Say cheese! Photographs and the definition of works of art for VAT purposes

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Abstract: *A reduced VAT rate can apply to works of art. The definition of art which is used for this beneficial treatment, can differ from the definition of art which experts use. This is particularly the case when regarding photographs. The central question in this article is to whether this different view can be based on inherent characteristics of VAT as the Court of Justice of the European Union (ECJ) claims. In order to answer this question, the article will start with a short overview of the benefits for works of art, followed by the definitions used for customs duties and VAT. The core part of this article includes an analysis of the case law applying these definitions to photographs: the 1989 Raab case and the 2019 Regards case.*

Key words: VAT; customs duties; works of art; photographs; reduced rate

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1. Introduction

Both the Combined Nomenclature (CN)[1] used for customs duties and the value added tax (VAT) Directive[2] include a beneficial treatment for works of art. However, the definition of art for these tax benefits differs from the definitions that art experts use. I have written about this before,[3] but following the recent judgement in the Regards Photographiques[4] case of the Court of Justice of the European Union (ECJ), the gap has appeared to have widened, especially for photographic art.

The numerous photography museums around the world,[5] photography exhibitions in general museums and art galleries and academic literature on photography,[6] show that at least by the art world, art critics, specialists and academics, photography is regarded an art form. James Elkins wrote in 2011: "It has been thirty years since Roland Barthes published his "little book," Camera Lucida.[7] In the intervening years photography has become a major part of the international art market, and a common subject in university departments of art history and

1. Council Regulation 2658/87/EEC of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and Commission Implementing Regulation 2018/1602/EU of 11 October 2018 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. O.J. 2018, L 273, pp. 1–960.
2. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter: VAT Directive).
3. S.J.C. Hemels, ´Art and the European VAT', *International VAT Monitor* March/April 2005, pp. 99–104, and S.J.C. Hemels, ´Tax incentives for the art market' (section 4) in Sigrid Hemels & Kazuko Goto (eds), *Tax incentives for the creative industries* (Springer Singapore, 2017), pp. 179–189.
4. Case C-145/18, *Regards Photographiques*, 5 September 2019, ECLI:EU:C:2019:668.
5. To name only a few around the world: The Museum of Contemporary Photography in Chicago, The International Center of Photography in New York, The National Museum of Photography in Denmark, Fotografiska in Stockholm, Finlands fotografiska museum in Helsingfors, Preus Museum of Photography in Horten (Norway), Lianzhou Museum of Photography in Lianzhou (China), Fototeca latinoamericana (Buenos Aires), Museo Nacional de la Fotografía de Colombia in Bogotá, Bensusan Museum of Photography in Johannesburg, the Photographers' Gallery in London, Museum für Fotografie in Berlin, Tokyo Metropolitan Museum of Photography in Tokyo, and FOAM and Huis Marseille in Amsterdam.
6. Just some examples: Pierre Bourdieu, *Un art moyen, Essai sur les usages sociaux de la photographie* (Ed. de Minuit, Paris, 1965); Susan Sontag, *On photography* (Farrar, Straus & Giroux, 1977); Roland Barthes, *La chambre claire. Notes sur la photographie* (Gallimard, 1980); James Elkins, *Photography Theory* (Routledge, 2007); Michael Fried, *Why Photography Matters As Art As Never Before* (Yale University Press, 2008); and Robert Kelsey, *The meaning of photography* (Clark Art Institute, 2008).
7. SH: This is the title of the English translation, the original title in French was *La chambre claire*.

philosophy. An enormous literature has grown up around photography, its history, theory, practice, and criticism."[8]

For VAT purposes, the view on photography is different. The central question in this article is whether this different view can be based on inherent characteristics of VAT, as the ECJ claims. Furthermore, as a starting point, this article takes the view that law should reflect reality. Even if the case law would fit in the VAT system, it is still important to check whether the systems duly reflects reality, and in this particular case, regarding works of art.

In order to answer this central question, I start with a short overview of the customs and VAT benefits for works of art, followed by the definitions used for 'works of art' in the CN (for customs duties) and the VAT Directive (that partially refers to the CN). The core part of this article will include an analysis of the case law applying these definitions to photographs: the 1989 Raab case[9] and the 2019 Regards case.[10]

2. Short overview of Customs and VAT benefits for works of art

If certain requirements are met, works of art can be imported in the European Union (EU) free of customs duties, for example by certain museums and for exhibitions.[11] Furthermore, EU Member States have the option to apply a reduced VAT rate to the importation of works of art. If these States choose to do so, they can apply it to the supply of works of art by their creator or his successors in title and to the supply of works of art. On an occasional basis, by a taxable person other than a taxable art dealer, where the works of art have been imported by the taxable person himself, or where they have been supplied to him by their creator or his successors in title, or where they have entitled him to full deduction of VAT (article 103 and Annex IX VAT Directive). This means, for example, that if an artist who is a Dutch resident sells his work for a net price of EUR 1,000 to an art collector, the art collector does not have to pay the standard VAT rate of 21% (leading to a gross price of EUR 1,210) but only the reduced rate of 9% (gross price of EUR 1,090).

