Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 2 March 2017 [1]

Case C-38/16

Compass Contract Services Limited
v
Commissioners for Her Majesty's Revenue & Customs

(Request for a preliminary ruling from the First-tier Tribunal (Tax Chamber), United Kingdom)

(VAT — Tax paid but not due — Detailed rules on repayment — National legislation introducing a limitation period — Difference in relation to the period laid down for repayment of deductions wrongly refused — Principles of equal treatment, fiscal neutrality and effectiveness)

1. Is it acceptable under EU law for the limitation periods applicable to claims for repayment of value added tax (VAT) paid but not due to differ, as regards the date on which they were brought into force, from those applicable to claims for deduction of VAT? That is, in short, the question submitted by a United Kingdom court in a dispute between Compass Contract Services (UK) Ltd ('Compass') and the national tax authorities.

2. In its judgment of 11 July 2002, *Marks & Spencer*, [2] the Court held that national legislation (such as the Finance Act 1997) which retroactively reduced from six to three years the period within which repayment could be sought of VAT collected in breach of Directive 77/388/EEC was incompatible with the principles of effectiveness and of the protection of legitimate expectations. [3]

3. In the light of that judgment, the United Kingdom legislature subsequently provided that that reduction of the period would not apply to claims for repayment of VAT relating to tax periods preceding the date on which the reduced period was introduced. The same provision was later adopted in relation to (late) claims for deduction of input tax.

4. However, administrative practice and successive legislative interventions have resulted in different treatment in the United Kingdom with regard to the date from which the limitation period applies for some claims (those for repayment of VAT) and the date from which it applies for others (those for deduction of VAT). The referring court asks the Court of Justice whether that difference is compatible with the principles of EU law, in particular, with the principle of equal treatment.

1 — Original language: Spanish.

2 — C-62/00, '*M&S I*', EU:C:2002:435.

3 — Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

I – Legislative framework

A – *EU law* Sixth Directive:

5. Under the heading ‘Origin and scope of the right to deduct’, Article 17 provides:

‘1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

(b) [VAT] due or paid in respect of imported goods;

(c) [VAT] due under Articles 5(7)(a) and 6(3).

…’

6. Article 18, headed ‘Rules governing the exercise of the right to deduct’, provides:

‘1. To exercise his right to deduct, the taxable person must:

(a) in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3);

(b) in respect of deductions under Article 17(2)(b), hold an import document, specifying him as consignee or importer, and stating or permitting calculation of the amount of tax due;

(c) in respect of deductions under Article 17(2)(c), comply with the formalities established by each Member State;

(d) when he is required to pay the tax as a customer or purchaser where Article 21(1) applies, comply with the formalities laid down by each Member State.

2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

…

3. Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2.

4. Where for a given tax period the amount of authorised deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine.

…’

B – *National law*

7. The history of the legislation on VAT, up to the Finance Act 1997, was set out in the judgment in *M&S I.*[4]

8. Article 11A(1)(a) of the Sixth Directive was not properly implemented in the United Kingdom until 1 August 1992, when the Finance (No 2) Act 1992 amended section 10(3) of the Value Added Tax Act 1983.

9. The latter provision is now worded as follows:

'If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount of money as, with the addition of the tax chargeable, is equivalent to the consideration.'

10. As regards the legislation on repayment of amounts of VAT unduly paid, the relevant provisions of section 24 of the Finance Act 1989 provided (with effect from 1 January 1990) as follows:

'(1) Where a person has paid an amount to the Commissioners [5] by way of value added tax which was not tax due to them, they shall be liable to repay the amount to him.

(2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose.

…

(4) No amount may be claimed under this section after the expiry of six years from the date on which it was paid, except where subsection (5) below applies.

(5) Where an amount has been paid to the Commissioners by reason of a mistake, a claim for the repayment of the amount under this section may be made at any time before the expiry of six years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

…

(7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of value added tax by virtue of the fact that it was not tax due to them.

