of *Generali Seguros*, for the parts relevant for this thesis, consists of whether supplies by an insurance undertaking of parts from written off motor vehicles, which have been parties to accidents covered by the insurance undertaking in question and which it has bought from the insured persons, fall within the VAT exempted category of 'insurance and reinsurance transactions' under Article 135(1)(a).[147] The CJEU, after considering among other things the principle of strict interpretation in connection with exceptions and the purpose of avoiding difficulties of the exemption of insurance transactions, that the supplies in question did not qualify as insurance transactions and did not have an inseparable link to the original insurance transaction.[148] Additionally, the CJEU noted that the supplies of the parts in question constituted, instead of services, supplies of goods in the meaning of Article 14(1) of the VAT directive and as such could not fall within the meaning of 'services performed by insurance brokers and insurance agents'.[149] Due to the CJEU's answer to this question, its decisions concerning the other questions in *Generali Seguros* are not relevant for this thesis.[150]

The meaning of *Genrali Seguros* for the VAT regime of the EU is of a clarifying nature. The VAT exemption for insurance transactions and related services does not include supplies solely because they were conducted by insurance undertakings even if they arguably are somewhat connected with actual insurance transactions. In Britain, however, the absence of a similar ruling could allow for innovative ways for insurance undertakings to conduct transactions exempt of VAT. A British ruling to the contrary through a more literal interpretation carrying the aforementioned effect would not be difficult to conceive especially in light of how British courts viewed innovative schemes related to exempt transactions in for example *First Choice Holidays plc*, *CSC Financial Services* and *Mirror Group plc*.[151]

C-620/21 *MOMTRADE RUSE*

[147] ibid., para. 26.
[148] ibid., paras. 29, 32, 35–39 and 46. The court reasoned, among other things, that the supplies of parts were separate from the agreements whereby the original insurances were put in place and that the supplies bore no relation to the covering of risk which is a traditional component of an insurance service.
[149] ibid. paras. 44–45. See also Lindholm – Stenius 3/2023, p. 381.
[150] See e.g. Judgment of the CJEU in C-42/22 *Generali Seguros*, paras. 49–50 and 52.
[151] See Chapter 3.2.

In *MOMTRADE RUSE* a Bulgarian court referred to the CJEU three questions concerning the interpretation of Article 132(1)(g).[152] Pursuant to said provision, Member States are obligated to exempt from VAT supplies of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing. As the case concerns a provision laying down an exemption of VAT and as the third question referred to the CJEU concerns the scope of the expression 'bodies recognised by the Member State concerned as being devoted to social wellbeing', the case includes both risk factors when it comes to the third question. The other two questions on the other hand relate more to the facts in accordance with the classification of *Zu*,[153] and will, due to the chosen limitations on source material, not be covered in this thesis.

The substance matter of *MOMTRADE RUSE*, for the parts relevant for this thesis, concerns whether the fact that an undertaking performing social services has been designated in a register as a provider of social services in accordance with the laws of a Member State is sufficient to meet the requirement of a 'body recognised by the Member State concerned as being devoted to social wellbeing' under Article 132(1)(g) of the VAT directive.[154] The CJEU's decision was that a designation in a register maintained by a public body could indeed serve as indication that the undertaking in question is exempt of VAT under Article 132(1)(g) as a body recognised by the Member State as being devoted to social wellbeing. However, the court notes that this can only be the case if the designation in the register is made based on evaluating the undertaking in the light of several factors, such as the specific local regulations and the principles of equal treatment and neutrality of taxation.[155]

For the VAT regime of the EU, *MOMTRADE RUSE* offers clarification regarding the scope of the VAT exemption for services closely related to social security work. The ruling, for the relevant parts, only concerns what kind of recognitions by Member States may justify the exemption from VAT. Therefore, a possible British interpretation to the contrary would not cause any significant diversions between the two systems as the methods of recognition even in the EU nonetheless lie with the different Member

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[152] Judgment of the CJEU in C-620/21 *MOMTRADE RUSE*, para. 32.
[153] See Zu 2023, p. 302.
[154] Judgment of the CJEU in C-620/21 *MOMTRADE RUSE*, para. 90.
[155] ibid., paras. 91, 92–93 and 97.

States. Thus, a different method of recognition in Britain would not cause any new significant burdens even for multinational undertakings active in the sector for social care services, as they already have to take into account the differences in recognition between the current Member States.

C-330/21 *The Escape Center*

In *The Escape Center* a Belgian court referred to the CJEU a question concerning Article 98(2) of the VAT directive in connection with point 14 of Annex III to the same. Under Article 98 of the directive, Member States are allowed to apply one or two reduced VAT rates, which may only apply to supplies of goods and services in the categories defined in Annex III. Point 14 of said annex reads 'use of sporting facilities'.[156] The case contains both risk factors, as the possibility to apply reduced VAT rates is a derogation from the general principle under which Member States are obligated to apply the same standard rates of VAT for all supplies of goods and services[157] and as the question referred to the CJEU relates to the scope of the expression 'use of sporting facilities'.[158] However, as a reduced VAT rate for the use of sporting facilities is not currently applied in Britain, this particular judgment is not relevant for this thesis and thus will not be analysed in more detail.[159]

C-515/20 *B AG*

In *B AG* a German court referred to the CJEU three questions concerning Article 122 of the VAT directive, which allows for the application of a reduced VAT rate for supplies of, among other things, wood for use as firewood. Said Article is a derogation from the general rule of Article 96, which obligates the application of a standard VAT rate for the supplies of all goods and services. Furthermore, the first question referred to the CJEU concerns the scope of the term 'wood for use as firewood' and thus, the case contains both risk factors.[160] Britain currently applies a reduced rate of VAT for supplies of firewood for domestic use[161] and, therefore, *B AG* is of relevance for this

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[156] Judgment of the CJEU in C-330/21 *The Escape Center*, paras. 5 and 15.
[157] See Article 96 of the VAT directive and Judgment of the CJEU in C-330/21 *The Escape Center*, paras. 17–18.
[158] Judgment of the CJEU in C-330/21 *The Escape Center*, para. 15.
[159] See VATA Schedule 7A.
[160] Judgment of the CJEU in C-515/20 *B AG,* paras. 25 and 28–29.
[161] See VATA Schedule 7A Part 1 and Part 2 Item 1(a), whereby a reduced rate applies for coal, coke, and other solid substances held out for sale solely as fuel. See also UK Government 2016, Section 7.1.3 on firewood as solid fuel.

thesis. However, the latter two questions referred to the CJEU concern customs nomenclature and will, therefore, be excluded from this evaluation.[162]

The substance matter of *B AG* concerns, for the relevant parts, whether the expression 'wood for use as firewood' means any kind of wood, the sole purpose of which based on its objective properties is to be burned.[163] The CJEU determined that the answer to the above-mentioned question is affirmative. The court notes that the uniform application of EU law requires that the expression be given an autonomous and uniform meaning applicable in the entire EU and that as an exception from the main rule of standard VAT rates, the expression must be interpreted strictly. Consequently, the court settles for a meaning corresponding with the meaning of the expression in everyday language, in other words for a literal interpretation.[164]

In *B AG* the CJEU confirmed that in EU VAT law the expression 'wood for use as firewood' is to be understood strictly and literally and be given a uniform meaning within the whole union. However, due to the significance the court gave in its reasoning for the importance of the expression being interpreted in a uniform manner throughout the union, it would be easy to conceive that in Britain, such arguments would not carry weight post-Brexit. Furthermore, as previous case law suggests, British courts have not always applied the principle of strict interpretation in connection with exceptions even in cases where the CJEU has.[165] Still, In Britain VATA, as previously described, currently applies a reduced rate of VAT for 'solid substances held out for sale solely as fuel', which includes firewood. The wording therefore corresponds with the CJEU's ruling in that it only applies for substances with the sole purpose of being burned, which would suggest that the CJEU's ruling in *B AG* would not in practice cause changes in the British VAT regime even if Britain remained in the union and the ruling was binding on British courts. Therefore, it does not seem likely that *B AG* in itself would drive further any sort of diversion between the two regimes.

C-513/20 *Termas Sulfurosas de Alafache*

In *Termas Sulfurosas de Alafache* a Spanish court referred to the CJEU a question concerning Article 132(1)(b) of the VAT directive. Under said Article, Member States

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[162] See Judgment of the CJEU in C-515/20 *B AG*, para. 24.
[163] ibid.
[164] ibid., paras. 26–30.
[165] See Chapter 3.2. For example, *Cantor Fitzgerald International* and *First Choice Holidays plc*.

are obligated to exempt from VAT hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature. The case thus concerns a provision exempting from VAT, and as the question referred to the CJEU concerns the scope of the expression 'closely related activities', the case contains both risk factors.[166]

The actual substance of *Termas Sulfurosas de Alafache* concerned whether a service consisting of opening for customers an individual file setting out their clinical history and allowing them to purchase thermal cure treatments could constitute an activity closely related to hospital and medical care in the meaning of Article 132(1)(b) of the VAT directive.[167] In its reasoning the CJEU refers to the principle of strict interpretation when it comes to exceptions along with the context and purpose of the provision.[168] Ultimately the CJEU ruled, that opening an individual file which allows for the purchase of thermal cure treatments could in fact benefit from the VAT exemption as a service closely related to hospital and medical care, as long as the files set out data related to for example the user's state of health and the medical care prescribed along with information on how it is to be administered. Furthermore, the care must be undertaken under the conditions and by the specific providers as described in Article 132(1)(b).[169] Thus, the CJEU provided a test for determining what kind of services could constitute activities closely related to medical care for the purposes of benefitting from an exemption of VAT.

For the diversion of the VAT regimes of the EU and Britain, *Termas Sulfurosas de Alafache* once again means a possible slight difference in their scopes of VAT exempted activities. Similarly, but conversely, to *Generali Seguros*, the difference potentially caused by *Termas Sulfurosas de Alafache* could potentially mean that certain transactions are exempt of VAT in the EU but not in Britain. This would, once again, mean that there would exist a business model which would benefit from the VAT exemption in one jurisdiction, but not the other. This seems to be the most common

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[166] Judgment of the CJEU in C-513/20 *Termas Sulfurosas de Alafache*, paras. 4 and 22.
[167] ibid., para. 23.
[168] ibid., paras. 25, 30 and 31.
[169] ibid. para. 42

practical effect of the potential diversion of the two VAT regimes in case British courts choose not to utilise non-binding judgments of the CJEU extensively.

C-228/20 *I GmbH*

In *I GmbH* a German court referred to the CJEU two questions concerning Article 132(1) of the VAT directive. Pursuant to said Article, as described previously in connection with *Termas Sulfurosas de Alafache*, hospital and medical care along with certain related activities are exempt of VAT, when performed by bodies governed by public law or under comparable social conditions with those applicable to bodies governed by public law, or by hospitals or other 'duly recognised establishments of a similar nature'. The first referred question concerned the German implementation of said provision and as such is not relevant for this thesis. The second question however concerned the interpretation of the expression 'social conditions comparable with those applicable to bodies governed by public law'.[170] Therefore, the case concerns a provision for an exception from the main rules as well as the interpretation of a specific expression, and thus both risk factors are fulfilled.