8. James Elkins, *What photography is* (Routledge 2011), p. vii.
9. Case C-1/89, *Ingrid Raab*, 13 December 1989, ECLI:EU:C:1989:648.
10. Case C-145/18, *Regards Photographiques*, 5 September 2019, ECLI:EU:C:2019:668.
11. Council Regulation 2658/87/EEC of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and article 43 (and Annex II) and article 90 of Council Regulation 1186/2009/EC of 16 November 2009 concerning the establishment of the Community regime of customs exemptions.

Member States may also allow taxable art dealers to apply the margin scheme to works of art, meaning that instead of applying the VAT rate on the sales price, the VAT rate is applied on the art dealer's margin (difference between the price for which she sold the work of art and for which she purchased it).[12] For example, if a Swedish art dealer bought a painting from a collector for SEK 150,000 and sells it for SEK 250,000 excluding VAT, the margin is SEK 100,000. Sweden would then apply a VAT rate of 25%. Without the margin scheme, the price including VAT would be SEK 312,500, but under the margin scheme the price including VAT is SEK 275,000. If the margin scheme is applied and certain additional requirements are met, no VAT is due on an intra-Community acquisition of the works of art.[13] Besides, the intra-Community acquisition of works of art is not subject to VAT if the vendor is an organiser of sales by public auction, acting as such, and VAT has been applied to the goods in the Member State in which their dispatch or transport began, in accordance with the special arrangements for sales by public auction.[14]

3. Definition of works of art

The short overview of section 2 demonstrates that the tax benefits can be substantial. However, these only apply to art that meets the definitions of 'work of art'.

3.1. Customs duties

For customs duties, since 1987[15] works of art are described in Chapter 97 Works of art, collectors' pieces and antiques of the CN that is based on the internationally used Harmonized System run by the World Customs Organization. The works of art included in this chapter are:

- 9701 Paintings, drawings and pastels, executed entirely by hand, other than plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes (these fall under heading 4906) and other than hand-painted or hand-decorated manufactured articles; collages and similar decorative plaques;
- 9702 Original engravings, prints and lithographs;
- 9703 Original sculptures and statuary, in any material.

12. Article 312-325 VAT Directive.
13. Article 4(a) VAT Directive.
14. Article 4(c) VAT Directive.
15. Before 1987, works of art were included in Chapter 99. The wording regarding works of art and the Notes were the same.

All other headings refer to collector's items and antiques. Photographs are not mentioned in this chapter. Photographs are mentioned in Chapter 49 "Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans" under heading 4911 Other printed matter, including printed pictures and photographs. Like the items in Chapter 97, items imported under 4911 heading are also exempt from customs duties in the EU.[16] For the amount of customs duties due upon importation in the EU, it is, therefore, currently not relevant whether an item is categorized under Chapter 97 or under heading 4911.

In Note 2 to Chapter 97 it is mentioned that for the purposes of heading 9702, the expression 'original engravings, prints and lithographs' means impressions produced directly, in black and white or in colour, of one or of several plates wholly executed by hand by the artist, irrespective of the process or of the material employed by him, but not including any mechanical or photomechanical process. Note 3 explains that 9703 does not apply to mass-produced reproductions or works of conventional craftsmanship of a commercial character, even if these articles are designed or created by artists. Note 4 requires that subject to notes 1 to 3, articles of chapter 97 are to be classified in this chapter and not in any other chapter of the nomenclature.

3.2. VAT Directive

Article 311(2) VAT Directive defines 'works of art' as the objects listed in Annex IX, Part A. The latter includes the following list:

(1) Pictures, collages and similar decorative plaques, paintings and drawings, executed entirely by hand by the artist, other than plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, hand-decorated manufactured articles, theatrical scenery, studio back cloths or the like of painted canvas (CN code 9701);
(2) original engravings, prints and lithographs, being impressions produced in limited numbers directly in black and white or in colour of one or of several plates executed entirely by hand by the artist, irrespective of the process or of the material employed, but not including any mechanical or photomechanical process (CN code 9702 00 00);
(3) original sculptures and statuary, in any material, provided that they are executed entirely by the artist; sculpture casts the production of which is limited to eight copies and supervised by the artist or his successors in title (CN code 9703 00 00); on an exceptional basis, in cases determined by the Member

16. Commission Regulation 1789/2003/EC of 11 September 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

States, the limit of eight copies may be exceeded for statuary casts produced before 1 January 1989;
(4) tapestries (CN code 5805 00 00) and wall textiles (CN code 6304 00 00) made by hand from original designs provided by artists, provided that there are not more than eight copies of each;
(5) individual pieces of ceramics executed entirely by the artist and signed by him;
(6) enamels on copper, executed entirely by hand, limited to eight numbered copies bearing the signature of the artist or the studio, excluding articles of jewellery and goldsmiths' and silversmiths' wares;
(7) photographs taken by the artist, printed by him or under his supervision, signed and numbered and limited to 30 copies, all sizes and mounts included.