…'

11. Section 24 of the Finance Act 1989 was repealed and replaced by section 80 of the Value Added Tax Act 1994 with effect from 1 September 1994. The material parts of section 80 follow the wording of section 24 almost exactly.

4 — Points 8 to 15 of this Opinion transcribe almost verbatim paragraphs 4 to 11 of the judgment in *M&S I.*

5 — Tax authority with responsibility for the collection of VAT in the United Kingdom.

12. On 18 July 1996, a Government minister, Her Majesty's Paymaster General, announced in Parliament that, in view of the increasing risk for the Treasury posed by claims for the refund of sums wrongly collected by way of tax, it was the Government's intention in the 1997 Finance Bill to alter the limitation period for refund claims concerning VAT and other indirect taxes, reducing it to three years. The new limitation period was intended to apply immediately to claims already made on the date of the announcement so as to prevent the change in the law being deprived of its effect by the passage of time before the parliamentary process could be concluded.

13. On 4 December 1996, the House of Commons voted in favour of the Government's budget proposals, including the proposal announced on 18 July 1996, which was included in the 1997 Finance Bill as section 47.

14. The Finance Act 1997 was enacted on 19 March 1997. Section 47(1) of the Act amended section 80 of the Value Added Tax Act 1994. Subsection (5) was repealed and subsection (4) was amended so as to provide as follows:

'The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.'

15. Section 47(2) of the Finance Act 1997 provides:

'... subsection (1) above shall be deemed to have come into force on 18 July 1996 as a provision applying, for the purposes of the making of any repayment on or after that date, to all claims under section 80 of the Value Added Tax Act 1994, including claims made before that date and claims relating to payments made before that date.'

16. In accordance with section 25(6) of the Value Added Tax Act 1994, a deduction of input tax under subsection (2) of that section and payment of a VAT credit cannot be made except on a claim made at the time and in the manner stipulated in regulations.

17. Regulation 29(1A) of the Value Added Tax Regulations 1995, in the version which was in force between 1 May 1997 and 31 March 2009,[6] provides that the tax authorities must not accept any claim for deduction of input tax lodged more than three years after the date by which the return for the prescribed accounting period was required to have been filed.

18. Pursuant to section 121(1) of the Finance Act 2008, the requirement in section 80(4) of the Value Added Tax Act 1994 does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009.

19. In accordance with section 121(2) of the Finance Act 2008, section 25(6) of the Value Added Tax Act 1994 does not apply to a claim for deduction of input tax that became chargeable in a prescribed accounting period ending before 1 May 1997 if the claim is made before 1 April 2009.

20. Under section 121(4) of the Finance Act 2008, that provision entered into force on 19 March 2008.

II – The facts

21. Compass is a company which supplies cold food and, in June 2006, it was judicially recognised that certain services on which it had charged and accounted for VAT in previous tax periods were, in fact, exempt from that tax.

6 — A period which includes the date on which Compass made its claim for repayment.

22. In particular, the United Kingdom courts held that those services qualified for the exemption corresponding to Article 28(2) of the Sixth Directive. The Commissioners therefore accepted that Compass had overpaid VAT.

23. In January 2008, Compass sought repayment of the output tax overpaid between 1 April 1973 and 2 February 2002.

24. The Commissioners agreed to repay the sums paid but not due between 1 April 1973 and 31 October 1996, arguing that the right to claim the remaining sums was time-barred.

25. Compass appealed against the Commissioners' decision to the First-tier Tribunal (Tax Chamber), United Kingdom, complaining about the difference in treatment between claims for a refund of wrongly paid VAT, on the one hand, and claims for deduction of VAT, on the other.

26. That difference in treatment consists of the fact that the former can succeed only if they relate to tax periods which ended before 4 December 1996, whereas the time limit for the latter runs until 1 May 1997.

27. Therefore, the main proceedings are concerned solely with the repayment of VAT wrongly paid between 1 November 1996 and 30 April 1997 (tax quarters 04/96 and 01/97).

