



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 27 November 2012¹

Case C-480/10

European Commission
v

Kingdom of Sweden

(VAT — Article 11 of Directive 2006/112/EC — National legislation restricting VAT group registration to providers of financial and insurance services — Compatibility with European Union VAT law)

I – Introduction

1. In these proceedings the Commission seeks a declaration that by restricting the availability of value added tax (VAT) grouping to the financial and insurance sectors, Sweden has failed to comply with its obligations under Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').²

2. Article 11 of the VAT Directive lays down rules concerning the treatment of more than one person as a single entity for the purpose of administration of tax (often referred to as 'VAT grouping'). A similar infringement action has also been raised against the Republic of Finland.³

II – Legal framework

A – European Union law

3. Article 11 of the VAT Directive lays down the rules concerning VAT groups as follows:

'After consulting the advisory committee on value added tax (hereafter, the "VAT Committee"), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

¹ — Original language: English.

² — OJ 2006 L 347, p. 1.

³ — Case C-74/11 *Commission v Finland*. I will also deliver today my conclusions in Case C-85/11 *Commission v Ireland* which concerns the issue of whether Member States are entitled to include non-taxable persons in VAT grouping, and indeed this issue is also pertinent in Case C-74/11 *Commission v Finland*. The Commission has also challenged the inclusion of non-taxable persons in VAT grouping in a series of other cases, namely Case C-109/11 *Commission v Czech Republic*; Case C-95/11 *Commission v Denmark*; Case C-65/11 *Commission v Netherlands*; Case C-86/11 *Commission v United Kingdom*. However, the Court has limited its request for an Opinion of an Advocate General to the present case and Case C-85/11 *Commission v Ireland*.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.’

B – *National law*

4. Article I of Chapter 6a of the law on VAT 1994:200 (mervärdesskattelagen) 1994:200 (‘the Swedish VAT law’) provides:

‘For the purposes of the application of the provisions of this law, two or more economic entities may, in the circumstances stated in this chapter, be regarded as a single economic entity (VAT group), and the activity exercised by the VAT group may be regarded as a single activity.’

5. Article 2 of Chapter 6a of the Swedish VAT law states as follows:

‘Only the following may be part of a VAT group:

1. economic entities, placed under the surveillance of the finance inspectorate, which exercise an activity which is exempt because the turnover from that activity is exempt under Article 9 or Article 10 of Chapter 3, and
2. economic entities whose main purpose is to deliver goods or provide services to the economic entities referred to in paragraph 1 above, or
3. economic entities which are commission agents and principals, and which have a commission link such as that referred to in Chapter 36 of the law on income tax (1999:1229).’

6. Article 9 of Chapter 3 of the Swedish VAT law exempts the provision of banking and financial services and operations consisting in trading in stocks and shares or similar transactions.

7. Article 10 of Chapter 3 of the same law also exempts the provision of insurance and reinsurance services. It follows from all of those provisions that, in the main, only economic operators in the financial and insurance sector may form a VAT group.

III – Pre-litigation procedure and proceedings before the Court

8. On 23 September 2008 the Commission sent a letter of formal notice to the Kingdom of Sweden in which it argued that the provisions of Swedish law restricting the availability of VAT grouping to providers of financial and insurance services were incompatible with Article 11 of the VAT Directive.

9. The Kingdom of Sweden responded by letter of 19 November 2008 stating that, in their opinion, the Swedish legislation concerning VAT groups was in line with the VAT Directive.

10. On 20 November 2009 the Commission addressed a reasoned opinion to the Kingdom of Sweden in which it restated its position. The Kingdom of Sweden replied by letter of 20 January 2010 in which it maintained that its interpretation of the VAT Directive was correct.

11. Not being satisfied with this reply, the Commission instituted the present action which was lodged at the Court on 1 October 2010. The Commission asks the Court to declare that the Kingdom of Sweden has failed to fulfil its obligations under Article 11 of the VAT Directive by restricting the availability of VAT grouping to providers of financial and insurance services.

12. The Kingdom of Sweden asks the Court to dismiss the action as inadmissible because the subject-matter of the application goes beyond the complaint formulated by the Commission in the administrative procedure. In the alternative, the Kingdom of Sweden seeks dismissal of the action as unfounded.

13. The Republic of Finland and Ireland have intervened in support of the Kingdom of Sweden. These Member States and the Commission participated in the hearing that was held on 6 September 2012.