The substance of the question relevant for this thesis concerned the factors which are considered when determining whether the medical care supplied is in fact provided under social conditions comparable with those applicable to bodies governed by public law in the meaning of Article 132(1)(b) of the VAT directive.[171] In essence the referring court therefore seeked to understand what factors actually created the comparable social conditions. The CJEU chose to utilise both the literal wording of the provision and its purpose. The court determined, first, that the provision in question did not require the conditions to be identical. Furthermore, the provision was intended not to exempt services provided by private undertakings, which are not subject to the same obligations as public law establishments, as well as to reduce the cost of medical care and to make it more accessible to individuals.[172] Under these conditions the CJEU ultimately decided that in order to determine whether conditions are comparable, it is permitted to take into account, when the services are actually intended to lower the costs and to make the services more available, for example the regulatory conditions applied to public bodies along with indicators related to for example the staff, the

[170] Judgment of the CJEU in C-228/20 *I GmbH*, paras. 4 and 26.
[171] ibid., para. 71.
[172] ibid., paras. 75–78.

premises, the equipment, and the cost-efficiency, if they are comparable with those of institutions governed by public law.[173] In practice the conditions to be taken to account thus relate to the objectives of the VAT exemption in question.[174]

For the VAT regime of the EU the judgment in *I GmbH* therefore represents a guideline for national courts to evaluate whether certain private suppliers of medical services can be considered exempt of VAT. These guidelines would without a doubt be different in Britain, if the local courts chose not to follow this precedent and its purposive approach,[175] and to instead created their own guidelines. In the absence of a similar ruling in Britain*, I GmbH* would thus cause a minor diversion between the two regimes, which might prove consequential for private hospitals and medical service providers.

Joined Cases C-58/20 and C-59/20 *K and DBKAG*

In C-58/20 *K* an Austrian court referred to the CJEU a question concerning Article 135(1)(g) of the VAT directive. Pursuant to the Article, Member States are obligated to exempt of VAT the management of special investment funds as defined by the Member States. The question by the Austrian court concerned the scope of the expression 'management of special investment funds'.[176] Thus, the case contains both risk factors. In C-59/20 *DBKAG* a German court referred to the CJEU a question concerning the same provision and the interpretation of the same expression, and thus the cases were joined.[177] As such, both cases are relevant for this thesis and will be covered together.

For the part of substance matter, *K* revolved around whether the VAT exempted management of special investment funds also covers the tax responsibilities entrusted to a third party by the management undertaking. In *DBKAG*, the substance of the referred question is of a similar nature and concerned whether the exempted management of special investment funds covers the granting by a third-party licensor of a right to use specialist software to the management undertaking.[178] After establishing that the expressions in Article 135(1)(g) constitute independent concepts

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[173] ibid. para. 83.
[174] See even Virtanen – Stenius 3/2022, p. 385.
[175] See for example Zu 2023 and Chapter 2.3 of this thesis, whereby it is established that a literal approach to interpretation is historically more natural for British courts than the purposive approach applied by the CJEU in *I GmbH*.
[176] Judgment of the CJEU in Joined Cases C-58/20 and C-59/20 *K and DBKAG*, paras. 4 and 14.
[177] ibid. paras. 24–25.
[178] ibid. paras. 14 and 25.

of EU law, that said provision, as an exception, should be interpreted strictly, and that the principle of fiscal neutrality should be adhered to, the CJEU ruled that services supplied by third parties to special investment fund management companies did fall under the scope of the exemption if they were connected to the management of such funds and were provided solely for the purpose of that management.[179]

For the VAT regime of the EU, *K and DBKAG* clarifies the scope of application of the VAT exemption in Article 135(1)(g) of the VAT directive. Furthermore, the ruling clarifies an earlier ruling given by the CJEU in C-231/19, *Blackrock Investment Management (UK)*[180], which concerned Britain.[181] In *K and DBKAG* the CJEU determined, in case of the software that when provided exclusively for the purposes of managing special investment funds and no other funds, that service could be considered 'specific' for that purpose and thus could fall within the scope of the exemption.[182] In contrast, in *Blackrock Investment Management (UK)* the CJEU held that certain performance and risk monitoring services provided to special investment fund managers by third-parties did not fall under the scope of the same VAT exemption, as the services in question had been designed for management of various types of funds and thus were not specific to the management of special investment funds, which are subject to the VAT exemption.[183]

Thus, the absence of a ruling similar to *K and DBKAG* from British domestic law in theory leads to the British VAT regime only including portions of the guiding factors in interpreting Article 135(1)(g) of the VAT directive and its national transposition. For the diversion between the VAT regimes of the EU and Britain this would mean that in the British system the exclusion of services not specific for the management of special investment funds do not benefit from the exemption under the legal rule established in *Blackrock Investment Management (UK)*. The conditions which make a third-party service specific enough for the benefit, clarified in *K and DBKAG*, are thus not clear in Britain unless a British court decides to utilise *K and DBKAG*

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[179] ibid. paras. 29–31 and 62.
[180] See judgment of the CJEU in C-231/19 *Blackrock Investment Management (UK)*. The judgment was given before withdrawal day on 2 July 2020 and thus remains binding on British courts unlike *K and DBKAG*.
[181] See Jovio 2023, p. 351.
[182] Judgment of the CJEU in Joined Cases C-58/20 and C-59/20 *K and DBKG*, paras. 57–58.
[183] Judgment of the CJEU in C-231/19 *Blackrock Investment Management (UK*), paras. 48–49. See also judgment of the CJEU in Joined Cases C-58/20 and C-59/20 *K and DBKAG*, para. 56.

The fact that a previous judgment, *Blackrock Investment Management (UK)*, explicitly concerned Britain and was given before the withdrawal date, and that a judgment clarifying that judgment, *K and DBKAG*, was given after the withdrawal day, highlights another interesting aspect of the post-Brexit diversion of the VAT regimes of the EU and Britain. Namely, as shown by this scenario, it is possible that judgments of the CJEU have created certain legal conditions in Britain, but that any successive or clarifying rulings to those conditions never become British law. This is another factor potentially leading to minor differences in the application of certain VAT rules between the EU and Britain.

C-907/19 *Q-GmbH*

In *Q-GmbH* a German court submitted to the CJEU a question concerning the interpretation of Article 135(1)(a) of the VAT directive. Pursuant to said Article, Member States are obligated to exempt of VAT insurance and reinsurance transactions including related services performed by insurance brokers and insurance agents.[184] As the question concerns the scope of the expression 'a service related to insurance and reinsurance transactions that is performed by insurance brokers and insurance agents' and as the provision in question concerns an exemption from VAT, it is clear that the case contains both risk factors.[185]

The substance matter of *Q-GmbH* concerned whether the VAT exemption of Article 135(1)(a) of the VAT directive applies to the provision of insurance products to insurance companies by taxable persons, the placement of that product on behalf of that same company, and the management of the insurance contracts concluded, where those services are considered a single supply for VAT purposes.[186] The CJEU first determined that it was not at all clear that the supply of the services in question in fact would constitute a single supply for the purposes of VAT, but as it could not be completely excluded, the court decided to resolve the matter as if the services in question constituted a single supply.[187] The court thereby noted that generally ancillary supplies share the VAT treatment of the principal supply, which in this case was the supply of a license to use an insurance product. The court further noted that as an

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[184] Judgment of the CJEU in C-907/19 *Q-GmbH*, paras. 3 and 17.
[185] ibid., para 17.
[186] ibid. para 18.
[187] ibid., para 27.

exception, Article 135(1)(a) was to be interpreted strictly.[188] Eventually, after adopting quite a literal interpretation, the court decided that the granting of a license for the use of an insurance product could not be considered an 'insurance transaction' in the traditional sense, as the supplier in such a transaction would only form a contractual relationship with the insurer. The CJEU further held, that the supply of the service in question was neither provided by insurance brokers and agents, nor related to transactions performed by such actors, and thus the provision of such a service did not fall under the scope of the VAT exemption.[189]

Q-GmbH is another case where the CJEU provides clarification on the scope of application of the VAT exemptions. In this particular case, the undertaking *Q-GmbH* operated an innovative business model, whereby it supplied an insurance company with licenses for special insurance products developed by it.[190] Its activity thus fell very close to a VAT exempted activity, namely insurance and related transactions. The provision of such services was not considered exempt of VAT in the EU, but the absence of a similar ruling or a ruling to the contrary might make similar business models exempt of VAT in Britain.

C-593/19 *SK Telecom*

In *SK Telecom* an Austrian court referred to the CJEU two questions concerning point (b) of the first paragraph of Article 59a of the VAT directive. Under said part of Article 59a, read in conjunction with Article 59 of the VAT directive, Member States may, in order to prevent distortion of competition, double taxation, or non-taxation consider the place of supply for telecommunications services, if otherwise situated outside the European Union, as being situated within their territory if the actual use and enjoyment of the services takes place within that territory.[191] In Britain this rule is implemented into Schedule 4A Part 2 Paragraph 9E subparagraph 4 of VATA, pursuant to which where a supply of telecommunications services to a relevant business person would otherwise be treated as made outside of Britain, and the services are to any extent effectively used and enjoyed in the Britain, the supply is to that extent treated as made in Britain. Thus, the British implementation of the rule notably does not affect

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[188] ibid., paras 29–30.
[189] ibid. paras. 33, and 42-44.
[190] ibid., paras. 6–7.
[191] Judgment of the CJEU in C-593/19 *SK Telecom*, paras. 6–7 and 26.

supplies made to private consumers.[192] Also notably the British rule no longer refers to the European Union and instead applies when the actual place of supply would be located outside of Britain. As the rule in question is a derogation from a general rule on the place of supply of telecommunications services and as the questions referred concern the interpretation of the expression 'effectively used and enjoyed', the case contains both risk factors.[193]

For the part of substance matter *SK Telecom* concerned whether the supply of roaming services by a mobile phone operator established in a third country to customers who are also established, have their permanent address, or usually reside in the same third country, which allows those customers to use the national communications network of a Member State they are visiting, means that that service is 'effectively used and enjoyed' in that Member State for the purposes of Article 59a of the VAT directive.[194] In other words, the question was whether the criterion of effective use and enjoyment could be met, and thus as place of supply considered the Member State, when a person travels to a Member State from outside of the Union and utilises the mobile communication network of that Member State through a roaming service supplied by an operator in their country of residence outside of the Union.