28. Against that background, the court seised of the dispute has made a reference to the Court for a preliminary ruling.

III – The questions referred for a preliminary ruling

29. The questions referred for a preliminary ruling, on 25 January 2016, are worded as follows:

'(1) Does the UK's different treatment of output tax Fleming claims (which could be made for periods ending before 4 December 1996) and input tax Fleming claims (which could be made for periods ending before 1 May 1997 — i.e. later than output tax Fleming claims) result in:

(a) a breach of the EU law principle of equal treatment; and/or

(b) a breach of the EU law principle of fiscal neutrality; and/or

(c) a breach of the EU law principle of effectiveness; and/or

(d) a breach of any other relevant EU law principle?

(2) If the answer to any of Question 1(a) to 1(d) is affirmative, how should output tax Fleming claims relating to the period from 4 December 1996 to 30 April 1997 be treated?'

IV – Procedure before the Court of Justice and the arguments of the parties

30. Compass, the United Kingdom Government and the Commission entered an appearance in the proceedings, submitting written observations and presenting oral argument at the hearing, held on 8 December 2016.

31. In Compass's submission, the first question should be answered in the affirmative. The difference in treatment complained of cannot be justified in accordance with the principle of equal treatment, because the two situations compared concern repayment of a 'VAT credit'. Compass argues that the underlying rationale of the national provisions on the retroactive limitation period demonstrates that the Commissioners were seeking to apply that limitation period to all claims for repayment of VAT overpaid.

32. In relation to the principle of neutrality, Compass maintains that it has received treatment less favourable than that of its hypothetical competitors entitled to deduct VAT during the period at issue.

33. As regards the second question, Compass contends that, in accordance with the judgment of 10 April 2008, *Marks & Spencer*,[7] the referring court should apply to it the same limitation period as that applicable to claims for deduction of VAT, as a more favourable provision. Not to do so, it adds, would constitute a breach of the principle of effectiveness.

34. The United Kingdom Government submits that, in the light of the questions referred, the only relevant principle is that of equal treatment. In the circumstances of the case, that principle does not preclude the difference in treatment of which Compass complains, since its situation is not comparable to that of a person submitting a 'late' claim for deduction of VAT. The two situations differ, in its opinion, both in their circumstances and in their legal nature.

35. As regards the circumstances, the United Kingdom Government contends that the difference derives from the fact that the respective caps (three years in both cases) were introduced at different times, after the judgment in *M&S I* found that there had been an infringement of EU law.[8] To remedy that infringement, section 121 of the Finance Act 2008 provided for a transitional period, taking as the reference dates the first dates on which the United Kingdom could reduce the limitation periods with immediate effect, those being the dates on which the provisions relating to the reduction of the limitation period from six to three years applied.

36. As regards the legal nature of the two types of claim, the United Kingdom Government argues that the right to obtain the sum claimed in respect of VAT paid but not due does not, by definition, derive from the VAT system or the VAT directives but from general EU law. By contrast, the right to deduct derives exclusively from the VAT directives, pursuant to which a person liable to VAT, who has paid or must pay VAT to a third person, also liable to VAT, from whom he has received certain good or services, is authorised to deduct the VAT paid (or to obtain the corresponding credit). Proof of the legal difference between the two situations is the fact that EU law grants the tax authorities the right to invoke unjust enrichment in the former but not in the latter.

37. The United Kingdom Government also submits that the phrase 'VAT credit' used in *M&S II*, is not strictly speaking a legal definition but rather a form of expression.

38. The United Kingdom Government further observes that the judgment in *M&S II* did not concern the national rules amended in 2005 and applied to Compass. Since that amendment, the two kinds of claim have been afforded the same treatment, while Compass has not established that anyone in the same situation as it has received different, more favourable treatment.

39. The United Kingdom Government concludes that the national legislation at issue does not offend against the principle of effectiveness or that of protection of legitimate expectations, for the incompatibility with EU law identified in *M&S I* was remedied by the introduction of transitional rules.

7 — C-309/06, '*M&S II*', EU:C:2008:211.

8 — C-62/00, EU:C:2002:435.

