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Topics: Legal Methods

C-238/22 *LATAM* vs C-180/22 *Mensing II*. Is the Court's approach to the relevance of the wording used in EU law provisions too flexible?

By Fabian Barth

It is well-established in the Court's case-law that the interpretation of a provision of EU law rests on three pillars: its wording, its context and the wider objective pursued by the rules of which it forms a part (see, for example, [C-336/03 *easyCar*](#), para 21). However, it is not always clear how they interact, and in particular how priority must be given if the latter two conflict with the former. By looking at two specific cases, namely [C-238/22 *LATAM*](#) and [C-180/22 *Mensing II*](#), it can be illustrated how this might sometimes lead to unforeseeable results, and potentially irrational distinctions.

Background to the cases

The legal framework within which *LATAM* and *Mensing II* had to be decided was very different: *LATAM* addresses air passenger rights, while *Mensing II* is a case concerning Value Added Tax (VAT). Yet, as will become apparent in the course of the next paragraphs, the legal problem of the cases, insofar as the principles of legislative interpretation are concerned, is strikingly similar: A literal interpretation of the legislation would have conflicted with what seemed systematically plausible. It is in that regard helpful to initially briefly summarise the issue to be determined by the Court, insofar as relevant.

LATAM

Regulation [No 261/2004](#) seeks to ensure a "high level of protection for passengers" in the field of air transport, and in particular to compensate them adequately for the

inconveniences caused by flight delays, denied boarding or cancellations (see First, Second and Twelfth recital thereof).

In line with these aims, under Article 4 of the Regulation, passengers who are denied boarding for a flight are entitled to certain amounts of compensation. Article 2(j) however makes this contingent upon the fulfilment of a further condition, specifically that the passenger must be not allowed to board the flight "although they have presented themselves for boarding".

Now, the critical issue in the case before the Court was that the passenger had been told well in advance by the airline that they would not be allowed to board the flight. The precise reason is not of further relevance for the present examination, suffice to say that the passenger was not to be blamed for the situation. Being however aware in advance that they would not be able to board the plane, the passenger for obvious reasons did not bother to come to the airport.

Accordingly, on a strict reading of the legislation, the passenger would not have been entitled to compensation – as the Court indeed found at para 30 of the judgment:

"[A] literal interpretation of Article 2(j) of Regulation No 261/2004 [...] suggests that a passenger can only be established to have been 'denied boarding' if that passenger presented him or herself for check-in."

Looking at the situation with common sense however, it would clearly run counter to the objective of the Regulation, namely to protect passengers, if they had to make an entirely pointless trip to the airport, or otherwise would effectively waive their right to compensation (particularly as they would also not be entitled to compensation under other provisions of the Regulation, since the flight had not been cancelled). Again the Court recognised this at para 36 of the judgment:

"On the contrary, an interpretation of Regulation No 261/2004 which, for the purpose of enabling passengers denied boarding to be compensated, relieves them of the obligation to present themselves for check-in, thereby sparing them an unnecessary formality, contributes to the attainment of that regulation's objective, that being to ensure a high level of protection for passengers."

Accordingly, it was clear that a literal interpretation would have conflicted with a purposive one: Under the former, the passenger was not entitled to compensation due to not making a trip to the airport in the knowledge that they would not fly anywhere – under the latter, compensation would need to be granted.

Finally, it is worth pointing out that the (systematically) undesirable result which would follow from a strict textual interpretation was, according to the Court, not intended or

envisaged by the EU legislature. This required some mental gymnastics, given that the Court had also found that the legislature had not thought about “pre-emptively denied boarding” at all (see para 34), but was ultimately justified on the basis that there was no “deliberate intention” to exclude such cases (para 35).

Mensing II

In order to avoid distortions of the free movement of goods and services, VAT law in the EU is highly harmonised (see Fourth Recital of Directive [2006/112/EC](#)). VAT is a broad consumption tax which, in principle, is to be levied on the consideration received for all goods or services supplied in the course of an economic activity (Article 2 of the Directive). The tax collected shall however not exceed an amount of VAT proportional to the value of final consumption (Article 1(2)). Under certain exceptional circumstances, such as the trading of second-hand goods, Directive 2006/112/EC envisages that this shall be achieved by virtue of the trader accounting for VAT only on his or her profit margin (Articles 312 et seq.). This is defined as the difference between the purchase price and the sales price of the underlying good (Article 315). The purchase price is deemed to include taxes:

“(1) ‘selling price’ means everything which constitutes the consideration obtained or to be obtained by the taxable dealer from the customer or from a third party, including subsidies directly linked to the transaction, taxes, [...]”

(2) ‘purchase price’ means everything which constitutes the consideration, for the purposes of point (1), obtained or to be obtained from the taxable dealer by his supplier.” – Directive 2006/112/EC, Article 312 (emphasis added)

Accordingly, VAT already paid by the trader to the person from whom they purchased the good reduces the trader’s margin, and hence the amount of VAT which they are liable to pay thereon, hence avoiding double-taxation.

Now, in *Mensing II*, the trader, Mr Mensing, found himself in a situation where he was economically in the same situation as someone who had paid VAT to the seller – however, his seller was in another EU country. As envisaged by the Directive, Mr Mensing did not pay VAT on the purchase price to the seller when purchasing the goods, but rather directly to the tax authorities (so-called intra-EU acquisition VAT). The same would have been true had Mr Mensing imported the goods from outside the EU – save that then Article 317 would have explicitly allowed him to reduce his profit margin by the tax already borne.