In its judgment, the CJEU utilised the purposes of the place of supply exception, namely prevention of distortion of competition, double taxation, and non-taxation, and ruled that the use of the provision was appropriate in situations preventing non-taxation within the EU.[195] Furthermore, the court ruled that the effective use and enjoyment of roaming services by nature takes place in the location of the user, as such services are distinct from other telecommunications services and subjects to separate roaming charges.[196] The court further asserted that any cases of distortions of competition, double taxation or non-taxation were to be assessed within the EU without paying attention to the third countries in question and explained that a ruling

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[192] See VATA Schedule 4A Part 2 Paragraph 9E subparagraph 4. See also HM Revenue & Customs, 2017.
[193] See judgment of the CJEU in C-593/19 *SK Telecom*, paras. 26–27 and 29–30. It should be noted here that the questions referred to the CJEU concern 'non-taxable end-customers', for whom the derogation is not applicable under British law. However, as the CJEU adopts as its objective to interpret the expression 'effectively used and enjoyed' in a broader sense without considering non-taxable end-customers specifically, this case was deemed relevant for this thesis as British law still applies the expression 'effectively used and enjoyed' for the purposes of this particular provision of the VAT directive when it comes to business persons.
[194] ibid., para. 27.
[195] ibid. paras. 41–43.
[196] ibid. paras. 37–39.

to the contrary would make the application of EU VAT rules dependent on the tax law of the third country in question.[197] The CJEU thus ruled that it was appropriate for Member States to treat their territories as the place of supply for provisions of roaming services by operators in third countries to customers from the same country while said customers were visiting a Member State regardless of the tax treatment of those services in the third country in question if such an action has the effect of preventing a situation of non-taxation within the EU.[198]

For the VAT regime of the EU, SK Telecom therefore provides important guidelines on how to levy VAT from providers of roaming services who allow their customers to utilise the mobile communication networks of Member States. Considering the purpose of the provision, it is allowed for Member States to levy VAT from such providers when not doing so would effectively lead to loss of tax revenue within the EU regardless of how the same supply is taxed in the third country. Furthermore, for the purpose of the EU VAT regime roaming services are by nature used an enjoyed in the place where the customer is located.

The absence of a similar ruling in domestic British law might lead into two important differences. First, it is possible that in Britain the usability of the place of supply-rule in question would be dependent on the tax treatment of the supply in its country of origin.[199] As the rule in VATA concerns suppliers established outside of Britain, this could possibly mean the tax treatment of the supplier within an EU Member State and lead to the British rule being unusable, if VAT was already levied for the same supply within an EU Member State even though the service was actually used in Britain. This could well be the case as Article 59a of the VAT directive, which under EUWA has become assimilated British law, explicitly mentions the purpose of prevention of double taxation.

Furthermore, as *SK Telecom* confirms that roaming services by nature meet the criterion of a service 'effectively used and enjoyed' in the place of location of the user, this confirmation has not automatically made its way into British domestic law. Therefore, it is theoretically possible that British court choose to interpret the expression 'effectively used and enjoyed' differently thus creating further diversion

[197] ibid. paras. 45 and 47.
[198] ibid. para. 50.
[199] See footnote 197.

between the systems. However, as the literal meaning of the expression would suggest a similar interpretation as made by the CJEU and as British courts have historically been prone to more literal interpretations,[200] it might well be that they would settle on a similar interpretation even if they chose not to consider *SK Telecom*.

C-373/19, *Dubrovin & Tröger – Aquatics*

In *Dubrovin & Tröger – Aquatics* a German court referred to the CJEU questions concerning the interpretation of Article 132(1)(i) and (j) of the VAT directive. Said Article obligates Member States to exempt of VAT the provision of, among other things, children's or young people's school or university education by bodies governed by public law with such an aim or by organisations recognized by the Members State to have similar aims, and tuition given privately by teachers covering school or university education.[201] The first two questions referred by the German court concern the interpretations of the expressions 'school or university education' and 'organisations having objects similar to those of bodies governed by public law that have as their aim the provision of children's or young people's education'.[202] Thus, the case contains both risk factors. The third question referred by the German court does not concern an explicit expression of the provision, and therefore it will not be covered in this analysis.

The substance matter of the questions referred to the CJEU included whether the concept of 'school or university education' can include swimming tuition, and whether the tuition provided by an institution allowing for the learning of a basic skill such as swimming indicates that the institution in question has aims similar to those governed by public law in the meaning of the provision in question.[203] The CJEU first notes, that the concepts of Article 132 of the VAT directive, as exemptions, are to be interpreted narrowly and that these exemptions constitute autonomous concepts of EU law, which have as their purpose the avoidance of divergence between their applications in different Member States. Furthermore, the court notes, that the purpose of the exemptions in Article 132 is to encourage certain activities in the public interest and that the EU legislature had the intention to refer to a certain type of education common to all Member States. Therefore, as such, the concept of 'school or university education'

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[200] See Zu 2023, p. 299 and Chapter 2.3.
[201] Judgment of the CJEU in C-373/19 *Dubrovin & Tröger – Aquatics*, paras. 3 and 18.
[202] ibid., para. 18.
[203] ibid., paras. 18–19.

for the purposes of VAT refers to an 'integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects, and to the furthering and development of that knowledge and those skills by the pupils and students in the course of their progress and their specialisation in the various constituent stages of that system'.[204] Against this background, the court ruled that even though important in itself, the provision of swimming tuition did not constitute such transfer of knowledge and skills which covers a wide range of subjects or to the furthering of their development, and it as such did not fall within the scope of the VAT exemption under Article 132(1)(i) and (j) of the VAT directive. Consequently, the court did not consider it necessary to rule on the other questions.[205]

As with most other cases concerning the VAT exemptions of the VAT directive, *Dubrovin & Tröger – Aquatics* serves a clarifying purpose for the VAT regime of the EU. In this particular case the court relied heavily on its previous definition of 'school or university education', which, significantly for this thesis, was expressed in a ruling given before the withdrawal day. As such, that important piece of material in support of the ruling is included in British domestic law as assimilated law. However, in the absence of a similar ruling or in case of a ruling to the contrary by a British court, it is possible that the scope of exempted activities under the expression 'school or university education' becomes more expansive in Britain than in the EU. This would, in Britain, potentially allow for the VAT exempt provision by institutions of tuition in swimming and other skills that could be interpreted to fall under the definition expressed by the CJEU in a previous judgment.

However, *Dubrovin & Tröger – Aquatics* also highlights the general principles under which the CJEU tends to interpret exemptions of VAT. They include, as described above, understanding the concepts in the provisions as autonomous concepts of EU law and interpreting the provisions strictly. Furthermore, the court has often paid attention to the purpose of the provision and the intent of the EU legislature. It is far from certain that British courts would find these principles compelling in their own decisions, as the concept of 'autonomous concepts of EU law' with the purpose of

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[204] ibid., paras. 20–28. The court, in paragraph 26, refers to a previous ruling given 14 March 2019 in C-449/17 *A & G Fahrschul-Academie*, where it expressed the description of the concept of 'school or university education' for the purpose of VAT. See judgment of the CJEU in C-449/17 *A & G Fahrschul-Academie*, para. 26.
[205] Judgment of the CJEU in C-373/19, *Dubrovin & Tröger – Aquatics*. paras. 31 and 33.

uniform interpretation and thus the functioning of the internal market are no longer relevant in Britain.[206] Furthermore, as shown in chapter 3.2 of this Thesis, British courts have not always applied the principle of strict interpretation in a similar manner as the CJEU's. All the above-mentioned serves to create uncertainty when it comes to possible diversion between the two systems even in cases such as *Dubrovin & Tröger – Aquatics*, where the ruling quite directly results from an earlier precedent applicable as law both in the EU and in Britain.

4.3 Conclusions concerning the first research question

The purpose of the analysis above has been to find answers to the question of how the exclusion of VAT related case law of the CJEU, given after the withdrawal day, from British domestic law affects the diversion of the two VAT regimes. Even though the limited length of this thesis required that the data be narrowed down to only covering the cases that are historically most likely to be interpreted differently, certain conclusions can be drawn.

First and foremost, it seems clear that as the CJEU has since the withdrawal day issued multiple rulings whereby it offers a clarified definition for a certain expression[207] these definitions have not automatically become binding in British law. Thus, every such ruling within the EU's regime by nature causes diversion from the British regime. The actual concrete effects of this kind of diversions are, although minor at first, not insignificant. For example, *Belgian State* clarifies how the expression 'second-hand goods' is to be understood for the purposes of the margin VAT scheme. Thus, a different scope of application for that particular expression could lead to different applications within the context of the whole margin scheme, which notably applies for other categories than second-hand goods as well. A different interpretation in a situation such as those in *Belgian State* could have led to the used vehicles in question not becoming considered as second-hand goods, or to them being considered second-hand goods under different conditions, which would have had an effect on the profitability and viability of the business model of the undertakings party to the case. This is an example of how a small diversion might lead to larger effects.

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[206] Zu 2023, p. 310-311, where the author notes that the project of European integration and other such purposes of EU law might no longer be relevant in Britain.
[207] See for example *SK Telecom* and *Belgian State*.

Second, it seems clear that in the context of VAT exemptions, the exclusion of the judgments covered above from British domestic law leads to the possibility of various business models being treated as exempt of VAT in Britain but not in the EU, and the other way around. For example, *Generali Seguros* leads to a stricter interpretation of the expression 'insurance transactions' within the EU. As such, its absence from the British legal system theoretically creates, at least for the moment, the possibility for insurance companies in Britain to claim that certain transactions conducted by them are exempt of VAT even though they would not be exempt in the EU. Conversely, *K and DBKAG* leads to a somewhat loosened interpretation of the term 'management of special investment funds' in the EU, as it clarifies how the rule introduced in *Blackrock Investment Management (UK)* can be used to justify that certain activities are exempt of VAT. As *Blackrock Investment Management (UK)* has become assimilated British law but *K and DBKAG* has not, the conditions for utilising the VAT exemption in innovative business models are, for the moment, more suitable in the EU than in Britain. This particular aspect of the diversion of the VAT systems might therefore lead to different developments within certain primarily VAT exempted industries, as new business models might, due to different scopes of exemptions, become more profitable in one or the other regime.

Thus, the exclusion of VAT related case law of the CJEU given after the withdrawal day from British domestic law has effects that potentially extend beyond mere different interpretations in certain specific situations. The diversion caused by the exclusion might cause certain parts of the VAT regimes to develop in different directions and may eventually even cause certain industries to develop very differently between the two jurisdictions.

Still, it is important to note that none of this is certain. The legal reality of Brexit is still relatively recent and as UK courts are still allowed to take judgments of the CJEU to account, the diversion might happen very slowly or even not at all. Furthermore, it is important to note that this thesis only covered a narrow section of VAT related case law given after the withdrawal date. The exclusion of case law concerning other provisions of the VAT directive than only those considered exceptions, and even case law concerning the treatment of specific circumstances might lead to significant diversion as well. An example of this is *Loyalty Management*, where the UKSC adopted

a very different opinion of the circumstances than the CJEU.[208] Thus, the findings of this Thesis should mainly be treated as examples of what Brexit might mean for the VAT environments in the EU and in Britain and to what kinds of changes undertakings active in both jurisdictions should prepare for and pay attention to. This includes the potential to utilise different business models more profitably in one jurisdiction compared to the other.

[208] See chapter 2.2.

5 Jurisprudence of the Supreme Court of the United Kingdom within the study period

5.1 General remarks and methodology

As has been noted by *Zu*, judicial interpretation in Britain has been influenced by the country's long membership in the EU, which is especially prevalent in the context of VAT, an EU based tax, as tax law in Britain is largely statutory.[209] Due to the common law tradition of the British legal system which places importance on the courts as authorities making law even in the context of statutory interpretation,[210] it would seem presumable that the domestic VAT case law in Britain, which includes precedents on how to interpret VAT statutes, will for its part ensure some kind of continuity of the European style of VAT jurisprudence. However, in order to measure whether this presumption could prove accurate in the years to come, it is necessary to determine to what extent British courts actually have assimilated to the European way of applying VAT law. For this reason, the second research question, namely whether post-Brexit VAT related case law of British courts points towards a degree of assimilation of European VAT practices into Britain's domestic law, was chosen for this thesis.