40. The Commission argues that tax legislation (like that in the present case) may provide for different periods without infringing the principle of neutrality or the general principles of EU law. In relation to the former, the Commission claims that that principle may be found to have been infringed only if there is a difference in treatment between competing traders, which happened in the circumstances of *M&S II* but not in those of this case.

41. In the same way as the absence of competing traders would mean that there was no infringement of the principle of neutrality, the presence of traders who are in a comparable situation could lead to an infringement of the principle of equal treatment. For the Commission, however, this case involves two situations that cannot be considered to be similar: there is an objective, substantial difference between the two kinds of claim, in that they concern different levels of economic activity and are also governed by different rules. This follows, according to the Commission, from the case-law laid down in *Reemtsma Cigarettenfabrike*.[9]

42. The Commission argues, lastly, that the mention of the principle of effectiveness is inappropriate, since, again, claims like Compass's cannot be placed on the same footing as claims for deduction. And as regards the principle of equivalence, it will be for the referring court to determine whether it is applicable, bearing in mind that, in accordance with the case-law, that principle may not be interpreted as obliging a Member State to extend its most favourable national rules to all actions brought in a certain area of law.

V – Analysis

A – *Introductory remarks. The historical and legislative context of the situation at issue*

43. As noted by the referring court[10] and emphasised by the United Kingdom Government,[11] in order to understand the different treatment, under section 121 of the Finance Act 2008, of claims for repayment of overpaid VAT, on the one hand, and claims to deduct VAT, on the other, it is necessary to look at the origins of the three-year limitation period and the chronology of the legal challenges made to it.

44. According to the account given by the referring court and by the United Kingdom Government, section 121 of the Finance Act 2008 represents the culmination of a series of legislative actions beginning with the announcement by the United Kingdom Government, on 18 July 1996, of its intention of amending section 80 of the Value Added Tax Act 1994.[12] The national legislature approved the Government's bill on 4 December 1996.

45. The Commissioners initially took the view that the new three-year period did not apply to claims for deduction of VAT. However, with effect from 1 May 1997, the VAT Regulations 1995 were amended so that that period also applied to such claims.

9 — Judgment of 15 March 2007, C-35/05, EU:C:2007:167.

10 — Points 8 to 26 of the order for reference.

11 — Point 4 of the United Kingdom Government's observations.

12 — As stated above at point 12 of this Opinion, the bill was put forward in the light of the 'increasing risk for the Treasury posed by claims for the refund of sums wrongly collected by way of tax'; the intention was to lower that risk by reducing from six to three years the period for reclaiming those sums.

46. In the light of the judgment in *M&S I*,[13] which held that the reduction (from six to three years), with retroactive effect, of the period for claiming a refund of VAT paid but not due was contrary to EU law, the United Kingdom courts decided (in what is called the 'Fleming case-law')[14] that that cap was to be applied by means of a transitional period and be extended to claims for deduction of VAT.

47. On the basis of that case-law, the Commissioners decided:

— to allow claims relating to wrongly paid VAT for accounting periods before 4 December 1996 (the date of amendment of section 80 of the Value Added Tax Act 1994, which initially concerned only that type of claim); and

— also to allow claims for deduction for accounting periods before 1 May 1997 (date of amendment of the Value Added Tax Regulations 1995, which put into effect the three-year period for such claims).

48. Following judicial approval of that administrative practice, the Finance Act 2008 finally gave legislative backing to the solution reached, providing that it was to apply to claims made before 1 April 2009.

49. This is the background against which the referring court has submitted its questions. By the second question, if the first question should be answered in the affirmative, the referring court asks how claims for repayment of overpaid VAT submitted in the period between the two dates should be treated.

B – *The first question referred*

50. The referring court asks, in short, whether it is contrary to EU law for a national measure, in laying down rules governing the transitional period applicable to reduced limitation periods, to treat claims for repayment of overpaid VAT differently from claims for deduction of VAT.[15] In the referring court's view, that difference in treatment may be contrary to several principles of EU law.

