

What Is VAT Fraud?

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One function of the law is to regulate human behaviour. An instrument to reach this goal is to impose sanctions for undesirable behaviour on persons who are responsible for inadmissible acts. It goes without saying that it should be commonly and clearly known at least:

1. which occurrences are undesirable by the lawgiver;
2. who is responsible for these actions;
3. what are the requisites for such responsibility to apply;
4. what are the sanctions imposed for such undesirable behaviour.

To put this into a more practical perspective, when a thief steals my car:

1. the theft is a behaviour which is deemed as undesirable by the legal system;
2. the person responsible for this act is the thief (and, eventually, his accomplices);
3. the requisites for bearing the responsibility relate, *inter alia*, to the thief's fault (in any way such a fault might be defined, depending on the legal system in question);
4. the sanction might consist in, e.g., a fine or imprisonment.

Taking this canvass to the field of VAT fraud, as understood on the basis of the case-law of the Court of Justice of the European Union (CJEU), it follows that:

1. the behaviour deemed as undesirable is a 'VAT fraud' (I will elaborate on this term below);
2. and 3. the entities responsible for this are those who commit the fraud or those who transact with the fraudster while knowing or should have known about the transaction being fraudulent;
3. the sanctions for committing fraud may be a denial of the right to deduct the input VAT or the right to an exemption.

The above sketches out, obviously, only a simplified picture of the matter. Sanctions and responsibility for VAT fraud are, in fact, quite broad concepts. I will not dwell on these points further as I might examine them on another occasion. In this article, instead, I will turn to the most important question here: what constitutes the undesirable behaviour itself, i.e. 'VAT fraud'. Unfortunately, this concept is the most vague among the components mentioned above.

Indeed, one may think of many different hypotheses on which VAT fraud can be conceived. Some of them are debated hereinafter.

Hypothesis 1: VAT Fraud Is a Behaviour That Is Contrary to the Principles of a Fair Conduct

In common parlance, the word 'fraud' refers to any behaviour that is a dishonest, unfair or corrupt. Accordingly, one may claim that VAT fraud is a general description of all behaviours (somehow connected with VAT) contrary to norms generally accepted in society. Some expressions used by the CJEU seem to support this approach, such as those used in *Axel Kittel (Case C-439/04)* (Paragraph 34: 'Exercise of the right to deduct can also be refused where it is proved that that right has been claimed fraudulently or unreasonably') or in *Mahagében and Dávid (Joined Cases C-80/11 and C-142/11)* (Paragraph 53: '...to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud'; similarly e.g. Paragraph 42 in *Tóth (Case C-324/11)*). This conclusion might however reach too far, especially if you consider the CJEU's decision in *Collée (Case C-146/05)*. The case concerned a taxpayer who acted dishonestly by evading the contractual rules based on which he could be granted a commission for concluding car sales. Instead of declaring intra-Community supply of goods, he in fact declared local deliveries subject to VAT. The CJEU did not find this behaviour as an act corresponding to VAT fraud. Thus, it seems that acting in a manner contrary to the norms generally accepted in society is not sufficient, by itself, for VAT fraud to take place.

Hypothesis 2: VAT Fraud Is a Behaviour That Is Contrary to Provisions of Law (Other than VAT Law)

The second suggestion that one may put forward is that VAT fraud occurs when a taxpayer behaves in a manner contrary to provisions of law in general (i.e., other than VAT-specific rules). Nonetheless, this approach also does not seem to reconnect with the one followed by the CJEU. Notably, in *Collée (Case C-146/05)*, even if the contractual terms (thus, as it might be assumed, civil law provisions) were breached, the Court did not find that behaviour corresponded to a VAT fraud. Other indications in this regard can be derived from cases concerning supplies by entities who breached employment law by engaging workers illegally and not fulfilling other legal obligations (see, e.g., *Tóth (Case C-324/11)*). Similar conclusions may also be drawn from *Altic (Case C-329/18)*, where breaching food law did not result in the occurrence of a VAT fraud. Hence, also breaching provisions of areas of law other than VAT does not seem decisive in recognizing the existence of VAT fraud.

Hypothesis 3: VAT Fraud Is a Behaviour That Is Contrary to VAT Rules

Since breaking the law in general does not seem to be the crucial element for a VAT fraud to exist, one may then consider that breaching VAT provisions is a necessary step for VAT fraud to take place. This suggestion seems to be correct. All cases where VAT fraud was recognized by the CJEU were in fact connected with a behaviour that was not found compliant with specific VAT rules. Notably, in *Astone (Case C-332/15)* the taxpayer did not keep VAT registers and books, nor did he record his VAT invoices. In *R. (Case C-285/09)*, a German taxpayer issued invoices for intra-Community supplies to Portugal indicating fake names of customers (i.e. persons other than actual buyers) and thus enabling fraudsters to evade VAT in Portugal. Even in situations like those at stake in *Mecsek-Gabona (Case C-273/11)*, it turned out that the goods - most likely - were not sent to the buyer indicated on the invoice outside Hungary. It should be noted that breaching VAT provisions also includes instances where the recipient of goods himself did not disregard any of the VAT provisions but knew (or should have known) that VAT rules were violated by the supplier (e.g., by invoicing the supply that was executed only to evade the VAT system). Consequently, it may be claimed the VAT fraud always relates to one or more breaches of VAT-specific rules.

Hypothesis 4: VAT Fraud Is a Behaviour Aimed at Jeopardizing the VAT System of Any (Including Non-EU) Country

Since I reached the conclusion that a breach of one or more VAT rules is a necessary condition for VAT fraud to exist, and yet not a sufficient one, it is time to focus on the intention of the actors. Namely, in all VAT fraud situations one significant feature can be noticed: an intention to jeopardize (i.e., evade) the VAT system. One case is in particular worth mentioning here *Unite! (Case C-653/18)*, where it was the Ukrainian VAT to be evaded. Notably, the case concerned a Polish company selling mobile phones to Ukrainian customers and documenting it with invoices issued to non-existent entities with the intention to enable the actual buyers not to pay Ukrainian VAT. The CJEU did not find those elements as amounting to VAT fraud. From this one may draw the conclusion that VAT fraud is a behaviour aimed at jeopardizing the VAT system of an EU Member State and not, instead, the VAT system of any non-EU country.

Hypothesis 5: VAT Fraud Is a Behaviour Aimed at Jeopardizing the VAT System of Any EU Member State

As a final hypothesis, it is worth inquiring whether it is a VAT system of a certain given EU Member State that should be the target of a jeopardy. In other words, the question is if there should be some specific link between the one who evades and the VAT system that is intended to be evaded and whose sanctions may be imposed. The CJEU indeed had an opportunity to address the issue in *R. (Case C-285/09)*, already mentioned above. There, a German taxpayer supplied the goods to Portugal. Accordingly, the German VAT system was not put in peril (the supplies are, in fact, exempted in Germany as intra-Community supplies). However, the issuance of invoices without indicating the actual buyers allowed not to pay the VAT due in Portugal by entities other than the seller. In that situation, the CJEU confirmed that exemption may be denied in Germany, although it was the Portuguese VAT system to actually be evaded.

Conclusion

It seems from the above that the following conclusions may be reached: VAT fraud is a behaviour in breach of certain specific VAT rules which could lead to a jeopardy of the VAT system of any EU Member State. Of course, the expression 'jeopardizing the VAT system' needs to be further clarified. But this is a topic for more in-depth considerations, as it is also for other elements related to the construction of a responsibility for VAT fraud which are mentioned above.