The UKSC is, unsurprisingly, the superior court for most cases in Britain, and for all cases in England, Wales, and Northern Ireland, and is one of the courts with the authority to make law.[211] The UKSC hears arguable points of law bearing the greatest public importance.[212] As was noted in chapter 1.2, as the highest court instance in Britain, the UKSC's attitude towards case law of the CJEU bears the greatest significance for the diversion of British and European VAT regimes, and it has the last word in creating precedents for statutory interpretation.[213] Thus, this chapter will only

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[209] See Zu 2023, p. 296 and 299.
[210] Partington 2012, p. 58 and 64-65. As VAT mostly concerns statutory law, the further curiosities of common law such as the doctrine of precedent, according to which principles established by courts stand as law until overruled by another court or an act of parliament regulating that question, will not be covered in this thesis. See Partington 2012, p. 63.
[211] See document 'Panel 9: The Supreme Court and the United Kingdom's legal system' available at https://www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf. From Scotland the UKSC only hears civil appeals. See also Partington 2012, p. 58 and 61.
[212] See website of the UKSC under 'About the Supreme Court' and 'The Supreme Court' available at https://www.supremecourt.uk/about/the-supreme-court.html.
[213] Partington 2012, p. 58 and 64-65.

cover VAT related case law of that court. The cases considered are further limited into those given during the study period due to the limited length of this thesis.

As described in chapter 1.2, the method for answering the research question in this chapter is a qualitative analysis of VAT related case law given by the UKSC within the study period. Considering the question, it would seem that the factors significant for the answer would be whether or not and to what extent the UKSC utilises case law from the CJEU in comparison with case law from British courts, and whether the arguments used by the UKSC reflect similar patterns as those used by the CJEU. Both of these factors are easily measurable even without excessive experience of interpreting British case law and the presence or absence of both factors in a case clearly points towards either greater or lesser utilisation of European style thinking. Of the three elements of qualitative case law analysis, the ones most suitable for this particular research question are therefore the elements of narrative and composition.[214] The narrative element includes analysis of what precedent case law is deemed as appropriate for guiding the evaluation in a case at hand, and the composition element covers analysis of the arguments used in a case.[215] Thus, a qualitative method of case law analysis focusing on the narrative and composition of UKSC case law will be utilised in this chapter.

As evidence of some degree of assimilation of European VAT thinking in British jurisprudence, this chapter shall utilise the style of argumentation used by the CJEU as discussed above in Chapters 3.2 and 4.2, and in the cases considered in Appendix I. Such arguments considered here to indicate a European way of thinking include considering the purpose of the provision,[216] the context of the provision,[217] or the intent of the legislature[218]. Furthermore, applying certain general principles common to European VAT law, such as a strict interpretation of exceptions[219] or the principles of

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[214] Nieminen et al. Chapters 13 and 13.1. See also Chapter 4.1 of this thesis.
[215] ibid., Chapters 13.1 and 13.4.2.
[216] See for example judgments of the CJEU in *Madgett and Baldwini*, *DFDS A/S*, and *First Choice Holidays plc*.
[217] See for example judgments of the CJEU in *Able UK Ltd*, *Shields & Sons Partnership*, and *Termas Sulfurosas de Alafache*.
[218] See for example judgments of the CJEU in *Able UK Ltd*, *British Film Institute*, and *Shields & Sons Partnership*.
[219] See for example judgments of the CJEU in *Generali Seguros*, *Termas Sulfurosas de Alafache*, and *Q-GmbH*.

neutrality, equal treatment, non-discrimination, effectiveness, and proportionality[220] will similarly be considered evidence of at least some degree of assimilation. Even though it does not seem reasonable to designate some these general principles, such as that of equal treatment, as solely European by origin, their utilisation in British case law would still indicate that British courts work with the same tools as the CJEU when resolving VAT issues, which in itself is an indication of a level of continuity and of a greater likelihood to interpret similar issues in a similar manner.

During the research period the UKSC has given 7 judgments relevant for this thesis,[221] all of which have the Commissioners for His Majesty's Revenue and Customs ('Commissioners for HMRC') as a party representing the tax authorities.[222] The relevant cases are [2022] UKSC 12 *Zipvit Ltd v Commissioners for HMRC*, [2023] UKSC 12 *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC,* [2022] UKSC 28 *Commissioners for HMRC v NHS Lothian Health Board (Scotland),* [2022] UKSC 26 *DCM (Optical Holdings) Ltd v Commissioners for HMRC (Scotland)*, [2023] UKSC 7 *News Corp UK & Ireland Ltd v Commissioners for HMRC*, [2021] UKSC 11 *Balhousie Holdings Ltd v Commissioners for HMRC*, and [2023] UKSC 35 *Target Group Ltd v Commissioners for HMRC*.

5.2 Description and analysis of case law

This section of the study contains the analysis of the relevant case law of the UKSC during the study period. As described in the previous section, the analysis will focus on the legal sources and arguments used by the court. Therefore, the facts of the cases will not be discussed beyond to what is necessary.

[2022] UKSC 12 *Zipvit Ltd v Commissioners for HMRC*

Zipvit Ltd v Commissioners for HMRC concerned the right of deduction of input VAT either due or paid by a trader on supplies made to it by another supplier for the parts that those supplies were used for the trader's own supplies made to the ultimate

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[220] See for example judgment of the CJEU in C-505/22 *Deco Proteste*, para. 17, judgment of the CJEU in C-453/22 *Schütte*, para. 20, and judgment of the CJEU in C-418/22 *Cezam*, paras. 27–28, and 30.
[221] Note that the search term 'VAT' in the National Archives' database gives 18 results for the UKSC within the study period. However, some of these decisions are unrelated to the actual substance of VAT law and instead concern, for example, tax fraud or various disputes. Such cases have not been covered in this thesis. The database is available at https://caselaw.nationalarchives.gov.uk/structured_search.
[222] The Commissioners for HMRC are civil servants responsible among other things for the collection of revenue. See for example Sections 1 and 5 of the Commissioners for Revenue and Customs Act 2005.

consumer. Notably, the UKSC immediately noted, that as the facts of the case took place before Britain's withdrawal from the EU, the outcome of the case was dependent on the interpretation of the EU provisions on VAT. [223] Furthermore, this particular case is significant in that it is the final decision in a VAT dispute, which the UKSC had previously referred to the CJEU, and in which the CJEU had given its ruling. The UKSC deemed the CJEU's judgment clear and helpful for their own decision.[224]

The legal sources utilised by the UKSC in *Zipvit Ltd v Commissioners for HMRC* are mostly European, as was noted by the court in paragraph 1 of its judgment. On the statutory side the dispute concerned Articles 168(a) and 226(9) and (10) of the VAT directive.[225] Furthermore, the dispute had originally been initiated due to the British implementation of Article 132(1)(a) of the VAT directive and the equivalent provisions preceding it, which exclude for example the supply of postal services from VAT. A judgment of the CJEU, which clarified that the exemption only applied to supplies made by the public postal service acting as such, was also part of the reason for the dispute.[226] In its decision the UKSC heavily relied on the judgment of the CJEU in *Zipvit* and its interpretation of Article 168(a) of the VAT directive as its main legal source.[227]

The arguments used by the UKSC in *Zipvit Ltd v Commissioners for HMRC* are also largely based on the CJEU's judgment and thus, by nature, have a largely European background.[228] Notably, however, the UKSC notes that one of the three main issues before it was of a domestic nature and concerned Regulation 29(2) of the British Value Added Tax Regulations 1995 (SI 1995/2518, 'VAT Regulations 1995'). The court noted that even as a matter of domestic law, the issue was related to the proper understanding of the operation of the VAT directive and as such, the question could be ruled on based on the judgment of the CJEU.[229] Interestingly, the UKSC also noted that as the CJEU left some of the questions unanswered due to the nature of its answers to other

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[223] Judgment of the UKSC in [2022] UKSC 12 *Zipvit Ltd v Commissioners for HMRC*, para. 1.
[224] ibid., para. 2. See also judgment of the CJEU in C-156/20 *Zipvit*. The UKSC notes that *Zipvi*t was the last case referred to the CJEU by it.
[225] Judgment of the UKSC in [2022] UKSC 12 *Zipvit Ltd v Commissioners for HMRC*, para. 7.
[226] ibid., paras. 8 and 13. See also judgment of the CJEU in C-357/07 *TNT Post UK Ltd*, para. 49. Notably, the British implementation and practice around the VAT exclusion of postal services and the CJEU's judgment in *TNT Post UK Ltd* clarifying it are another example of the more tolerant approach of British authorities and courts towards the application of VAT exemptions compared to that of the CJEU's.
[227] ibid., paras. 29–34.
[228] ibid.
[229] ibid., para. 34.

questions, it would not have been appropriate for the UKSC to pick up those questions as they related to points of EU law which had not yet been ruled on by the CJEU. Still, the UKSC did submit that a debate on the significance of the CJEU's ruling in *Zipvit* for even those questions may take place domestically later.[230]

The UKSC's judgment in *Zipvit Ltd v Commissioners for HMRC* is special in that it explicitly acknowledges that it particularly concerns the application of EU VAT law and in that a reference to the CJEU was made in it. Thus, the judgment is not particularly useful in determining the level of assimilation of EU VAT law in Britain post-Brexit. However, the small nuances in this judgment still indicate that the UKSC, even though this was the last reference made by it to the CJEU, did not consider it appropriate to meddle in the interpretation of points of EU VAT law not yet ruled on by the CJEU. Additionally, the court recognised the significance of understanding the functioning of the VAT directive even in connection with a question of domestic law. These two small but significant recognitions by the UKSC would indicate that at least case law of the CJEU which has become assimilated domestic British law is utilised in a manner consistent with the time before Brexit.

[2023] UKSC 12 *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC*

Moulsdale t/a Moulsdale Properties v Commissioners for HMRC concerned the exemption from VAT of certain supplies of land. The case concerns provisions of VATA, which, according to the UKSC, if understood purely literally, would cause a situation where the tax treatment of the supply would be dependent on whether the supplier intended or expected that the purchaser pay VAT on the price of the supply.[231] The court immediately noted that the case concerned provisions which have as their purpose the prevention of allowing suppliers to deduct input VAT when their business is exempt of VAT. Furthermore, as according to the court those provisions did 'not quite work' it was up for the UKSC to decide on their application in the light of the legislature's intention and the purpose of the provisions.[232]

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[230] ibid., paras. 33–34.
[231] Judgment of the UKSC in [2023] UKSC 12 *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC*, para.4.
[232] ibid. paras. 1–3.