51. In particular, the referring court refers to the principles of equal treatment, fiscal neutrality and effectiveness, and to 'any other relevant EU law principle'; the latter phrase would permit account to be taken of the principles of equivalence[16] and of the protection of legitimate expectations.[17]

52. However, I agree with the United Kingdom Government[18] that the dispute in the main proceedings has focused (and so, I think, should the reply to the question too) on the difference between the rules applied to the one kind of claim and the other respectively, that is, on a possible infringement of the principle of equal treatment. I believe that, in this case, the other principles mentioned by the referring court have a merely incidental effect.

13 — C-62/00, EU:C:2002:435.

14 — According to the explanation provided by the referring court at point 4 of the order for reference, the term 'Fleming claim' derives from the judgment of the House of Lords in *Fleming v HMRC* [2008] UKHL 2. An 'output tax Fleming claim' is a claim under section 80 of the Value Added Tax Act 1994 in respect of a sum brought into account, or paid, by way of output tax that was not tax due for a prescribed accounting period ending before 4 December 1996. The term 'input tax Fleming claim' refers to a claim for deduction of input tax where the right to deduct arose in a prescribed accounting period ending before 1 May 1997.

15 — As stated, while the same limitation period was established for both types of claim, the date with effect from which it applies in each case is different.

16 — The Commission's observations, points 34 to 36.

17 — The United Kingdom's observations, points 28 to 34.

18 — The United Kingdom's observations, point 8.

53. The principle of neutrality, fundamental to the common system of VAT,[19] prohibits similar goods or services — which, precisely because of that similarity, are deemed to be in competition with each other[20] — being treated differently for VAT purposes.[21] I agree with the stance of the Commission[22] and the United Kingdom Government[23] when they state that that was not the case here.

54. In particular, it has not been established that the Commissioners treated the services supplied by Compass differently from similar services supplied by its competitors. The provisions governing the time limits were applied in the same way to all those suppliers, including Compass, depending on the nature of their claims (whether for repayment or deduction).

55. The principle of fiscal neutrality is simply the translation into the sphere of VAT of the principle of equal treatment.[24] The latter applies not only between competing traders but also between traders who are not necessarily in competition with each other but are nevertheless in a similar situation in other respects,[25] which brings the analysis back to the principle of equal treatment.

56. In short, it has to be determined:

— whether the situation of a person who, like Compass, claims a refund of overpaid VAT is comparable to that of one who, while not necessarily a competitor of Compass, claims deduction of VAT; and

— whether, if the two claims should be held to be similar, the difference in treatment is justified if the law sets for the exercise of each of them limitation periods that, while identical, nonetheless start on different dates.

1. The difference between the nature of the right to a refund of VAT and the right to deduct VAT

57. The United Kingdom Government and the Commission maintain that, conceptually, a claim for a refund of overpaid VAT cannot be considered equivalent to a claim for deduction of VAT. I believe that they are right and, in fact, Compass does not even deny that there are differences between the two kinds of claim, because they are so obvious as hardly to admit of any argument.[26]

58. The right to deduct VAT is a basic principle of the common system of VAT established by the European Union. The Court has stated that the deduction system 'is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities'. In that way, 'neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT' is ensured.[27]

19 — Judgment of 19 December 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 59).

20 — Judgment of 10 November 2011, *The Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraphs 33 and 34).

21 — In that connection, judgment of 3 March 2011, *Commission* v *Netherlands* (C-41/09, EU:C:2011:108, paragraph 66).

22 — The Commission's observations, point 20.

23 — The United Kingdom's observations, points 25 to 27.

24 — Judgment of 8 June 2006, *L.u.P.* (C-106/05, EU:C:2006:380, paragraph 48).

25 — Judgment in *M&S II* (C-309/06, EU:C:2008:211, paragraph 49).

26 — At the hearing, Compass acknowledged that they were different species of claim although, in its view, they belonged to the same genus.

27 — See, for example, judgment of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraphs 25 and 27 and the case-law cited).