Section 1-3 refer to the CN codes of Chapter 97 discussed above. Here there is a clear link between the definition of works of art for customs duties and for VAT. The VAT list dates from 1995 and is, therefore, of a later date than the list in Chapter 97. The enumeration in the VAT Directive is, however, more extensive than Chapter 97. Unlike Chapter 97, it includes a reference to photographs.

Art that does not fall into one of these categories is not eligible for the VAT benefits that apply to works of art.

4. The ECJ on photographs and the definition of works of art for customs duties

The ECJ had to interpret the definitions of 'works of art' on several occasions, both for customs duties and VAT. The older case law is all on the interpretation of the CN codes for customs duties. Because of the references to the CN codes in the VAT definition, the criteria the ECJ developed for customs duties may also apply in determining whether an object is a work of art for VAT purposes.

4.1. Photographs and the definition of works of art in the CN

In the 1989 Raab case, the Court of Justice had to decide whether 36 photographs by the famous photographer Robert Mapplethorpe could be exempt from customs duty under the code for original engravings, prints and lithographs. Ingrid Raab, the owner of an art gallery in Berlin, had purchased these photographs for DM 66,783.30 and imported them from the USA into Germany. The German customs office classified the photos under the code for photographs and charged customs duty at 5.8% as, at the time, items classified under heading 4911 could not be imported duty free.

Ms. Raab claimed that that the photographs were related to the field of graphic arts, as only a limited amount of copies was made from an artistically prepared original plate and the value of the photographs was far higher than the value of the materials used. The German Customs authority held that a classification criterion based on the artistic nature of goods would be unusable in practice, and pointed at the unequivocal wording of the Common Customs Tariff.

The ECJ observed that although the exemption for works of art was provided for to promote artistic production, that does not mean that all objects that may be recognized as being of an artistic nature, are to be classified under that chapter. The Court pointed out that for the interpretation of the nomenclature the titles of sections, chapters and sub-chapters are provided for ease of reference only. Furthermore, the Court held that original engravings, prints and lithographs were characterized by the personal intervention of the artist in executing the original by hand, and only the reproduction of the original may be carried out by means of a mechanical printing process. According to the Court, photographs do not satisfy this condition. The Court was of the view that although the photographer may, by the choice of subject and techniques used, confer some artistic merit of his work, the original is always the result of a technical process consisting in fixing the image of objects on a sensitive surface by the action of light. The Court was, for that reason, of the opinion that the original could not be considered to be wholly executed by hand within Note 2 to this chapter. Therefore, the Court held that art photographs could not be classified under this heading.

One may question whether the Court was correct in claiming that the original is merely a result of a technical process. This would mean that anybody could make art photographs but, as evidenced by academics, art critics and curators of photography museums, this is clearly not the case. Also, this view seems to fixate the definition of art and does not leave any room for technical innovations. In a way, prints were an innovation from paintings, making it possible to easily make more copies of the same work. In that line, photographs could be viewed as a further innovation from prints.

In any case, the Court observed that photographs are expressly referred to in subheading 4911, that this subheading does not draw any distinction according to whether or not photographs are of an artistic nature, and that it is a residual heading which covers all artistic printed matter not listed or referred to in any other heading. Although, according to General Rule 1 for the interpretation of the nomenclature, the titles of chapters may serve as reference for the nature of an article which is referred to in a heading, it cannot be used to justify its classification under a heading in another chapter. According to the Court this was particularly the case as the possible artistic merit – in the view of the Court - is defined essentially by reference to subjective and indeterminate criteria, whereas tariff classification must be founded on objective criteria for the purposes of its effective operation and of legal certainty. For that reason, the Court came to the conclusion that

photographs which may be recognized as being of an artistic nature fall, like all photographs, within subheading 4911 and are therefore not exempt from duties when imported.

In this respect, one might wonder why the value of an object and the fact that it is sold or bought by an art dealer, art gallery or museum would not be an objective characteristic of an object.

4.2. Strict interpretation of heading 9702 not in line with case law on other headings

The outcome of the Raab case does not seem to be in line with judgements of the Court on a work of Swedish artist Claes Oldenburg (Onnasch case[17]) and on a work of the Hungarian artist Laslo Moholy-Nagy (Gmurzynska-Bscher case[18]). These cases regarded the interpretation of the headings on original sculptures (9701) and sculptures and statuary (9703), respectively. The work of Claes Oldenburg, called 'modl. motor section – giant soft fan', was composed of cardboard polystyrene, black paint, oil, wire and resin attached to a wooden panel and could, in the view of the German customs, not be regarded a sculpture. Similarly, Moholy-Nagy's Konstruktion in Emaille I (Telephonbild), a steel plate with a fused coating of enamel-glaze colours was not a painting in the view of the German customs. In these cases the Court was willing to interpret the headings liberally and taking into account artistic innovations.