As legal source material, the UKSC in *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC* primarily uses the domestic British provisions of VATA and the VAT Regulations 1995. The main provisions applicable are included in Schedule 10 of VATA and implement into British law the Articles 135(1)(j) and (l) and 137 of the VAT directive. The provisions most important here have as their purpose the prevention of deductions of input VAT for exempt transactions. The provisions aim to prevent the utilisation of the option to tax land in creating an output supply subject to VAT in addition to the otherwise exempt businesses.[233]

In order to determine how the provisions in question operate and why, the UKSC multiple time referred to previous judgments by various British courts.[234] Cases such as [2008] UKHL 23 *Principal and Fellows of Newham College in the University of Cambridge v Revenue and Customs Commissioners*, [1996] 1 WLR 201 *Robert Gordon's College v Customs and Excise Comrs*, and [2005] UKHL 47 *MacDonald v Dextra Accessories Ltd* were mainly referred to as additional background information, whereas the First Tier Tribunal (Tax Chamber)'s decision in [2017] UKFTT 782 (TC) *PGPH Ltd v Revenue and Customs Comrs* was referred to as a source clarifying the application of the provisions, although in different circumstances than those in this case.[235] On the other hand, the UKSC did not utilise any judgments of the CJEU even though it did recognise that the background of the domestic provisions was European. Therefore, it could be argued that the UKSC in this particular case chose to utilise mainly domestic sources, even from a court of first instance, rather than to look for answers from the EU. This is even though the facts of the case occurred before the withdrawal day.[236]

The style of argumentation by the UKSC in *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC* partly resembles that often used by the CJEU. For example, the court identifies the need to interpret the unclear provisions in accordance with the intent of the legislature and the purpose of those provisions. Both ways of thinking are factors designated as evidence of a certain degree of assimilation of EU law for the purposes of this thesis. However, the UKSC in this case explicitly refers to the intent of

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[233] ibid., paras. 13–15.
[234] See ibid., paras. 1, 15–16, 35–37, 53–54, and 64.
[235] ibid., paras. 1, 15-16, 35–37 and 53-55.
[236] ibid., paras. 6–10.

the British Parliament instead of that of the EU legislature.[237] Furthermore, the UKSC utilises a sort of contextual interpretation in that it attempts to understand how multiple provisions in different legal instruments function together to fulfil the purpose for which they were enacted,[238] and even applies the principle of strict interpretation when it comes to exceptions such as the anti-tax avoidance provisions in this case, which limit the rights otherwise conferred on the taxpayer.[239] The tax authorities even made certain claims regarding the general objectives and principles of the VAT directive, but the UKSC decided not to consider them as it did not find such consideration to add anything to the arguments which were based on the wording of the domestic provisions.[240] Ultimately the court weighed the alternative interpretations provided by the parties and through utilisation of the aforementioned styles of interpretation and argumentation, along with the literal meaning of the wording of the provisions, sided with the tax authorities.[241]

In *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC* the UKSC largely utilised arguments and interpretation methods common in European VAT thinking. Of the factors designated as evidence of assimilation, the court in this case utilised both a purposive and contextual style of argumentation and even utilised the principle of strict interpretation of exceptions. Consequently, it is somewhat surprising that the legal sources utilised by the court were mainly British even though it was explicitly acknowledged that the provisions subject for interpretation were of a European origin. Still, *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC* shows that certain practices common to European VAT law have been assimilated and are being utilised even in connection with domestic British sources without the explicit need to recognise these methods and ways of thinking as shared with the EU.

[2022] UKSC 28 *Commissioners for HMRC v NHS Lothian Health Board (Scotland)*

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[237] See for example ibid., paras. 3, 15 and 25.
[238] See ibid., 58. See also para. 32, where the UKSC explains how certain provisions in different legal instruments together affect the case at hand, and para. 66, where the court concludes that its decision makes the most sense in the context of the statutory provisions.
[239] ibid., para. 60.
[240] ibid., para. 66.
[241] ibid., para. 67. See also for example para. 61, where the court asserts that Mr. Moulsdale's interpretation was inconsistent with some of the wording in the provisions in question.

Commissioners for HMRC v NHS Lothian Health Board concerned the reclaiming of input tax paid by the claimant in connection with purchases of goods and services during the years 1974 and 1997, as allowed temporarily by a national provision. The claimant had provided clinical services to hospitals but also other services to outside bodies for which they charged a fee. Thus, the claimant could have recovered a proportion of input VAT in accordance with the proportion of its activities which consisted of services provided to outside bodies against a fee.[242] The provision allowing for temporary reclaims of input VAT paid years ago was introduced after a judgment of the CJEU determined that while the principle of effectiveness did not make reducing the reclaim period through national provisions unlawful, it required that such a reduced period be reasonable and include an adequate transitional arrangement, which the relevant national provisions in Britain did not fulfil.[243]

The legal sources utilised by the UKSC in *Commissioners for HMRC v NHS Lothian Health Board* include provisions and case law both from Britain and the EU. The court duly noted the relevant provisions of the VAT directive concerning levying of the tax, making deductions, and the apportionment of deductions, along with the provisions of VATA which implement the provisions of the directive.[244] When it comes to time limits on the recovery of input VAT not deducted during the accounting period of occurrence, on which the VAT directive is silent,[245] the UKSC provided a long summary explaining the relevant domestic cases and provisions culminating with the above mentioned decision of the CJEU.[246] In its reasoning, the UKSC considered multiple judgments of the CJEU, all of which were given before the withdrawal day. These judgments included C-664/16, *Vădan*, C-199/82, *San Giorgio*, C-326/96, *Levez v T H Jennings*, Joined Cases C-430/93 and C-431/93, *Van Schijndel v Stichting Pensionenfonds voor*

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[242] Judgment of the UKSC in in [2022] UKSC 28 *Commissioners for HMRC v NHS Lothian Health Board (Scotland),* paras. 1-2.
[243] ibid., paras. 32–37. The UKSC notes how the CJEU's ruling in C-62/00 *Marks & Spencer* concluded that the time limit imposed by section 80(4) VATA was incompatible with EU law. Furthermore, according to the UKSC based on *Marks & Spencer*, the House of Lords concluded in [2008] UKHL 2 *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* that the same applied for the time limit imposed by regulation 29(1A) of the VAT Regulations.
[244] ibid., paras. 5–20.
[245] ibid., para. 21.
[246] See ibid., paras. 21–38. Besides the cases referred to in footnote 243, the UKSC in this connection as background information even refers to an older case, namely [2001] EWHC 485 *University of Sussex v Customs and Excise Commissioners*.

Fysiotherapeuten, and C-621/15, *Sanofi*.[247] Furthermore, the UKSC referred to Advocate-General Kokott's opinion C-156/20, *Zipvit*.[248] Additionally, the UKSC referred to and refuted the applicability of certain domestic cases which were brought up by the lower courts, such as [2015] UKUT 605 (TCC) *Revenue and Customs Commissioners v General Motors (UK) Ltd* and 1914 SC (HL) 18 *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson*.[249] Thus, it can be concluded that European sources played an important role in this particular case.

The reasoning of the UKSC in *Commissioners for HMRC v NHS Lothian Health Board* revolved around case law of the CJEU and the legal guidance therein. First, the UKSC utilised the CJEU's judgment in *Vădan* and the Advocate-General's opinion *Zipvit* to assert that in order to successfully claim a right to deduct input tax, a taxpayer must be able to quantify the deductible amount through whatever documentation is required by the tax authorities.[250] Second, the UKSC, utilising the CJEU's decisions in *San Giorgio, Levez v T H Jennings*, and *Van Schijndel v Stichting Pensionenfonds voor Fysiotherapeuten*, determined that the principle of effectiveness in EU law had been excessively expanded and incorrectly applied by the lower court.[251] Thus, the UKSC interpreted the applicability of a principle of EU law for this particular case in the light of relevant case law from the CJEU. Third, the UKSC interpreted the EU principle of effectiveness in connection with the conduct of the tax authorities and, mainly through considering the facts of the case, found that the faults identified by the lower court were not relevant for the claim itself.[252] Thus, the reasoning of the UKSC was greatly influenced by case law of the CJEU and the court interpreted the proper application of a general principle of EU law with the help of available European sources. However, none of the explicitly named factors considered evidence of assimilation were present.

Commissioners for HMRC v NHS Lothian Health Board clearly shows that the UKSC explicitly utilises relevant assimilated European case law as binding sources even post-

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[247] See ibid., paras. 60–64, 66–70, and 76–80. The UKSC did, however, note that Sanofi was not relevant for the current case and it was brought up by one of the parties. Considering the research question for this chapter, it was still worth mentioning, as it shows that case law of the CJEU is still used to support argumentation in the UKSC and the court independently considers whether each particular case is relevant.
[248] See ibid., para. 62. The CJEU's judgment in *Zipvit* concerned *Zipvit Ltd v Commissioners for HMRC*, which has been covered previously in this chapter.
[249] ibid., paras. 76 and 81.
[250] ibid., paras. 60–63.
[251] ibid., paras. 67–71 and 76.
[252] ibid., paras. 83–89.

Brexit. Of course, as assimilated law, the judgments referred to in this case remain technically binding on the UKSC. Still, as the UKSC post-Brexit is explicitly provided with the option to depart from case law of the CJEU, it can be considered a conscious decision and a nod of approval by the UKSC to apply judgments of the CJEU in its own decisions.

[2022] UKSC 26 *DCM (Optical Holdings) Ltd v Commissioners for HMRC (Scotland)*

DCM (Optical Holdings) Ltd v Commissioners for HMRC concerned whether the tax authorities were subject to a statutory time bar and whether the authorities had the power to refuse a taxable persons self-assessed claim for a VAT credit payment in order to evaluate it themselves and later decide that they would only pay a lower amount. The case, therefore, revolved around the powers of the tax authorities in the context of the self-assessment system through which the VAT system functions.[253]

The legal sources used in *DCM (Optical Holdings) Ltd v Commissioners for HMRC* were mostly British. The first issue widely concerned sections 73(1) and (6) VATA, which give the tax authorities the power to assess the amount of VAT due in certain situations and set out a time limit for such an assessment. To interpret this provision, the UKSC utilised domestic case law from both the initial proceedings of the case in question as well as the court of appeals' proceedings in a different case, [1999] STC 95 *Pegasus Birds Ltd v Customs & Excise Commissioners*.[254] To resolve the second issue, the UKSC interpreted section 25(3) VATA, which governs the payment of VAT credits by the tax authorities.[255] To determine whether the authorities had the contested powers as described in the previous paragraph, the UKSC referred to multiple British judgments and one judgment of the CJEU.[256] Concerning the second issue, it is not

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[253] Judgment of the UKSC in in [2022] UKSC 26 *DCM (Optical Holdings) Ltd v Commissioners for HMRC (Scotland),* paras. 1-3.
[254] ibid., para. 16 and 18–19.
[255] See ibid., para. 25.
[256] See ibid., paras. 30, 33, 37, 39, and 45. The British cases referred to are [2004] EWHC 2515 *R (UK Tradecorp Ltd) v Customs and Excise Commissioners,* [1987] STC 502, *R v Customs and Excise Commissioners, Ex p Strangewood Ltd*, [2002] EWHC 197 *Capital One Developments Ltd v Customs and Excise Commissioners*, [1979] 1 WLR 239 S J *Grange Ltd v Customs and Excise Commissioners,* [2003] STC 495 *University Court of the University of Glasgow v Revenue and Customs Commissiners,* [2007] EWCA Civ 542 *BUPA Purchasing Ltd V Customs and Excise Commissioners,* [2011] EWCA Civ 271 *Chamberlin v Revenue and Customs Commissioners,* [1982] AC 617 *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Business Ltd,* and [1985] AC

surprising that the UKSC mostly draws guidance from domestic case law. This is because under Article 183 of the VAT directive the Member States are allowed determine the conditions pursuant to which any refunds or excess payments are made to the taxpayers. Same applies for the first issue, as pursuant to Article 273 of the VAT directive Member States are in principle allowed to impose other obligations, which they deem necessary to ensure the correct collection of VAT, even though the VAT directive does not explicitly mention powers for the national authorities to assess the correct amount of VAT or any time limits for such measures.[257] Thus, although the British provisions in question are in line with the VAT directive, they are not explicitly regulated in EU legislation.