59. For its part, the right to a refund of overpaid VAT — which, by contrast to the above, does not derive from the VAT directives but from general EU law [28] — 'helps to offset the consequences of the duty's incompatibility with EU law by neutralising the economic burden which that duty has unduly imposed on the operator who, in the final analysis, has actually borne it'. [29]

60. It is logical that those differences on points of principle should lead to legal rules governing each of those two rights that reflect their differences. Both may, therefore, be framed in such a way that they differ as regards their content and the conditions for their exercise, having regard to the aim for which they were instituted by law.

61. That very diversity explains, for example, the fact that, under certain conditions, it is not contrary to EU law for a national legal system to refuse repayment of charges levied but not due when to allow it could lead to unjust enrichment of the recipients, [30] a criterion not applicable to the deduction of VAT.

62. As EU law now stands, given that there are no harmonised rules in this respect, it is for each Member State to lay down the conditions under which claims for repayment of taxes may be made; those conditions must observe the principles of equivalence and effectiveness. [31] However, in the field of VAT, the Sixth Directive defines, in Article 20, the conditions which must be met in order that deduction of input taxes may be adjusted at the level of the person to whom goods or services have been provided. [32]

63. Taking those differences into account, therefore, the respective positions of the holders of each of those rights are not comparable and, as a result, the requirements of the principle of equal treatment may not be extended to those positions. The Member States may introduce different rules (on, inter alia, the periods within which the respective claims must be made and on the time-barring of the right to make a claim) for a refund of overpaid VAT, that may differ from those applicable to the deduction of input VAT. EU law does not, I repeat, require the two kinds of national rules to be identical.

64. Notwithstanding their specific and particular features, the two positions may be based on a common denominator: in both cases, they are rights entitling the holders to demand that the same institution responsible, that is, the tax authorities, should give effect to their content.

65. Compass refers to that factor as an element of similarity, using the expression 'VAT credit', which was used in *M&S II*. [33] The United Kingdom Government [34] stresses the inappropriateness of that phrase which, in its view, the Court did not use as a legal definition but as a simple, practical form of expression to describe either the situation of those claiming a refund of overpaid VAT or of those claiming a deduction of VAT, [35] but never the compared situation of those making the two kinds of claim.

28 — The judgment of 16 May 2013, *Alakor Gabonatermelő és Forgalmazó* (C-191/12, EU:C:2013:315), expresses this as follows in paragraph 22: 'the right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court.'

29 — Ibid., paragraph 24.

30 — Judgment in *M&S II* (C-309/06, EU:C:2008:211, paragraph 41).

31 — In other words, the conditions for making such claims must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the Community legal order. See, inter alia, judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167, paragraph 37).

32 — Judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167, paragraph 38).

33 — C-309/06, EU:C:2008:211, paragraph 50.

34 — Written observations, points 18 and 19.

35 — A situation in relation to which the United Kingdom Government invokes, inter alia, the judgment of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267).

66. I believe that the United Kingdom is right to point out the context in which the meaning and scope of the term 'VAT credit' are to be interpreted. In that connection, however, it constitutes sufficient latitude to indicate that a person claiming a refund of overpaid VAT and a person claiming a deduction of input VAT both claim a 'credit' (that is, a sum of money which the creditor is entitled to demand and collect from the debtor) from the authorities. The credit position of both parties in relation to the treasury is an element that enables their positions to be compared in such a way that, from the perspective of the principle of equal treatment, a judgment can be made regarding their different treatment under national law.

67. For the purposes of enforcing claims to each of those 'credits', account must be taken of what is provided in the respective sets of legislative rules. The tax authorities will fulfil their obligation by abiding by what the tax system provides for every right claimed. They must, therefore, observe the conditions for exercise of the right fixed by the rules defining the respective legislative spheres. Rules that not only need not necessarily be the same for every one of the rights claimed but may, on the contrary, differ precisely because they concern different rights.