In the Onnasch case, the Court held that the expression 'sculptures and statuary' must be understood to refer to all three-dimensional artistic productions, irrespective of the techniques and materials used. The Court found this interpretation in accordance with Note 4, under which, where there is doubt as to the classification of an article, preference should be given to classification in one of the headings of the chapter covering works of art, collectors' pieces, and antiques. Furthermore, the Court agreed with the Commission's observation that if the rate of customs duty laid down for the materials used was applied to a value for customs purposes, fixed on the basis of the work's artistic nature, the duty payable would be out of all proportion to the cost of that material. In the Gmurzynska-Bscher case, the Court also referred to this Note 4. As the national court had no doubt that the Telefonbild was an original work of art, according to the ECJ, it could not be regarded as being for decoration and thus not fall under Chapter 83 'Miscellaneous articles of base metal', but had to be classified under Chapter 97. The Court referred to the Onnasch case stating that this was particularly important, in view of the fact that according to the case-law of the Court the headings of Chapter 97 must be given a liberal interpretation. Alongside this, if the rate of customs duty laid down for the materials used were applied to a value for

17. Case C-155/84, *Reinhard Onnasch*, 15 May 1985, ECLI:EU:C: 1985:207.
18. Case C-231/89, *Krystyna Gmurzynska-Bscher*, 8 November 1990, ECLI:EU:C:1990:386.

customs purposes fixed on the basis of the work's artistic nature, the duty payable would be out of all proportion to the cost of that material.

The puzzling conclusion is, therefore, that where the Court favored a liberal interpretation of heading 9701 and 9703, art photographs were confronted with a very strict interpretation of heading 9702. At the time, this interpretation resulted in customs duties on photographs that were widely recognized of having an artistic and cultural value. The taxable base for these imports was determined by this artistic value, leading to a duty payable that was out of proportion. The 1985 Onnash case and the 1989 Raab case were decided in chambers of only 3 judges with a completely different composition. The 1990 Gmurzynska-Bscher case was decided in a chamber of 7 judges. It had the same precedent as the Onnasch case and included all three judges of the Raab case but not the two other judges of the Onnasch case. The Court was, in my view, not consistent in its interpretation of the three headings of Chapter 97, by favoring a liberal interpretation for two headings and a strict one for the third.

Currently, photographs can also be imported duty free. This might, for now, just be a theoretical problem, but as soon as the rates for Chapter 97 and heading 4911 start to deviate again, this problem might return. Such deviation is not just theoretical, especially not in the trade war times we are living in. For example, as part of the 15 year battle between the USA and the EU on alleged illegal subsidies to Boeing and Airbus respectively. In October 2019, the US introduced a 25% levy on, amongst other things, photographs printed within the past 20 years and imported from the UK and Germany.[19]

5. The ECJ on photographs and the definition of works of art for VAT

Point 7 of Annex IX to the VAT Directive includes a specific reference to photographs. On 5 September 2019, the ECJ delivered an important judgment on how point 7 should be interpreted. According to the Court all photographs that are taken by the photographer, printed by him or under his supervision, are signed and numbered and limited to 30 copies, qualify for the reduced rate. Furthermore, the Court held that no other requirements, including on the artistic character, may be imposed. This judgement seems to ignore the observations in the Onnasch case and the Gmurzynska-Bscher case. Interestingly, the Court, that consisted of only three judges, did refer to the Raab Case, but not to the two other

19. Anna Sansom (20 November 2019), "A giant wall': art world feels the pinch of Trump's 25% import duty on printed works', *The Art Newspaper* (online). Retrieved from <https://www.theartnewspaper.com/news/art-trade-penalty-import-duty> (accessed 14 January 2020).

cases. Below I shall discuss the facts of the case, the French view and the arguments used by the Court and Advocate General Szpunar[20] and I will argue why these arguments are, in my view, based on flawed (implicit) assumptions.

5.1. The facts of the case

Regards Photgraphiques SARL (hereinafter: Regards) is a company that creates[21] and sells photographs.[22] It had applied the reduced VAT rate on portraits and wedding photographs, claiming that all requirements in point 7 were met: the photographs were developed under the supervision of the photographer, signed, numbered and limited to 30 copies. Both the lower French court and the court of appeal dismissed the claim of Regards. The court of appeal observed that the reduced rate did not apply to the photographs, because they lacked originality and did not demonstrate a creative intent and could, therefore, not be regarded as taken by an artist.