IV – Admissibility

14. In its rejoinder the Kingdom of Sweden argues that the Commission did not mention breach of the principle of equal treatment at any stage during the administrative procedure. Rather, its complaint was confined to breach of the principle of fiscal neutrality. Equal treatment was raised for the first time in the infringement action before the Court, thereby unlawfully extending and modifying the litigation.

15. According to the established case-law of the Court, an application must be based on the same reasons and grounds as the reasoned opinion.⁴ To the extent that a claim has not been mentioned in the reasoned opinion, it cannot be declared admissible in the proceedings before the Court.

16. However, as the Court observed in *Commission v Portugal*, the requirement cannot be stretched so far as to mean that in every case the formal statement of objections set out in the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered.⁵

17. Article 38(1)(c) of the Rules of Procedure of the Court of Justice, read in conjunction with Article 21 of the Statute of the Court of Justice, stipulates, under the conditions of admissibility, that an application bringing an action for failure to fulfil obligations must state the subject-matter of the proceedings and *summary of the pleas in law on which the application is based*.⁶ What is required, at the very least, is a summary of the *legal* and factual particulars on which those complaints are based.⁷ The proper conduct of the procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member States concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.⁸

18. In my opinion, when a plea in law that is raised for the first time in proceedings before the Court materially differs from a plea in law that has been raised in the pre-litigation procedure, the inevitable result is that the Commission has extended or altered the subject-matter of the proceedings. In such circumstances, it cannot be argued that the Commission is merely adding detail to arguments that have been raised in general terms at an earlier stage of the proceedings.⁹ Rather, the architecture of the litigation becomes fundamentally different.

4 — See Case C-139/00 *Commission v Spain* [2002] ECR I-6407, paragraph 18 and case-law cited.

5 — Case C-458/08 [2010] ECR I-11599, paragraph 44 and case-law cited. See also Case C-39/10, *Commission v Estonia* [2012] ECR, paragraphs 24 to 26.

6 — The corresponding provision in the recast Rules of Procedure that entered in force on 1 November 2012 is Article 120, point (c), OJ 2012 L 265 p. 1.

7 — Case C-456/03 *Commission v Italy* [2005] ECR I-5335, paragraph 23 and case-law cited.

8 — *Commission v Italy*, paragraph 37.

9 — *Commission v Portugal*, paragraph 47.

19. That is not, however, the case with regard to the principle of equal treatment in the context of the present infringement action. The complaint of the Commission has remained the same during the administrative procedure and the Court proceedings. That is, by limiting the availability of Article 11 VAT grouping to certain sectors, to the exclusion of all other economic operators in Sweden, while comparable situations are being treated differently.

20. The difference between fiscal neutrality and the more general equal treatment principle boils down to the question of whether economic operators that do not directly compete with each other are in a comparable situation. This is so because fiscal neutrality is only applicable in this context of competition. Breach of the equal treatment principle can nonetheless arise if comparable situations are treated differently.¹⁰ However, in my opinion, any distinction between fiscal neutrality and equal treatment can only be of secondary or even tertiary importance to resolving the dispute to hand.

21. I have reached this conclusion because of the primary role played by interpretation of Article 11 of the VAT Directive in deciding whether Sweden is acting compatibly with EU law by restricting the availability of VAT grouping to the financial and insurance sectors. Under the established case-law of the Court, the first step is to consider the literal meaning of Article 11. Only when the relevant words in Article 11 are open to different interpretations can recourse be made to its context and purpose.¹¹ At this stage the principles of fiscal neutrality and equal treatment become relevant as arguments elucidating the interpretation of Article 11 of the VAT Directive.¹² They do not as such play a role that is independent of Article 11 as elements of the Kingdom of Sweden's obligations that would affect the admissibility of the present infringement action.

22. Thus, the fact that the Commission's reasoned opinion made no explicit reference to the principle of equal treatment in a sense wider than that of fiscal neutrality does not mean that the Commission has introduced a new claim which the Court cannot address.

V – Arguments of the parties

23. The Commission argues that restricting the availability of VAT grouping to providers of financial and insurance services is contrary to Article 11 of the VAT Directive because any national grouping system provided by a Member State must be available to all economic operators established in that Member State, regardless of their line of business. This, according to the Commission, is evident from the wording of Article 11, which states that 'each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links'.

24. This interpretation, the Commission argues, is further supported by the purpose of Article 11 of the VAT Directive which is to enable Member States to regard as one taxable person economic operators that are separate entities only as a matter of technicality. Article 11 simplifies administration and combats abuse. These objectives, the Commission says, are relevant to all economic operators, and not just to those in a certain sector.