68. Quite apart from the conditions relating to and inherent in the subject matter of each right claimed, the key question is whether the tax authorities are entitled to impose different temporal conditions for its exercise. In other words, does the difference between the right to the refund of overpaid VAT, on the one hand, and the right to deduct VAT, on the other, allow the exercise of each right to be made subject to different time limits?

2. Justification for the different treatment of the two rights as regards the start of the limitation period established for their exercise

69. The question submitted by the national court arose in the context of legislative action whose purpose was the uniform treatment of the two rights at issue: the intention was to extend to claims for deduction the reduced time limit which the national legislature had initially introduced exclusively for claims for overpaid VAT.

70. As I have explained, the intended temporal uniformity of the two types of claim involved providing that the reduction of the time limit (from six to three years) introduced in December 1996 for claims for repayment of overpaid VAT would apply, with effect from May 1997, to claims for deduction.[36]

71. The intention of providing uniform treatment for the two types of claim is openly acknowledged by the United Kingdom Government. In its submissions, it indicates that it agrees that the amendment, with effect from 1 May 1997, of regulation 29 of the Value Added Tax Regulations 1995 was intended 'to correct the inadvertent anomaly' consisting of the different treatment of claims for repayment and claims for deduction and 'to ensure that all [these claims] were subject to the same 3 year cap'.[37]

72. To avoid the breach of EU law identified by the Court in *M&S I*,[38] the national legislature decided not to apply retroactively the new three-year period for claims, but instead to calculate that period from the time the measure entered into force, which took place on a different date for each of the two types of claim. Apart from that difference, treatment is the same for both types of claim, as the national legislature moreover intended.

36 — The limitation of the retroactive reduction of the time limit for each type of claim could only be effective if the claim for either repayment or deduction was submitted before the same date, applicable to both types of claim (1 April 2009).

37 — The United Kingdom's observations, point 4(b).

38 — C-62/00, EU:C:2002:435.

73. The difference at issue in the main proceedings is, therefore, the result of the unexpected consequences of legislative action intended to bring the rules governing the two types of claim into line with one another. It was, accordingly, a difference based on an objective event: the different dates of entry into force of the reduction of the period for making each type of claim.

74. In my opinion, the measure adopted did not depart from the purpose that prompted it, for the period is, in any event, three years for both types of claim and only the date from which that period is to start being applied is different. I stress that, by the adoption of that measure, the United Kingdom legislature intended that the new period should apply strictly from the date on which the measure entered into force, thereby preventing any retroactive effect on claims which, until then, were subject to a six-year time limit. As the date on which the amendment entered into force was not the same for both types of claim, it seems reasonable for the cap on the retroactive effect of the new time limit (three years) to be set at a date when the old time limit (six years) still had to apply.

75. The solution implemented by the national legislature de-activated the retroactive effect *in peius* of the amendment of the limitation period, which was essential because the Court held in *M&S I*[39] that, otherwise, there was an infringement of EU law. In view of the difference with regard to entry into force of the three-year period, the prohibition of retroactivity, from the point of view of the principle of equal treatment, reflected the difference in treatment for each of the two types of claim, since the moment from which the new limit could be applied without giving rise to retroactive effect was different in either case.

76. Whatever the aim of the amendment and the degree[40] to which its aim of making the two limitation periods the same was achieved, the fact is that, for just a few months (December 1996 to May 1997) there was a temporal imbalance between the treatment of claims for a refund of VAT and the treatment of claims for deduction of VAT.

77. Given that what is at stake in this case is a claim for repayment of VAT overpaid by Compass, the temporal imbalance, resulting from the unexpected consequences of the national legislative procedure, between the limitation period for such claims and the limitation period for claims for deduction of input VAT is not, in my view, open to objection under EU law, because:

— on the one hand, as I have pointed out, EU law contains no unified or harmonised rules prevailing over national provisions governing the exercise of the right to repayment of wrongly paid VAT, it being sufficient that the latter observe the principles of equivalence and effectiveness,[41] which are not at issue in this case; and

— on the other hand, neither the Sixth Directive nor the other provisions applicable to the common system of VAT require the treatment of claims for repayment of VAT (when it has been paid in error or, in general, is not due) to be the same as that of claims for deduction of input VAT.