5.2. French guidance and arguments

The French tax administration had issued specific guidance on the requirements for applying the reduced rate on art photographs.[23] Only photographs that demonstrated a clear creative intent of their creator could be regarded works of art to which the reduced rate could apply. Such creative intent existed if the photographer, by choosing the subject, setting (*mise en scène*), the special features of the shot or any other distinctive characteristic, specifically the quality of the framing, the composition, lightning, contrasts, colors and reliefs, the play of lights and volume, lens and film selection or specific conditions in which the negative is processed, produces a work that goes beyond the simple mechanic fixation of the memory (*souvenir*) of an event, trip or people and which is thus of interest to the general public (*tout public)*[24]. For that reason, the guidance excluded identity, school and group photographs from the application of the reduced rate. Photographs, where interest depends primarily on the status of the individual or the nature of the object shown, such as photographs of religious or family events

20. Hereinafter: the AG.
21. This is the wording the English version of the judgment uses, see for example paragraph 14. See on the difference between taking, making and creating a photograph <https://jakubmarian.com/make-a-photo-vs-take-a-photo-in-english/> (accessed 14 January 2020).
22. See also <www.regardsphotographiques.fr> (accessed 14 January 2020).
23. TVA. Taux réduit de 5,5% applicable aux œuvres d'art. Situation des photographies d'art. Bulletin officiel des impôts 115 du 2 juillet 2003.
24. The English language version of the case uses 'any audience' but I do not think that this is a correct translation of what is meant by 'tout public' in the French guidance. It also deviates from the wording used in other language versions, such as *allgemeine Öffentlichkeit* in German, *algemene publiek* in Dutch, *offentligheden* in Danish and *allmänhetens* in Swedish. For that reason, I use 'the general public'.

(weddings, holy communions etc.), were in general, not regarded as art photographs. For other photographs, the creative intention and the importance for the general public could be reinforced if the photographer proves that his works have been exhibited in regional, national or international cultural institutions, museums, temporary or permanent exhibitions, or commercial institutions such as fairs, shows and galleries or in specialized publications and by the use of specific materials and equipment for taking and developing the photographs.

Before the ECJ, the French government also claimed that the reduced rate could only apply to art photographs, photographs demonstrating clear creative intent of their creator and that are of interest to the general public. This was derived from the use of the word 'artist' in point 7, the need to interpret the option of applying a reduced rate strictly and the objective of promoting artistic production by applying a reduced VAT rate.

5.3. What are we talking about?

The Court started by pointing out that it was not asked to determine the meaning of the concept 'work of art' in general, but to do this in the context of the provisions of the VAT Directive on the reduced rate (paragraph 20). Here the Court seems to follow the AG who started his opinion,[25] stating that the nature of photography as a 'reflection of reality', its apparent ease of execution and its increasing democratization raise doubts about its artistic character, referred to a source of 1859. This regarded the debate on whether or not photography is an art and concluded the matter by saying that taxation business must be founded on clear and objective criteria based on legislation, and that the debate on whether photography is an art cannot be settled by the tax administration or courts. In my view, the AG did not only not do justice to art photography and the extensive canon (that has certainly evolved since 1859!) on that matter. The AG also failed to appreciate that governments have active policies supporting art requiring them, their administrative bodies and their courts to make decisions on such matters, and that reduced VAT rates are one of the instruments governments have used for such policies way before the harmonized VAT was introduced.

5.4. Does the artist make art or does art make the artist?

The European Commission pointed at the wording of article 103(2)(a): 'the supply of works of art, by their creator or his successors in title' and argued that the wording does not refer to the artist, but to the creator of a photograph that is regarded as a work of art (paragraph 24). The ECJ followed this reasoning and observed that point 7 does not apply to art photographs but to all photographs that meet the requirements of point 7 (paragraph 27). The Court was of the view that

25. AG in Case C-145/18, *Regards Photographiques*, 7 March 2019, ECLI:EU:C:2019:184, paragraph 1.

the terms 'creator' and 'artist' refer to the same person, especially in the view of the importance embedded in point 7 on the personal involvement of the creator of the photograph in its execution: taking the photograph and at least supervising its printing. The Court held that from the use of the word 'artist', it cannot be derived that the photograph must have an artistic character next to meeting the requirements of point 7.

The AG pointed out that point 7 did not refer to 'an' artist, but to 'the' artist (paragraph 18). In his view this was significant (paragraph 18) and meaning that any person who has executed a photograph produced in the conditions set out in point 7 is classified as an artist within the meaning of that provision (paragraph 25). In short: it is not the artist who makes art, but art that makes the artist.

This is a rather unconventional way of seeing things as in the non-tax world (the art world, or could I even say the real world?). It is definitely the other way around: an urinal,[26] a vacuum cleaner[27] and an unmade bed[28] become a work of art because an artist takes them out of context and decides that they become art. As was explained in an anonymous editorial published in the May 1917 issue of Marcel Duchamp's avant-garde magazine The Blind Man. This was in relation to the urinal signed R. Mutt that was, under the name 'Fountain', included in an exhibition and caused a scandal: "Whether Mr. Mutt with his own hands made the fountain or not has no importance. He CHOSE it. He took an ordinary article of life, and placed it so that its useful significance disappeared under the new title and point of view – created a new thought for that object." By turning things upside down as now seems to be the case for photographs, the VAT Directive would deny over a 100 years of art history.