10 — See e.g. Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049. Indeed, the validity of provisions of the VAT Directive themselves can be challenged for infringement of the principle of equal treatment. See Case C-460/07 *Puffer* [2009] ECR I-3251. For a recent example of a case in which the Court considered whether a Member State had breached the principle of fiscal neutrality in implementing the VAT Directive see Case C-117/11 *Purple Parking and Airparks Services* [2012] ECR.

11 — Case C-582/08 *Commission v United Kingdom* [2010] ECR I-7195, paragraph 51. See also my Opinion in that case at point 52.

12 — See e.g. Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 31; Joined Cases C-443/04 and C-444/04 *Sollefeld* [2006] ECR I-3617, paragraph 36.

25. The Commission further argues that the relevant Swedish laws are inconsistent with the principle of equal treatment because similar situations are being treated differently with no objective justification.¹³ The Commission also contends that, in the area of taxation, infringement of the principle of equal treatment may be established by discrimination that affects traders who are not necessarily in competition with each other but who are nevertheless in a similar situation.

26. The Commission claims that in relation to the application of Article 11 of the VAT Directive, all economic operators established in Sweden are in a similar position, but restricting the availability of VAT grouping to providers of financial and insurance services means that these economic operators are treated more favourably than economic operators in other areas. The Commission is of the opinion that there exists no objective reason for this difference in treatment.

27. The Kingdom of Sweden claims that the Swedish provision is in line with the wording of Article 11 of the VAT Directive. In the absence of more precise wording in Article 11, the Member States are free to decide which persons established in their territory can have recourse to VAT grouping.

28. The Kingdom of Sweden argues that it is especially appropriate to introduce VAT grouping within the financial sector because it is a sector in which activities are often divided between different legal persons. This is caused by regulatory requirements. Furthermore, the financial sector is strongly exposed to competition from economic operators established in other Member States, and because these economic operators have access to a VAT grouping system, Swedish economic operators providing financial services would be at a disadvantage in relation to them if VAT grouping was not available.

29. In addition, the Kingdom of Sweden argues that restricting the availability of VAT grouping to economic operators in the financial and insurance sector serves to prohibit the tax avoidance that occurs, for example, when a group of companies includes as internal transactions in their accounts transactions that occurred between the members of the group and companies outside the group.

30. The Kingdom of Sweden is of the opinion that Swedish VAT grouping law conforms to both the principle of equal treatment and the principle of fiscal neutrality. The Court's case-law concerning the principle of equal treatment sets requirements for the neutrality of competition and Swedish VAT grouping law complies with these because economic operators within the financial sector essentially only compete with each other. Nor is Swedish law incompatible with the principle of equal treatment in its broader meaning because economic operators in the financial sector are not in a comparable situation with economic operators in other sectors. This is so because economic operators in the financial sector are often divided between different legal persons for regulatory reasons.

31. Finally, the Kingdom of Sweden argues that in interpreting Article 11 of the VAT Directive, inspiration can be drawn from provisions of the VAT Directive concerning exemptions and reduced rates of tax.¹⁴ As Article 11 enables transactions within a VAT group to take place without being subject to VAT, and the provision thus derogates from the general VAT regime, its scope must be interpreted strictly.

13 — The Commission refers here to Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraphs 49 and 51.

14 — See Title IX and Article 98 of the VAT Directive, respectively.

VI – Analysis

A – Preliminary remarks

32. In my opinion the decisive question is as follows: Is a Member State which has opted to introduce a VAT grouping system entitled to limit its operation to certain economic operators that fulfil the requirements laid down in Article 11 of the VAT Directive, without extending the availability of Article 11 VAT grouping to all economic operators that meet these requirements?

33. Much depends on the scope of Article 11 of the VAT Directive. Are the Member States when exercising their right to consider as ‘a single taxable person’ persons established in their territory who are legally independent, but closely bound to one another by financial, economic and organisational links, allowed to make a distinction by reference to the nature of the business in which economic operators are engaged, so that some transactions or certain categories of taxable persons are excluded?¹⁵ Has Sweden respected the limits of Article 11?¹⁶

34. At the outset, it is useful to recall that, according to the settled case-law of the Court, in determining the meaning of a provision of European Union law, its objectives, context and wording must all be taken into account.¹⁷ As I have already mentioned, I will first consider the wording of Article 11 and, if necessary, its context and objectives.