78. In short, I believe that the existence of two dates with effect from which the three-year period for each type of claim was to be applicable raises no issue of incompatibility with EU law. The United Kingdom authorities could undoubtedly have made different arrangements for the application to claims of the new temporal rules, but the way in which the limitation period for claims for a refund of VAT paid but not due was governed retroactively is not contrary to EU law, nor is the fact that that limitation period differs from the period stipulated for claims for deduction.

39 — C-62/00, EU:C:2002:435.

40 — I wonder whether a subsequent legislative intervention might have been possible, which, after establishing the outcome resulting from the earlier laws, corrected the temporal anomaly identified by bringing it into line with the aim of placing both types of claim on an equal footing in all respects (also with regard to the start of the limitation period).

41 — See point 62 and footnote 31 of this Opinion.

79. I suggest, therefore, in reply to the first question referred, that it is not contrary to EU law for a national measure, like that at issue in the main proceedings, in laying down a transitional period for the introduction of reduced limitation periods applicable both to claims for repayment of overpaid VAT and to claims for deduction of input VAT, to provide that the new limitation period should start to run, for the latter, from a later date than the date fixed for it to start running for the former.

C – *The second question referred*

80. The second question is framed in the alternative, in case the reply to the first question should be affirmative, that is, if it were to be confirmed that the treatment in the United Kingdom of the two kinds of claims breaches EU law. As I have proposed the contrary, I believe that the Court need not examine this second question. I shall, in any case, set out my observations in this regard.

81. The referring court essentially asks how claims for repayment of overpaid VAT relating to the reference period (from 4 December 1996 to 30 April 1997), that is, relating to the period between the dates on which the three-year limitation period started to apply to each kind of claim (for repayment or for deduction of VAT), should be treated.

82. As the Court observed in *M&S II*,[42] 'it is, in the absence of Community legislation, for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law'.

83. It therefore falls to the referring court to draw any conclusions from the infringement of the principle of equal treatment which may have been identified by the Court of Justice, using the guidance provided by the latter with regard to certain criteria or principles of EU law which must be complied with when that task is carried out.[43]

84. In particular, the referring court would have to 'set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the favoured category'.[44]

85. Subject to the other rules of its own legal system, the referring court would have, in principle, to order that the trader affected by discrimination should receive the amount of VAT overpaid, as a remedy for the infringement of the principle of equal treatment, unless, under national law, there are other remedies available to make reparation for that infringement.

86. Finally, I believe that it would not be acceptable for the unequal treatment identified to be remedied by making claims for deduction subject to the time limit stipulated for claims for repayment, in other words, by bringing forward for the former the date initially set for them (30 April 1997) and making them subject instead to the date set for the latter (4 December 1996). That would, of course, resolve the difference in treatment between the two, but with the corollary that claims for deduction would suffer the retroactive application of a time limit that, for those claims, did not enter into force until 1 May 1997. That would be contrary to the case-law laid down in *M&S I*.[45]

42 — C-309/06, EU:C:2008:211, paragraph 59.

43 — Judgment in *M&S II* (C-309/06, EU:C:2008:211, paragraph 61).

44 — Judgment in *M&S II* (C-309/06, EU:C:2008:211, paragraph 63).

45 — C-62/00, EU:C:2002:435.

VI – Conclusion

87. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the First-tier Tribunal (Tax Chamber), United Kingdom:

(1) It is not contrary to EU law for a national measure, like that at issue in the main proceedings, in laying down a transitional period for the introduction of reduced limitation periods applicable both to claims for repayment of overpaid VAT and to claims for deduction of input VAT, to provide that the new limitation period should start to run, for the latter, from a later date than the date fixed for it to start running for the former.

(2) In the alternative, were the Court to give an affirmative answer to the first question, the national court would have to draw the appropriate conclusions from infringement of the principle of equal treatment, in accordance with the rules of national law relating to temporal effects, in such a way that the remedies it grants are not contrary to EU law.