5.5. Artistic value not an objective requirement?

The ECJ referred to established case law that the terms contained in the VAT Directive are objective in nature and apply without regard to the purpose or results of the transactions concerned (paragraph 33). The European Commission and Regards argued (paragraph 24) that the conditions of point 7 are detailed and objective, whereas the artistic value is a subjective and undetermined criterion whose assessment entails a judgement on the merits of a work. They were of the view that the detailed and objective requirements were included in point 7 to avoid such a subjective assessment. The Court followed this reasoning that those criteria rule out the possibility that photographs might be classified as 'works of art' when they are mass produced, where printing is entrusted to specialist laboratories and the photographer does not have control over the final effect (paragraph

26. *Fountain*, Marcel Duchamp 1917.
27. *New Hoover Convertibles, Green, Blue; New Hoover Convertibles, Green, Blue; Doubledecker*, Jeff Koons 1981–1987.
28. *My bed*, Tracy Emin 1998.

34). According to the ECJ, artistic merit is a subjective characteristic as it is based on subjective and indeterminate criteria. In this respect the Court referred to the Raab case, amongst others, however seemingly without acknowledging the preceding Onnasch and later Gmurzynska-Bscher case. The Court held (paragraph 50) that the French requirements were not objective, clear and precise criteria for designating photographs that have artistic character but merely establish an abstract definition of those photographs. This is based on vague and subjective criteria relating to the clear creative intent of the creator and the interest to the general public which those photographs must demonstrate. The Court was of the view that although France gave a number of indicators to facilitate the assessment of those criteria, it allowed the tax administration to make an assessment of the artistic quality of the photographs based on vague and subjective criteria (paragraph 51).

I doubt whether the Court is correct in claiming that artistic value is purely a subjective and a vague criterion. The French guidance, in my view, includes several objective requirements, such as public interest, exhibitions in museums etc. to establish such value. Furthermore, this value can also be measured in monetary terms as was done in the Onnasch and Gmurzynska-Bscher case in which the Court referred to a value for customs purposes fixed on the basis of the work's artistic nature (which would lead to a duty payable out of all proportion to the cost of the material under which heading it was brought). This market value can easily be established and compared with the price of commercial photos. For example, according to Regards' website a studio portrait costs EUR 86.[29] This is incomparable with the costs of, for example, the portrait of a girl Dutch artist Rinneke Dijkstra made in Odessa on 10 August 1993 and that was estimated at an auction price between USD 20,000 and 30,000.[30] Price is, therefore, an objective and in VAT terms easy criterion to establish the artistic value of a photograph. It is also difficult to manipulate as no customer will be prepared to pay a high price for a commercial photo, just to be able to benefit from the reduced rate for works of art.

5.6. Competition between comparable goods?

The ECJ recalled (paragraph 32) that the application of the reduced rate is an exception to the application of the standard rate for which reason the provisions which identify the photographs to which that reduced rate may be applied, must be interpreted strictly. However, this strict interpretation should not be construed in such a way as to deprive the provision of its effects. The interpretation of the terms must conform to the objectives pursued by the arrangement and respect the requirements of neutrality.

29. <https://www.regardsphotographiques.fr/photographe-portrait.html> (accessed 14 January 2020).
30. <https://www.invaluable.com/artist/dijkstra-rineke-fpb6d49pf7/sold-at-auction-prices/> (accessed 14 January 2020).

It is settled case law that the principle of fiscal neutrality precludes treating similar goods or supplies of services, which are thus in competition with each other, differently for VAT purposes. The important question in this respect is what similar goods and services are. It is also settled case law that in order to determine whether two supplies of services are similar, account must primarily be taken of the point of view of a typical consumer, avoiding artificial distinctions based on insignificant differences.[31] In the 2011 Rank Group case, [32] the Court held that the principle of fiscal neutrality is already infringed if two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer, are treated differently for VAT purposes. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established. According to the Court in this case (to which it does not refer in the Regards case), two supplies are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or the other (paragraph 44).

In paragraph 36 of the Regards case, the Court was of the view that if the reduced VAT rate would only apply to photographs with an artistic character, photographs, such as, for example, depicting family events such as weddings. These would be treated differently depending on whether or not the tax authority considers them to be artistic, even though those photographs may, in the view of the court, have similar characteristics and meet the same consumer needs.