B – Interpretation of the wording of Article 11 of the VAT Directive

35. According to the established case-law of the Court, Member States are entitled to rely on the wording of a directive.¹⁸ On this basis, it is clear from the wording of Article 11 of the VAT Directive that it is an optional provision. However, if a Member State decides to opt for VAT grouping, the conditions thereof must be in conformity with the VAT Directive.

36. Article 11 of the VAT Directive provides that VAT grouping is available to *any persons* established within the territory of the Member States, provided that these persons have close financial, economic and organisational links. There are no other limitations in the provision. On the contrary, one can argue that the use of the expression ‘any persons’ curbs the Member States’ discretion to apply further limitations in their national implementation of the article. In my opinion, ‘any persons’ covers persons independently of the sector of economic activity in which they are involved. Therefore, the literal interpretation of Article 11 of the VAT Directive excludes any restriction of its scope to defined economic sectors.

37. If the Court were to accept the above analysis based on the wording of Article 11, it is not strictly necessary for the Court to go on to consider its context and objectives.¹⁹ However, I will discuss this issue in case my conclusion with respect to the wording of Article 11 is not accepted.

15 — See on analogous problematics, *Turn- und Sportunion Waldburg*, paragraph 30.

16 — See, by analogy, Case C-363/05 *JP Morgan Fleming* [2007] ECR I-5517, paragraph 44.

17 — Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 23 and case-law cited; see also Case C-33/11 *A Oy* [2012] ECR, paragraph 27.

18 — See *Commission v United Kingdom*, paragraphs 49 to 51.

19 — *Commission v United Kingdom*, especially at paragraph 51. See also my Opinion in that case at point 52.

C – The VAT grouping option in the broader context of the VAT regime

38. The forming of a VAT group results in the creation of a single taxable person for VAT purposes which is in all respects comparable to a taxable person consisting of only one entity.²⁰ Regardless of its nature as a special scheme, VAT grouping neither introduces limitations nor broadens the rights of a taxable person as defined in Article 9 of the VAT Directive.

39. The VAT system achieves the highest degree of simplicity and neutrality under two conditions: when the tax is levied in as general a manner as possible and when its scope covers all stages of production, distribution, and the supply of services.²¹ The VAT regime should result in neutrality in competition, so that within the territory of a Member State similar goods and services bear the same tax burden, regardless of the length of the production and distribution chains.²² When functioning optimally, this so-called neutral taxation should not affect either competition or the decisions economic operators make when organising their activities, such as legal form or organisational structure.²³

40. The establishment of a VAT group initiates the tax liability of the VAT group, and terminates the separate tax liability of those of its members who were taxable persons for VAT purposes before joining the group.²⁴ The VAT treatment of the group's transactions, both to and from entities outside the group, is comparable to VAT treatment of a single taxable person operating individually. Transactions between the individual members of the group, and which remain therefore within the group, are considered as having been carried out by the group for itself. Consequently, a VAT group's internal transactions do not exist for VAT purposes.

41. When a VAT group acts in accordance with the rules of the VAT regime, the right of the persons belonging to the VAT group to deduct VAT for purchases is not expanded.²⁵ This right continues to be applicable only to those supplies that are made for the activities subject to VAT by the VAT group. Nor are the members of a VAT group entitled to deduct VAT on supplies made for VAT exempted activities.

D – The purpose of the VAT grouping provisions

42. In the light of the purpose and content of VAT grouping, which I have outlined above, I cannot agree with the Kingdom of Sweden's argument that Member States have a discretion with respect to the economic sectors to which VAT grouping is available. I have reached this conclusion for the following reasons.

43. VAT grouping does not create economic benefits when a purchase is made for activities subject to VAT, since the purchaser is entitled to deduct input VAT. In such a situation it is in principle irrelevant whether the purchase is made within the VAT group without input VAT or with input VAT from outside of the VAT group.

20 — The practical implementation of the VAT group option varies. In some Member States that have introduced VAT grouping, it is obligatory for persons fulfilling the requirements, and in others it is voluntary.

21 — See recital 5 of the VAT Directive.

22 — See recital 7 of the VAT Directive.

23 — Terra, B., and Kajus, J., *A Guide to the European VAT Directives*, IBFD, 2012, Chapter 7.3.

24 — See Case C-162/07 *Ampliscentifica* [2008] ECR I-4019, paragraph 19 and 20.

25 — For a summary of the deduction system, see Case C-324/11 *Tóth* [2012] ECR, paragraph 25 and case-law cited.