The reasoning of the court included the application of several of the factors designated as evidence of assimilation. For example, in connection with the issue of the powers of the tax authorities, the UKSC referred to the principle of neutrality, which according to it 'underpins EU law and domestic law jurisprudence in relation to VAT'. According to the court that principle requires that the tax authorities verify claims of payments in order not to provide unwarranted advantages to certain traders. Notably in this connection the UKSC attributed the significance of the neutrality principle to a British judgment in *R (UK Tradecorp Ltd) v Customs and Excise Commissioners*. Furthermore, the UKSC noted that no unequal treatment occurs when an extended verification process of payments leads to a somewhat different treatment of traders, if fiscal neutrality is achieved. It is also in this connection that the UKSC refers to the CJEU's judgment in C-107/10, *Enel Maritsa Iztok 3 AD*, whereby it was established that extended periods of investigation were generally reasonable, if the temporary withholding of funds is compensated and the principle of fiscal neutrality complied with through the payment of interest.[258] Additionally the UKSC noted that the existence of a power to, in some situations, verify and deny VAT credits was consistent

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835 *R v Inland Revenue Commissioners, Ex p Preston*. The judgment of the CJEU referred to by the UKSC is C-107/10 *Enel Maritsa Iztok 3 AD*.

[257] See for example judgment of the CJEU in C-935/19 *Grupa Warzywna*. paras. 8, 11, and 25–26. In that case under Polish law, failure to submit VAT returns led to the tax authority assessing a correct amount of VAT and imposing a penalty on top of that amount. The case only concerned the penalty payments, but it seems clear that the power to estimate the correct amount of VAT is also based on Article 273 of the VAT directive, as the directive does not regulate ensuring the correct collection and preventing evasion. Notably, this judgment was given after withdrawal day and is therefore not binding on British courts.

[258] Judgment of the UKSC in in [2022] UKSC 26 D*CM (Optical Holdings) Ltd v Commissioners for HMRC (Scotland)*, paras. 34, 37 and 40. See also judgment of the CJEU C-107/10 *Enel Maritsa Iztok 3 AD*, para. 53.

with the provisions of VATA, thus adopting a contextual argument.[259] Finally, the court referred to the requirement of proportionality in the tax authorities' exercise of their powers and noted, that pursuant to British case law there are judicial remedies for cases where such powers have been exercised disproportionately.[260] Consequently, *DCM (Optical Holdings) Ltd v Commissioners for HMRC* shows a high level of assimilation of ways of thinking common to the European system into British jurisprudence.

DCM (Optical Holdings) Ltd v Commissioners for HMRC offers a good example of how the basics of the European common VAT system are present in the British legal system. This case explicitly concerns domestic provisions which pursuant to the VAT directive are subject to the Member State's discretion, and yet the general principles of the European VAT system are clearly visible. It is also significant for the purposes of this thesis that in *DCM (Optical Holdings) Ltd v Commissioners for HMRC* the UKSC referred to two principles, neutrality and proportionality, both of which are designated as evidence of assimilation, mostly based on domestic British case law. This could be treated as evidence of a more deep-rooted assimilation showing that these principles have so firmly become parts of the British VAT system, that in their application it is not necessary to refer to the EU at all.

[2023] UKSC 7 *News Corp UK & Ireland Ltd v Commissioners for HMRC*

News Corp UK & Ireland Ltd v Commissioners for HMRC concerned the exemption from VAT of newspapers and the scope of that exemption in relation to digital newspaper editions. The UKSC first noted that the issue required balancing between the general always speaking principle of British statutory interpretation and the EU law principle of strict interpretation in connection with VAT exemptions together with the standstill provision preventing further designations as zero-rated. This was because pursuant to the always speaking principle, statutes are to be interpreted with consideration towards changes which have occurred since their enactment, such as technological developments, to prevent them from becoming outdated. Furthermore,

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[259] Judgment of the UKSC in in [2022] UKSC 26 *DCM (Optical Holdings) Ltd v Commissioners for HMRC (Scotland)*, para. 41.
[260] ibid., para. 45. The case law referred to by the UKSC here are [1982] AC 617 *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Business Ltd,* and [1985] AC 835 *R v Inland Revenue Commissioners, Ex p Preston.*

the court noted that Britain's withdrawal from the EU did not affect this case, as it concerned a period of time before the withdrawal day.[261]

The legal sources referred to by the UKSC in *News Corp UK & Ireland Ltd v Commissioners for HMRC* were mostly case law both from Britain and the EU. The court referred to multiple British cases to demonstrate that in modern English law statutory interpretation requires considering the wordings of provisions in the light of their purpose and context,[262] and that the always speaking principle is deeply established in British law, a claim which is further supported through references to legal literature.[263] In connection with the EU law principle of strict interpretation of exemptions, the UKSC referred to its own judgment in [2019] UKSC 14 *SAE Education Ltd v The Commissioners of HMRC* as well as the CJEU's judgment in C-445/05 *Werner Haderer*, and the Advocate General's opinion in C-251/05 *Talacre Beach Caravan Sales*. In connection with the standstill provision, the UKSC refers to the judgment of the CJEU in *Talacre Beach Caravan Sales*.[264] Additionally, the court considers the principle of fiscal neutrality and in that connection refers to two judgments of the CJEU, namely joined cases C-259/10 and C-260/10 *The Rank Group*, and C-44/11 *Deutsche Bank*.[265] Thus, *News Corp UK & Ireland Ltd v Commissioners for HMRC* is an example of a balancing act between national British principles and supranational EU principles to determine the scope of a certain provision. This is reflected in the legal sources utilised by the court, which consist of relevant case law from both jurisdictions.

The reasonings of the UKSC in *News Corp UK & Ireland Ltd v Commissioners for HMRC* reflect many of the factors designated as evidence of assimilation. First, the

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[261] Judgment of the UKSC in in [2023] UKSC 7 *News Corp UK & Ireland Ltd v Commissioners for HMRC*, paras. 1-2, 7, 18, 29 and 31. Notably, the UKSC states that in any case the relevant EU law and domestic implementations had later become domestic retained EU law pursuant to EUWA and the European Union (Withdrawal Agreement) Act 2020.
[262] ibid., para. 27. The cases referred to in this connection are [2021] UKSC 5 *Uber BV v Aslam*, [2021] UKSC 13 *Rittson-Thomas v Oxfordshire County Council,* and [2022] UKSC 3 *R(O) v Secretary of State for the Home Department*.
[263] ibid., para. 28. The cases referred to in this connection are [1981] AC 800 *Royal College of Nursing of the United Kingdom v Department of Health and Social Security,* [1998] AC 147 *R v Ireland*, [2003] UKHL 13, *R (Quintavalle) v Secretary of State for Health*, [2018] UKSC 41 *Owens v Owens*; and [2020] UKSC 47 *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners*. The legal literature referred to is Craies on Legislation (ed Daniel Greenberg), 12th ed., (2022) ch 21; and Bennion, Bailey and Norbury on Statutory Interpretation 8th ed, (2020) ch 14.
[264] ibid., paras. 38–39 and 41–42.
[265] ibid., paras. 61–62.

court explicitly considered the meaning of the term 'newspaper' in European VAT legislation contextually in the light of the standstill provision from 1975 and determined that at the time the scope of the term could not have included digital newspapers. Furthermore, the court considered the purpose of the EU legislature in enacting the standstill provision, namely the prevention of social hardship arising from abolishing existing zero-rates and determined that no hardship would arise from the exclusion of digital newspapers as they did not exist at the time. In accordance with the principle of strict interpretation of exceptions the court ruled that the purpose of the provision thus limited the extent of applying the always speaking principle.[266] The court further ruled that physical and digital newspapers were fundamentally conceptually different in that the first should be considered a good and the second a service. The court relied on an analogous application of EU VAT on applying reduced rates for supplies of books to determine that it was not possible to extend the VAT exemption of newspapers to cover digital newspapers pursuant to the always speaking principle.[267] Lastly the UKSC dismissed claims that a different VAT treatment for physical and digital newspapers would infringe the principle of neutrality by noting that it was well established in European case law that the principle could not extend an exemption.[268]

News Corp UK & Ireland Ltd v Commissioners for HMRC is a special case in that it fulfils both of the risk factors for differing interpretations identified in chapter 3 of this thesis. The case is essentially a question of an exception and concerns the scope of the term 'newspaper'. Significantly, the UKSC without hesitation resolves the issues through extensive use of principles and ways of thinking common in the CJEU's decision practice, such as purposive and contextual interpretations and application of the principle of strict interpretation for exceptions. Furthermore, in its judgment the UKSC explicitly mentions how even British statutory interpretation nowadays requires a purposive approach and consideration towards the intent of the legislature. The case

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[266] ibid., paras. 44 and 47–48.
[267] ibid., paras. 55–56 and 58. See also para. 60. The UKSC pays attention to the VAT treatment of supplies of books pursuant to directive 2009/47/EC and a decision of the CJEU in C-502/13 *European Commission v Luxembourg*, whereby according to the UKSC it was established that a reduced rate could be applied to physically supplied books and newspapers including USB-sticks and CD-ROMs, but not to supplies dependent on electronically supplied services.
[268] ibid., para. 62. The case referred to by the CJEU for this point was *Deutsche Bank*.

clearly shows assimilation and habitual application of the methods and ways of thinking also commonly used by the CJEU.