In my view, the Court makes a faulty factual assumption here. A wedding photograph of a bride and groom meets completely different consumer needs than an art photograph which pictures a bride. Furthermore, their use is not comparable and the differences between them have a significant influence on the decision of the average consumer to buy one or the other. The ordinary wedding photograph will only be relevant for a small circle of family and friends and meets the consumer need to remember this event so important for the people involved. The art photograph of a wedding meets a completely different need and has a different use that is similar to the need fulfilled by other art such as paintings. This is also reflected in the price of these two categories of photographs. Cedric Nunn's picture of a wedded couple in front of a grave that was estimated

31. See for example paragraph 52 and 53 of Case C-454/12 and C-455/12, *Pro Med Logistic and Pongratz*, 27 February 2014, ECLI:EU:C:2014:111 to which the Court refers in Regards paragraph 36.
32. Case C-259/10 and C-260/10, *The Rank Group*, 10 November 2011, ECLI:EU:C:2011:719.

to sell at an auction for an amount between USD 200 and 400,[33] meets a completely different consumer need than the wedding pictures of Caspar and Cécile that Regards sells at a much lower price per photo to the couple. Not only are these photographs different, it is a completely different market as well: Regards only sells photographs to persons commissioning these photographs, whereas art photographs are sold on an open market. These differences have a significant influence on the decision of the average consumer to buy one or the other. An average consumer who wants to buy art will not buy (or even be allowed to buy) the wedding photographs of Caspar and Cécile: these will only be bought by themselves and their relatives and friends. On the other hand, Caspar and Cécile will not be interested in any wedding photograph, but only in the photographs of their own wedding. In my view, the Court now deems these photographs to be similar based on insignificant similarities such as the mechanical process and signing of the photograph, neglecting the significant differences such as price, market on which the photographs are sold and the consumer need that is met by the photographs. These are objective criteria that can easily be assessed by a tax inspector and do not need a subjective judgement on artistic merit.

Furthermore, the judgment of the Court leads to a distortion of competition between similar goods that meet the same consumer needs, as most consumers will not care whether or not the photographs of their loved ones are signed: it is not the signature that is relevant, but the people in the photograph. However, because of the Regards case an ordinary, but signed, wedding photograph can be sold at the reduced rate, whereas exactly the same photograph that is not signed, has to be sold at the standard rate. The signature on a wedding photograph cannot, in my view, be qualified as anything other than an artificial distinction based on insignificant differences and should not make any difference for the applicable rate in order not to infringe the principle of neutrality.

5.7. Purpose of the reduced rate for works of art

The recitals of the VAT Directive do not explain the reasons to permit Member States to apply the reduced rate to works of art. According to France, the objective of the reduced rate is to promote artistic production. The latter was the objective the ECJ established in the Raab case for the exemption of works of art from export duty, and seems to make sense from a cultural policy point of view. However, the AG and the ECJ defined the objective of the reduced VAT rate in a completely different way.

In the view of the AG (paragraph 42) the reduced rate for works of art is consistent with the favorable VAT treatment of goods and services designed to meet

33. Cedric Nunn, *The Wedding of Deborah Eksteen and Noel Norris Mangete, ZwaZulu-Natal* (Blood Relatives Series) 2001, <https://www.invaluable.com/artist/nunn-cedric-3ri9ypvap3/sold-at-auction-prices/> (accessed 14 January 2020).

a wide range of cultural and entertainment needs of consumers.[34] The AG deems it of relevance that none of these provisions mention any requirement relating to the artistic character or standard of the goods or services. In his view, the very broad formulation of those categories tends to suggest that the EU legislature wished to include all kinds of cultural and entertainment activities in them, without passing judgement on their artistic or intellectual standard. In his view, the objective underlying favorable tax treatment of these activities is therefore plainly not limited to the promotion of art in the noble sense of the term.

The ECJ took a different starting point where it referred to recital 51 of the VAT Directive (paragraph 38): "It is appropriate to adopt a Community taxation system to be applied to second-hand goods, works of art, antiques and collectors' items, with a view to preventing double taxation and the distortion of competition as between taxable persons." From this preamble, the Court derived that the aim of the reduced rate was to prevent double taxation and distortion of competition between taxable persons. Applying the reduced rate to all kinds of photographs that meet the requirements of point 7, is, according to the Court, consistent with this preamble insofar as it is avoided to assess the artistic merit of a photograph based on subjective and indeterminate criteria as this assessment bears the risk of distorting of competition.