44. In certain situations members of a VAT group may gain economic benefits from belonging to the group.²⁶ For example, membership of a VAT group can be beneficial in a situation in which the member making a purchase subject to VAT had, because of the VAT exempt nature of its activities, no right to deduct VAT at all, or no full VAT deduction right. If such a member purchases from a supplier outside the VAT group, VAT would be incurred. If, however, it makes the purchase from another member of the group, no VAT is incurred.

45. Where an economic operator is not entitled to deduct input VAT incurred in a purchase, it might be economically advantageous for it to produce the goods or services itself. For example, a bank that is not entitled to deduct VAT might benefit economically if it produces IT services needed for its banking activities internally rather than buying them from a third party. However, if the VAT grouping option is available, it may outsource its IT service provision to a subsidiary belonging to the group and gain the same advantage.

46. The above described economic motivation may make it reasonable for a Member State, where the VAT grouping option is not generally available to all economic operators, to nonetheless open that option to providers of financial and insurance services, which are taxable persons engaged mainly in VAT exempt activities. This does not mean, however, that it would be legal as a matter of European Union VAT law.

E – Can VAT grouping be restricted to certain economic sectors?

47. It goes without saying that a Member State's laws on VAT grouping must comply with the purposes of VAT grouping as provided in the VAT Directive. In this respect the Member States do not have any discretion.

48. It should also be borne in mind that it follows from the need for uniform application of European Union law, and from the general principle of equality, that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union.²⁷

49. As noted above, the Kingdom of Sweden argues that restricting the availability of VAT grouping to the financial and insurance sectors is justified because of the need to create equal conditions of competition for economic operators in these sectors vis-à-vis international operators. In addition, it is argued that such a limitation is justified because of stricter regulation and supervision within the finance and insurance sectors than that which occurs in other sectors. VAT grouping is essential for these sectors as individual economic operators in them have to be organised as separate legal persons for regulatory reasons.

50. Without denying the importance of these considerations, I recall that the purposes of VAT grouping are administrative simplification and avoidance of abuse. These goals are not limited to certain sectors but are applicable to all economic operators regardless of the sector in which they operate.

26 — See Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax (COM(2009) 325 final), pages 11 and 12.

27 — See *NCC Construction Danmark*, paragraph 24, and case-law cited.

51. As for the tendency for the financial and insurance services sectors to divide their activities between different legal persons, it should also be noted that multistage group structures are currently typical in many other sectors as well. In areas such as social and health care services and real estate, VAT grouping could be similarly advantageous.²⁸ Under Swedish legislation, taxable persons providing exempted supplies, and for which VAT grouping is permitted, are in a more favourable position than groups of other economic operators providing exempted supplies which are denied this option.

52. It should be emphasised that a VAT group, after its registration, is a normal single taxable person. No other limitations apply, even if VAT grouping is indeed a special regime.²⁹

53. To my mind, in the light of the requirement for coherent and equal interpretation of European Union VAT law, limiting taxable status of a person by reference to sectors is not justifiable. Different kinds of practical, social, economic and other goals within a sector should be taken into account in the context of specific provisions of VAT law regulating that sector. However, these factors should not be relied on in the definition of taxable persons for the purposes of Article 11 of the VAT Directive.³⁰

54. For this reason the analogy between Article 11 of the VAT Directive and its provisions on exemptions and reduced VAT rates,³¹ which the Member State wishes to draw from the optional nature of VAT grouping, cannot be upheld. In fact, the provisions on exemptions and reduced rates of tax of the VAT Directive are based on sector specific policy aims which are recognised, or at least tolerated, by the European Union legislator. As the Court has stated in its established case-law, the Member States are free to implement the alleviation of the VAT burden of certain groups of consumers.³²

55. The provisions on VAT grouping, on the other hand, regulate the status of a group of persons as a single taxable person under specific conditions. The VAT Directive does not provide for any non-fiscal specific policy aims that could be fostered by recourse to this regime. Therefore, a more useful analogy to Article 11 of the VAT Directive might be found in the case-law relating to the application of optional measures in the internal market context.³³ There the Court has concluded that the optional nature of a measure does not mean that the Member States could limit its scope in a way that is not provided in the European Union provision in question.

28 — For a discussion of VAT grouping within the Swedish VAT system, see Håkan Magnusson: Gruppregistrering till mervärdesskatt, *Skattenytt* 1998/11.