[2021] UKSC 11 *Balhousie Holdings Ltd v Commissioners for HMRC*

Balhousie Holdings Ltd v Commissioners for HMRC concerned the zero-rate of VAT applicable for supplies made in connection with construction or conversion of buildings for certain residential or charitable purposes pursuant to Group 5 of Schedule 8 VATA. Pursuant to paragraphs 36(2) and (3) of Part 2 of Schedule 10 VATA, however, the benefit from the zero-rating can be collected from its recipient if within ten years from the completion of the building either the recipient has disposed of their interest in the building, or the building is not used for relevant residential or charitable purposes.[269] The issue before the UKSC was whether a sale and leaseback arrangement of a building constituted a disposal of interest in the meaning of the provisions mentioned above in that the arrangement created a moment in time, during which the recipient had sold its ownership interest but had not yet acquired a leasehold interest.[270]

The sources of law relevant for *Balhousie Holdings Ltd v Commissioners for HMRC* are mostly statutory. The parties had provided arguments related to multiple judgments both from the CJEU and from British courts, but for the most parts the UKSC decided that they were not useful in context of the question of whether multiple transactions, such as those in a sale and leaseback scheme, should be viewed separately or together for the purposes of VAT.[271] Therefore, as sources of law, the UKSC mostly used the British provisions themselves supported by certain general principles backed by case law. For example, according to British case law referred to by the court, a general principle for resolution of tax issues is to determine whether the statutory

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[269] Judgment of the UKSC in [2021] UKSC 11 *Balhousie Holdings Ltd v Commissioners for HMRC*, paras. 1-2.
[270] ibid., paras. 3 and 7. The phenomenon referred to in para. 7 is called a 'scintilla temporis'.
[271] ibid., paras. 23 and 45. The judgments of the CJEU referred to for this point were C-4/94 *BLP Group Plc*, C255/02 *Halifax Plc*, C-63/04 *Centralan Property Ltd*, C-607/14 *Bookit Ltd*, C-130/15 *National Exhibition Centre Ltd*, C-425/06 *Part Service Srl*, and C-201/18 *Mydibel*. The British judgments referred to were [1969] 1 WLR 951 *Sargaison v Roberts* and [1996] 1 WLR 201 *Robert Gordon's College v Customs and Excise* Comrs.

provisions in the light of their purposes were realistically intended to include the transaction in question.[272]

The reasoning of the UKSC in *Balhousie Holdings Ltd v Commissioners for HMRC* included a few of the factors defined as evidence of assimilation in this thesis. These factors were a contextual and purposive approach to interpretation, which the court utilised throughout the judgment.[273] Additionally, the UKSC did consider the principle of fiscal neutrality, but did not refer to any European sources in connection to it.[274] Interestingly, in connection with the applicability of case law from the CJEU, the UKSC argued that as the issues in this case only concerned a small part of a scheme enacted through British legislation and as the scheme's compatibility with Article 110 of the VAT directive was not contested by the parties, the matter could be resolved through interpretation of British statutory material.[275] The majority of the UKSC eventually decided that sale and lease were two separate transactions.[276] However, based on interpretation of various European sources, Lady Arden arrived at a different conclusion. She argued that the principles of EU law did in fact apply to zero-rated supplies and that therefore it was not sufficient to interpret the situation the light of domestic provisions only, as was done by the majority.[277] Furthermore, unlike the majority, Lady Arden determined that the CJEU's judgment in *Mydibel* was applicable to the facts in *Balhousie Holdings Ltd v Commissioners for HMRC*. According to her, *Mydibel* showed that in connection with sale and leaseback arrangements for funding purposes, the CJEU would treat the transactions together as a single supply, which should have therefore been the case in *Balhousie Holdings Ltd v Commissioners for HMRC* as well.[278]

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[272] ibid., para. 24. The cases referred to by the UKSC here were [2003] HKCFA 46 *Collector of Stamp Revenue v Arrowtown Assets Ltd,* [2005] 1 AC 684 *Barclays Mercantile Business Finance Ltd v Mawson,* and [2006] 1 WLR 1005 *UBS AG v Revenue and Customs Comrs*.
[273] See for example ibid., paras. 26, 30–34, and 37–38.
[274] ibid., paras. 39–41.
[275] ibid., paras. 22–24. The UKSC does, however, in this connection recognize that even if the scheme's compatibility with Article 110 of the VAT directive had been contested, it would not have been possible for the court to refer the issue to the CJEU.
[276] ibid., para. 42.
[277] See ibid., paras. 51–52 and 54. In support of her conclusion, Lady Arden refers to the judgment of the CJEU in C-309/06 *Marks & Spencer PLC* and notes that it established that the general principles of VAT law apply to exemptions including zero-rating. See judgment of the CJEU in C-309/06 *Marks & Spencer PLC* as referred to by Lady Arden.
[278] ibid., paras. 55 and 62. See also the portions of the judgment of the CJEU in *C-201/18 Mydibel* referred to by Lady Arden.

Balhousie Holdings Ltd v Commissioners for HMRC provides an interesting example of division within the UKSC. In this particular case the majority opted for interpretation of the relevant provision in the light of national principles of interpretation, whereas one of the Lords, in this case a Lady, argued that the general principles of EU law should have been considered to a greater extent. Furthermore, even though the majority applied a contextual and purposive style of interpretation, they referred to it in the light of British principles of interpretation. For the purposes of this thesis this suffices as evidence of a certain degree of assimilation, but the contrast between the opinion of the majority and that of Lady Arden exemplifies a potential factor significant for future differentiation; the majority of the UKSC might in some situations decide that certain issues do not warrant the application of general principles of EU law, even though they still form a part of the VAT regime of Britain. In this particular case, however, the differences between the majority and the minority in their perceptions of the nature of the sale and leaseback arrangement did not affect the outcome of the case, as both groups eventually decided that the recipient had either not disposed of their interest, or at least not of all of it.[279]

[2023] UKSC 35, *Target Group Ltd v Commissioners for HMRC*

Target Group Ltd v Commissioners for HMRC concerned whether the VAT exemption of certain financial transactions pursuant to Article 135(1)(d) of the VAT directive applied to certain loan administration services. The central issue before the UKSC was whether a service constituting of the provision of instructions for the payment of loans, where the payments are later carried out automatically, could benefit from the exemption, which according to the tax authorities based on case law of the CJEU only applied to executions of orders for payment.[280] In this case, the UKSC explicitly noted that no issue concerned the wording of a British statute and that the interpretation of the VAT directive, as retained EU law pursuant to EUWA, is a matter of EU law.[281]

The sources of law referred to by the UKSC in *Target Group Ltd v Commissioners for HMRC* were mostly case law from the CJEU with a few supporting references to British case law. The UKSC first referred to judgment of the CJEU in C-455/05, *Velvet & Steel*

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[279] ibid., see paras. 46 and 63.
[280] Judgment of the UKSC in [2023] UKSC 35 *Target Group Ltd v Commissioners for HMRC*, paras. 1-4.
[281] ibid. paras. 7–8.

Immobilien und Handels GmbH, and noted that the purpose of the exemption of VAT of financial services is to prevent difficulties in determining the consideration for such services and to keep the costs of consumer credits low. Significantly, the court then noted that resolving the issue before it required in-depth interpretation of a collection of case law of the CJEU.[282] The court then, accordingly, proceeded to analyse and interpret judgments of the CJEU in C-2/95 *Sparekassernes Datacenter*, C-175/09 *Axa UK plc,* C-350/10 *Nordea Pankki*, C-607/14 *Bookit II,* C-130/15 *National Exhibition Centre Ltd,* C-5/17 *DPAS,* and C-464/12 *ATP PensionService A/S*,[283] which covers most of the judgment. Thus, the UKSC's judgment in *Target Group Ltd v Commissioners for HMRC* is almost completely based on case law of the CJEU, all of which precedes the withdrawal day.

The reasoning of the UKSC in *Target Group Ltd v Commissioners for HMRC*, as could be expected considering the sources of law, contains several of the factors considered evidence of assimilation for the purposes of this thesis. The court for example pays attention to the purpose of the Article 135(1)(d) of the VAT directive and, as a provision containing and exemption, identifies the need to interpret it strictly.[284] Interestingly, in relation to the principle of strict interpretation of exceptions the UKSC refers to a British judgment from the England and Wales Court of Appeal (Civil division) in [2001] EWCA Civ 1882 *Expert Witness Institute v Customs and Excise Comrs*, where the court determines that a strict interpretation is not the same as a restrictive interpretation. The difference according to that court in *Expert Witness Institute v Customs and Excise Comrs* is that a strict interpretation requires the supplier to show beyond doubt that the supplies in question are covered by the exception under a fair interpretation of the words, even if a more restricted meaning for the words, which would exclude the same supplies, existed.[285]

After its thorough consideration of CJEU case law, the UKSC eventually determined that it was clear, that narrow interpretation in line with the principle of strict interpretation of exceptions was required. This interpretation, according to the court, meant that the exemption could only cover services, which had as their effect the

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[282] ibid., paras. 19–20.
[283] See ibid., paras. 22–53.
[284] ibid., paras. 17 and 19.
[285] ibid., para. 18. See also judgment of the England and Wales Court of Appeal (Civil Division) in [2001] EWCA Civ 1882 *Expert Witness Institute v Customs and Excise Comrs*, para. 17.

transferring of funds and a change in the financial and legal situation, which required functional participation instead of only performing a function leading to a payment.[286] Significantly, the UKSC thus dismissed claims arguing that a judgment of a British court of appeal in [2000] STC 672 *Customs and Excise Comrs v FDR Limited* contained the correct interpretation of the law. Instead the UKSC explicitly stated that the judgment in *Customs and Excise Comrs v FDR Limited* in the light of subsequent case law from the CJEU had erred in the application of the law and needed to be overruled.[287]

Target Group Ltd v Commissioners for HMRC once again exemplifies factors determined as evidence of assimilation. In its judgment, the UKSC applies the principle of strict interpretation of exceptions and pays attention to the purpose of the provision in question. It is of particular significance, that in relation to the definition of the principle of strict interpretation of exceptions, the UKSC decided to rely on domestic British case law instead of a European source much like it did in *DCM (Optical Holdings) Ltd v Commissioners for HMRC* for the principles of neutrality and proportionality. As was done in connection with that case, also in *Target Group Ltd v Commissioners for HMRC* that choice can be viewed as evidence of a deeper level of assimilation, where this principle central to European law is considered a principle of British law as well. It is also of significance for the purposes of this thesis that in *Target Group Ltd v Commissioners for HMRC* the UKSC decided to overrule a national British judgment, although from a lower court, based on jurisprudence of the CJEU, even though that jurisprudence had been given before the withdrawal day. This decision could be viewed as evidence of the UKSC considering assimilated EU law as fully equivalent to law of a completely British origin in a manner justifying the disapplication of a British court ruling.

5.3 Conclusions concerning the second research question

Based on the sources of law and arguments used by the UKSC in its recent judgments it is possible to state that ways of thinking and resolving VAT cases common to the European common VAT regime are deeply rooted into the British legal system as well. The second research question should therefore be answered in the affirmative. The

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[286] ibid., paras. 55–56.
[287] ibid., paras. 64–65. See also para. 22.

UKSC operates mostly with the same tools and principles as the CJEU when resolving VAT issues. Also significantly, there were no examples of either the UKSC having regard to or utilising a non-binding judgment of the CJEU, or the UKSC explicitly departing from a binding judgment of the CJEU.

It is of particular significance, that there are multiple examples of the UKSC referring to a principle generally used in the context of EU law as stemming from a British source. For example, the effects of the principles of neutrality and proportionality in *DCM (Optical Holdings) Ltd v Commissioners for HMRC* and the strict interpretation of exceptions in *Target Group Ltd v Commissioners for HMRC* were mainly considered through British sources. Additionally, in *Moulsdale t/a Moulsdale Properties v Commissioners for HMRC* the court interpreted provisions explicitly recognised as having a European background but chose to mostly utilise British sources. All of this would suggest that even though post-Brexit judgments in Britain are still mostly decided using similar tools as in the EU, the UKSC prefers to utilise British sources where available. This would, however, not be possible unless the practices common to European VAT judgments were already so deeply assimilated within the British legal culture, that domestic sources of law alternative in effect to European ones existed. As this seems to be the case for at least certain principles, it is possible to argue that the way of interpreting VAT common in Europe is deeply assimilated to Britain.