Both the AG and the ECJ use very general sources to define the purpose of the very specific category of works of art. Their arguments are not convincing. Both the AG and the Court seem to disregard the fact that when the VAT Directive was negotiated between the Member States, many already had a value added, or sales tax that included a special provision for works of art. For example, the first sales tax that was introduced in the Netherlands in 1934,[35] included a reduced rate for works of art to support artists.[36] In 1938 this was replaced by an exemption for which 'protection of art' was given as an additional reason. Already then it was explicitly mentioned that this beneficial treatment should not apply to mass products. In 1948, works of art were excluded from the high rate for luxury articles because of their cultural significance and to help artists, given their weak

34. The mandatory exemption for the supply of certain cultural services and the supply of goods closely linked thereto of article 132(1)(n) VAT Directive and the permission to apply the reduced rate to the supply of books, newspapers and periodicals, to admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities, to reception of radio and television broadcasting services and to supply of services by writers, composers and performing artists, or of the royalties due to them (article 98 of the VAT Directive, read in conjunction with Annex III).
35. Wet van den 25sten October 1933, Staatsblad 546, tot heffing van eene omzetbelasting (Omzetbelastingwet 1933).
36. For an elaborate discussion and all references to sources I refer to S.J.C. Hemels, *Door de Muze omhelsd. Een Onderzoek naar de inzet van belastingsubsidies voor kunst en cultuur in Nederland* (WLP Nijmegen, 2005), pp. 221–228.

economic position and the nature of their work that does not in the first place have a commercial character. As mentioned, other Member States provided for similar benefits in their national legislation. It is to be expected that the reasons behind the national benefits for works of art inspired Member States to include these in the VAT Directive. In my view, given the lack of a reasoning for the inclusion of the reduced rate in the VAT Directive, the AG should at least have done some research into the reasons why Member States included such benefits in their legislation dating from before the VAT Directive. This research could then have been used by the ECJ to come to a better founded decision.

6. Conclusion

The Regards case leads to a strange result, infringes the principle of neutrality and distorts competition. Photographs that are clearly commercial products and not art based on objective criteria because they are sold at a relatively low price, are not shown in or sold to museums or art galleries and are only sold to the person commissioning the photograph, benefit from the reduced VAT rate for works of art. This infringes fiscal neutrality and distorts competition as two commercial portraits that are exactly the same and fulfill the same consumer need, a remembrance of loved ones or an important family event such as a wedding, are taxed differently depending on the artificial detail of the signature of the photographer. Furthermore, it also leads to a significant deviation between the 'real world' and VAT-reality, making VAT an imperfect reflection of the society it is bound to regulate.

Given the reluctance of the Court to come back on previous decisions, I do not have high hopes that this, in my view erroneous, case law will be redressed in the near future. I could very well understand if countries, because of the ridiculous effect of the Regards case and the resulting distortion of competition between wedding and portrait photographers, decide to no longer apply the reduced rate on any photograph any more. This would, in my view, infringe fiscal neutrality and distort the competition between art photographs and other two dimensional forms of art such as paintings and prints but is probably no problem for the ECJ. Given the current state of the case law the only way out of this, at least insofar as VAT is concerned, would be following the Danish way and abolish the reduced rate altogether.

The problem might also be solved - in a strange way -if the definitive VAT system would be introduced. The European Commission has proposed that in that case instead of a list with goods and services to which reduced rates can be applied, Annex III would be replaced by a negative list in Annex IIIa to which re-

duced rates cannot be applied.[37] According to the proposed article 98(3) reduced rates and exemptions may only benefit the final consumer and must be applied to pursue, in a consistent manner, an objective of general interest. However, such reduced rates may not be applied to goods and services set out in Annex IIIa. Paragraph 14 of this annex includes, without any exclusions, 'Supply of works of art'. The linked CPA-classification[38] codes include retail trade services of souvenirs and arts (47.00.69), retail trade services of, antiques (47.00.91), museum collections (91.02.2) and original works of painters, graphical artists and sculptors (90.03.13) which, according to the explanation includes paintings, drawings and pastels; original engravings, prints and lithographs; original sculptures and statuary, in any material and excludes statues, other than artistic originals. Based on the Raab case, photographs do not seem to be included in this list. Photographs seem to fall under CPA-classification 18.12.14 Printing services for books, maps, hydrographic or similar charts of all kinds, pictures, designs and photographs, postcards and CPA-classification 58.19.12 Printed pictures, designs and photographs. Neither of these are included in Annex IIIa, which, given the jurisprudence of the Court, would mean that all works of art would have to fall under the standard rate, but that Member States have the option to apply a reduced rate to art photographs. This would – in a very counter-intuitive way – solve the problem for art photographs but at the same time lead to a new infringement of fiscal neutrality and distortion of competition, but now the other way around as art photographs could be treated more beneficial than other works of art. The VAT would, in such case, still not reflect societal reality and cultural policy goals of Member States.

It is clear that the relation between VAT and art is problematic and that this is not likely to change in the future.

37. COM (2018) 20: Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of value added tax.
38. Classification of products by activity established under European Parliament and Council Regulation 451/2008/EC of 23 April 2008 establishing a new statistical classification of products by activity (CPA) and repealing Council Regulation (EEC) No 3696/93. O.J. 2008, L 145, p. 65). This can also be found on <https://ec.europa.eu/eurostat/ramon/index.cfm?TargetUrl=DSP_PUB_WELC> (accessed 14 January 2020).