29 — The parties have discussed the question whether Article 11 of the VAT Directive provides for an exception or derogation that should be interpreted restrictively. I am of the opinion that this is not a useful approach, especially as the Commission seems to claim, in the present case, that VAT grouping is not a derogation from the general VAT regime, but a special regime. However, the Commission appears to have taken the opposite position in the *Commission v Ireland*.

30 — I observe that in point 2 of Annex A to the Second VAT Directive it was stated that '[i]f a Member State intends not to tax certain activities, it should achieve its purpose by means of exemptions rather than by excluding from the scope of the tax persons pursuing such activities'. Hence, within the European Union VAT regime, the provisions defining status as a taxable person should not be applied for the purpose of obtaining specific policy objectives.

31 — Cited above.

32 — See for example Case C-94/09 *Commission v France* [2010] ECR I-4261, paragraph 28: '... where a Member State decides to make use of the possibility given by Article 98(1) and (2) of Directive 2006/112 to apply a reduced rate of VAT to a category of supply in Annex III to that directive, it has, subject to the requirement to observe the principle of fiscal neutrality inherent in the common system of VAT, the possibility of limiting the application of that reduced rate of VAT to concrete and specific aspects of that category'. See also Case C-169/00 *Commission v Finland* [2002] ECR I-2433, paragraph 30; Case C-384/01 *Commission v France* [2003] ECR I-4395, paragraph 24; and Case C-442/05 *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-1817, paragraph 43.

33 — As to the interpretation of a comparable situation in the European Union in the context of a legislative option, see case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-12537, where the Court held in paragraph 20 that '... The Member State's option [in transposition of Article 5(2) of Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1)] thus relates to the principle itself of granting greater protection to marks with a reputation, but not to the situations covered by that protection when the Member State grants it.'

F – *Final observations*

56. The complaint of the Commission is expressly limited to restricting the availability of VAT grouping to providers of financial and insurance services. Therefore the observation I am about to make cannot serve to confirm the outcome of the infringement action against Sweden. Nevertheless, it provides a useful illustration of the problems that restricting availability of VAT grouping may entail, and indeed it was discussed between the parties at the hearing.

57. In fact Swedish VAT law does *not* exclude from VAT groups *all* legally independent persons acting within sectors other than the financial and insurance sectors. Under paragraphs 2 and 3 of Article 2 of Chapter 6a of the Swedish VAT law, the following may also be part of a VAT group; (i) economic entities whose main purpose is to deliver goods or provide services to economic entities providing financial services and insurance services and (ii) economic entities which are commission agents and principals, and which have a commission link of the kind referred to in Chapter 36 of the law on income tax.

58. As was made clear at the hearing, the two types of entities I have mentioned in points (i) and (ii) above may direct a part of their business activities to customers outside the group. It should be added that, according to the information provided by the representative of the Government of Sweden, in practice the proportion of outward directed activities has been limited to 20%.³⁴ This is of relevance because it shows that the Swedish VAT grouping regime may cause problems in terms of competition neutrality, which is one aspect of fiscal neutrality, and that such problems have been recognised, and to a certain extent, addressed, by the Member state.

59. Given that the restriction on the availability of VAT grouping to financial services and insurance sectors is not absolute in Swedish legislation, the members of a VAT group may gain economic benefits from VAT grouping also in relation to their activities outside financial and insurance sectors.

60. On these grounds, I am of the opinion that, if a Member State chooses to provide the option of VAT grouping, it needs to be open to economic operators active in all sectors in the Member State concerned, provided they fulfil the conditions set out in Article 11 of the VAT Directive.³⁵ Limitations to that principle could be justified only if there is need to take action against potential abuse for clearly identified transactions. In the absence of this, restricting the availability of VAT grouping to the financial and insurance sectors is not acceptable.

VII – Conclusion

61. In light of these considerations, I propose that the Court should declare that, (i) by restricting the availability of VAT grouping to the financial and insurance sectors, the Kingdom of Sweden has failed to fulfil its obligations under Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and; (ii) order the Kingdom of Sweden to pay the costs and; (iii) order the Republic of Finland to support its own costs.

34 — According to the legislative proposal for the VAT grouping provision in Sweden, a maximum of 20 to 30% of the activity can be directed outside of the VAT group. In the case of enterprises providing support services for financial services, the requirement that this should be their main purpose was justified in the relevant government bill with reference to the need to diminish the negative competition effects of VAT grouping in relation to outside providers. See Regeringens proposition 1997/98:148, page 37.

35 — A national VAT grouping introduced only for some sectors might also be open to criticism from a State aid viewpoint as it entails a selective advantage to economic operators active in such sectors.