The judgments analysed in this chapter also raise another potential factor driving diversion from European VAT thinking even though some practices are deeply assimilated. In *Balhousie Holdings Ltd v Commissioners for HMRC* the majority of the Lords on the UKSC ruled that the issue in question did not require consideration of European principles. The minority, Lady Arden, however referred to multiple judgments of the CJEU and held that the European principles should have been considered. *Balhousie Holdings Ltd v Commissioners for HMRC* therefore shows how the composition of the court could affect whether or not the UKSC in a particular issue has regard to case law and principles from Europe. *Balhousie Holdings Ltd v Commissioners for HMRC* also exemplifies how the UKSC may in future cases as well decide that for some reason the European principles do not apply, much like the court did in *HRMC v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* almost ten years prior. It should thus not be considered

certain that the UKSC would always adhere to the same principles as the CJEU might. Considering the conclusions in the previous paragraphs, this could well be especially true for such principles, for which there exist no British legal sources. On the other hand, in *Target Group Ltd v Commissioners for HMRC* the UKSC quite explicitly overruled a British judgment on arguments based on assimilated European sources. Therefore, and in light of the other findings of this chapter, the judgment in *Balhousie Holdings Ltd v Commissioners for HMRC* could reasonably be considered a rare occurrence.

Considering the findings of this chapter, it seems very likely that diversions from the European VAT regime caused consciously through jurisprudence by the UKSC will not become common. The UKSC has quite clearly in its recent jurisprudence shown that it considers binding case law of the CJEU a valid legal source and regularly applies principles common to the European VAT regime. Thus, it does not seem likely that even without the exemptions from certain Brexit provisions granted for VAT law in Finance Act 2024 British VAT jurisprudence would venture far from European jurisprudence at least through the opinions of the UKSC.

As there were no examples of the UKSC deciding to utilise a non-binding judgment of the CJEU during the study period, it is difficult to analyse whether British courts might take advantage of that option in the future. Yet, considering how habitually the UKSC mostly utilised the interpretational tools also commonly used by the CJEU, it would not seem reasonable to argue that the option to consider non-binding judgments of CJEU was insignificant.

6 Conclusions and further discussion

This thesis has introduced the British post-Brexit legal framework for VAT law and identified jurisprudence through courts as the most likely driver of future diversion between the two systems. This is due to the non-binding effect on British courts given to judgments of the CJEU, and the option of the UKSC to depart from CJEU case law, both established in statutory British law. Consequently, this thesis has studied the future diversion through jurisprudence from both points of view and determined, that while the exclusion of newer jurisprudence of the CJEU could have significant practical effects for the diversion of VAT in the European and British jurisdictions, it still seems clear that the British legal culture has assimilated a large portion of the principles and ways of thinking common to the European system of VAT, which makes a large scale conscious diversion through jurisprudence unlikely, but possible, as shown in *Balhousie Holdings Ltd v Commissioners for HMRC*.

It should, however, be recognised that as a student thesis, this work has a variety of limitations. First of all, concerning the first research question, the source pool utilised was very limited and only covered cases where the questions referred to the CJEU explicitly concerned the interpretation of a provision of the VAT directive. Furthermore, the source pool was further narrowed to only cover cases containing risk factors for different interpretations. Thus, the analysis of the practical effects of the exclusion of CJEU's case law from British law only covered a very narrow sector of even the VAT sector. Additionally in the context of the second research question the source pool was limited to only cover judgments of the UKSC. Even though UKSC is without a doubt the most important British court for this kind of analysis, it should once more be pointed out that pursuant to EUWA, even the CoA, which hears more cases than the UKSC, is allowed to depart from case law of the CJEU. Thus, for a more complete picture of the situation, it would be important to consider jurisprudence of the CoA as well.

Furthermore, even though the point of view of this thesis is focused on tax law, the larger theme of this thesis is significant even for other fields of law with roots in the European union. Section 28 of the Finance Act 2024 clearly creates an exception from certain Brexit provisions for VAT law, but for other fields of law, the general principles of EU law explicitly have ceased to apply in Britain. Therefore, the assimilation of the

European principles important for those particular fields of law into the British legal system could provide a very interesting topic of further studies. The changes to tax policy brought by the new Labour government in Britain are also of interest for a potential larger diversion from the European regime even in the context of VAT in the future.[288]

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Appendices

Appendix 1. Categorization of judgments of the CJEU during the study period

Bolding indicates that the judgment was chosen for closer analysis in Chapter 4.2.

Case	Name	Provision	Other	C1	C2
C-532/22	*Westside Unicat*	x			x
C-505/22	*Deco Proteste*		x		
C-453/22	*Schütte*		x		
C-418/22	*Cezam*		x		
C-365/22	***Belgian State (TVA – Véhicules vendus pour pièces)***	x		x	x
C-355/22	*Osteopathie van Hauwermeiren*		x		
C-344/22	*Gemeinde A*		x		
C-288/22	*Administration de l'enregistrement (TVA – Membre d'un conseil d'administration)*		x		
C-282/22	*Dyrektor Krajowej Informacji Skarbowej*		x		
C-249/22	*GIS*		x		
C-239/22	*Belgian State and Promo 54*	x		x	
C-232/22	*Cabot Plastics Belgium*	x		x	
C-180/22	*Mensing II*		x		
C-146/22	*Dyrektor Krajowej Informacji Skarbowej (TVA pour boissons chaudes lactees)*		x		
C-127/22	*Balgarska telekommunikatsionna kompania*	x		x	
C-114/22	*Dyrektor Izby Administracji Skarbowej (TVA – Acquisition fictive)*		x		
C-108/22	*Dyrektor Krajowej Informacji Skarbowej (TVA - Agrégateur de services hôteliers)*	x		x	
C-78/22	*ALD Automotive*		x		
C-42/22	***Generali Seguros***	x		x	x
C-677/21	*Fluvius Antwerpen*	x			
C-664/21	*NEC PLUS ULTRA COSMETICS*		x		
C-641/21	*Climate Corporation Emissions Trading*		x		
C-620/21	***MOMTRADE RUSE***	x		x	x
C-616/21	*Gmina L.*		x		
C-615/21	*Napfeny-Toll*		x		
C-612/21	*Gmina O.*		x		
C-596/21	*Finanzamt M (Étendue du droit à déduction de la TVA)*		x		
C-519/21	*DGRFP Cluj*		x		
C-516/21	*Finanzamt X () and machines fixés à demeure)*	x		x	
C-512/21	*Aquila Part Prod Com*		x		

C-482/21	*Euler Hermes*		x		
C-461/21	*Cartans Preda*		x		
C-458/21	*CIG Pannonia Eletbiztosito*	x		x	
C-397/21	*HUMDA*		x		
C-378/21	*Finanzamt Österreich (TVA facturée par erreur à des consommateurs finals)*		x		
C-368/21	*Hauptzollamt Hamburg (Lieu de naissance de la TVA - II)*		x		
C-330/21	***The Escape Center***	x		x	x
C-294/21	*Navitours*		x		
C-293/21	*Vittamed technologijos*		x		
C-267/21	*Uniqa Asigurări*	x			x
C-250/21	*O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O*		x		
C-247/21	*Luxury Trust Automobil*		x		
C-235/21	*RAIFFEISEN LEASING*	x			
C-227/21	*HA.EN*		x		
C-218/21	*DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes*		x		
C-194/21	*Staatssecretaris van Financiën (Forclusion du droit à déduction)*		x		
C-146/21	*DGRFP Bucureşti*		x		
C-98/21	*Finanzamt R (Déduction de TVA liée à une contribution d'associé)*		x		
C-97/21	*MV - 98*		x		
C-56/21	*AVRI ir ko*		x		
C-1/21	*Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika"*		x		
C-714/20	*U.I. (Représentant en douane indirect)*	x			x
C-697/20	*Dyrektor Izby Skarbowej w L. (Perte du statut d'agriculteur forfaitaire)*		x		
C-696/20	*Dyrektor Izby Skarbowej w W. (Qualification erronée d'opérations en chaîne)*		x		
C-695/20	*Fenix International*		x		
C-637/20	*DSAB Destination Stockholm*	x			x
C-612/20	*Happy Education*		x		
C-607/20	*GE Aircraft Engine Services*	x			x
C-605/20	*Suzion Wind Energy Portugal*		x		
C-596/20	*DuoDecad*		x		
C-582/20	*SC Cridar Cons*		x		
C-570/20	*BV*		x		

C-515/20	***B AG***	x		x	x
C-513/20	***Termas Sulfurosas de Alafache***	x		x	x
C-489/20	*Kauno teritorinė muitinė*		x		
C-487/20	*Philips Orăştie*		x		
C-398/20	*ELVOSPOL*		x		
C-396/20	*CHEP Equipment Pooling*		x		
C-334/20	*Amper Metal*	x			x
C-333/20	*Berlin Chemie A. Menarini*		x		
C-324/20	*X-Beteiligungsgesellschaft (TVA – Paiements successifs)*	x			x
C-299/20	*Icade Promotion*		x		
C-294/20	*GE Auto Service Leasing*		x		
C-281/20	*Ferimet*		x		
C-269/20	*Finanzamt T (Prestations internes d'un groupement TVA)*	x			x
C-228/20	***I (Exonération de TVA des prestations hospitalières)***	x		x	x
C-186/20	*Hydina SK*		x		
C-182/20	*Administraţia Judeţeană a Finanţelor Publice Suceava and Others*		x		
C-156/20	*Zipvit*		x		
C-154/20	*Kemwater ProChemie*		x		
C-141/20	*Norddeutsche Gesellschaft für Diakonie*	x			x
C-90/20	*Apcoa Parking Danmark*	x			x
C-80/20	*Wilo Salmson France*	x			x
C-58/20	***K***	x		x	x
C-48/20	*P. (Cartes de carburant)*		x		
C-45/20	*Finanzamt N (Communication de l'affectation)*		x		
C-21/20	*Balgarska natsionalna televizia*		x		
C-9/20	*Grundstücksgemeinschaft Kollaustraße 136*		x		
C-7/20	*Hauptzollamt Münster (Lieu de naissance de la TVA)*	x		x	
C-4/20	*ALTI*		x		
C-935/19	*Grupa Warzywna*		x		
C-931/19	*Titanium*	x			x
C-907/19	***Q-GmbH (Assurance de risques spéciaux)***	x		x	x
C-855/19	*Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Acquisitions intracommunautaires de gazole)*		x		
C-846/19	*Administration de l'Enregistrement, des Domaines and de la TVA*	x			x
C-844/19	*technoRent International and Others*		x		
C-812/19	*Danske Bank*	x		x	
C-802/19	*Firma Z*		x		
C-717/19	*Boehringer Ingelheim*		x		

C-712/19	*Novo Banco*		x		
C-703/19	*Dyrektor Izby Administracji Skarbowej w Katowicach*		x		
C-695/19	*Rádio Popular*		x		
C-655/19	*AJFP Sibiu and DGRFP Braşov*		x		
C-604/19	*Gmina Wrocław (Conversion du droit d'usufruit)*		x		
C-593/19	***SK Telecom***	x		x	x
C-581/19	*Frenetkexito*	x		x	
C-521/19	*Tribunal Económico Administrativo Regional de Galicia*		x		
C-501/19	*UCMR - ADA*		x		
C-373/19	***Dubrovin & Tröger - Aquatics***	x		x	x
C-288/19	*Finanzamt Saarbrücken*	x			x
C-213/19	*Commission v United Kingdom (Lutte contre la fraude à la sous-évaluation)*		x		