According to the strict wording of the law, the intra-EU acquisition tax was however neither an amount of money to be obtained *by the seller*, nor VAT paid on importation, hence Mr

Mensing would not be allowed to consider it as a reduction of his profit margin. This was confirmed by the Court at para 36:

“Second, it is common ground [...] that the literal interpretation of Articles 312 and 315 and of the first paragraph of Article 317 of the VAT Directive [...] leads to a differentiated tax burden on supplies in a Member State, depending on whether the work of art was the subject of such an intra-Community acquisition, was acquired by the taxable dealer in the territory of the same Member State or was imported from a third country.”

Systematically however, it is counterintuitive, and in fact irreconcilable with the free movement of goods, that Mr Mensing shall pay more tax simply because he purchased the goods from another EU state, as opposed to within the same state or from outside the EU. This was explicitly pointed out by the Court itself (see in particular para 36). Secondly, a literal application of the law also results in double-taxation, as Mr Mensing has to pay “VAT on the VAT”. This is once more against the explicit aim of the Directive – a circumstance which the Court duly acknowledged at para 33. So, in the overall scheme of things, it was clear, and the Court accepted, that it would make sense to allow Mr Mensing to deduct the acquisition VAT when calculating his profit margin, in the same way as he would have been allowed to do so had he paid the same amount to his supplier or as import VAT.

Finally, it again appears that the arguably illogical and therefore undesirable result arising from a strict literal interpretation does not emerge from an explicit legislative intention. In fact, it was only following the Court’s judgment in [C-264/17 *Mensing I*](#) that it became clear that the margin scheme applied by Mr Mensing would also cover acquisitions from other EU states.

Common Features – Different Outcomes

Notwithstanding their different thematic background, as indicated at the start, striking parallels between the two cases can be ascertained: Firstly, the underlying wording in the legislation is both times reasonably clear, and if a literal interpretation was the only permissible approach, the legal issue could be resolved fairly quickly (in *LATAM*, this would *not* be in the passenger’s favour, while in *Mensing II*, it would *not* be in Mr Mensing’s favour). Secondly, a contextual and purposive application of the law would achieve precisely the opposite result than a literal one (in *LATAM*, it makes sense to grant the passenger a right for compensation, in *Mensing II* it makes sense not to double-tax Mr Mensing). Thirdly, neither the wording of the law, nor any other materials, support the conclusion that the EU legislature explicitly intended to create this outcome – it rather appears to arise “by accident”, the legislature had simply neglected to contemplate it.

It is important to point out that at least the first two features are neither simply the author's view, nor were they merely amongst the arguments put forward respectively by the parties. Rather, their existence was each time expressly recognised by the Court.

In the light of all the foregoing considerations, one may naively believe that the cases would be decided in the same manner: Either the Court cannot displace the clear and unambiguous wording, in which case both the passenger and Mr Mensing lose, or it can give priority to purposive considerations, and both win. Whatever the outcome, it would seem sensible that the two are tied – but *au contraire!*

In *LATAM*, the purpose of the provision prevailed, effectively displacing the wording of the law:

“[A literal] interpretation cannot, however, be accepted in a situation of pre-emptively denied boarding.” – para 31

“It thus follows from a contextual and teleological interpretation of Article 4(3) of Regulation No 261/2004, read in conjunction with Article 2(j) and Article 3(2) of that regulation, that a passenger is not required to present him or herself for check-in where an operating air carrier has informed him or her in advance that, against that passenger's will, it is going deny him or her boarding in respect of a flight for which that passenger has a confirmed reservation.” – para 38

In *Mensing II* on the other hand, the Court was happy to uphold a result it found admittedly illogical, by blaming the legislature:

“It is clear, however, that that situation [of a differentiated tax burden] results directly from the wording of the applicable provisions.” – para 37

“[The] Court cannot depart from the clear and precise wording of those provisions.” – para 40

This contrast is, at least *prima facie*, so hard to ignore that it begs the question: So, which one is it? In the following paragraphs, it shall therefore be examined whether objective reasons can justify the different outcomes.

Potential Justifications

It is normally fairly well-established that one should at least pause whenever reaching an interpretation of EU law that runs counter to its purpose and wider systematic considerations, since those considerations form a crucial pillar of legislative construction of EU law which is not subsidiary to the importance of the actual wording employed by the legislature.

Mensing II attempts to offer an explanation why it was justified to reach such a conclusion:

“[The] interpretation of a provision of EU law in the light of its context and aims cannot have the result of depriving the clear and precise wording of that provision of all effectiveness. Thus, where the meaning of a provision of EU law is absolutely plain from its very wording, the Court cannot depart from that interpretation.” – para 34

This can hardly be convincing. “Absolutely plain” would have been wording along the lines of “intra-EU acquisition VAT shall not be deducted from the margin”. Such a provision, illogical as it may be, would indeed be deprived of all effectiveness if the Court decided to simply ignore it. In reality however, the EU legislature simply did not address the situation before the Court in *Mensing II* when drafting Directive 2006/112/EC. It therefore remains fundamentally unclear which specific provision would be deprived of all effectiveness had the Court found in favour of Mr Mensing.

In any event, it seems very difficult to argue that the wording considered in *Mensing II* was more clear and unambiguous than the Regulation in *LATAM*. On the contrary, in the latter case there was a specific provision contradicting the (systematically) desired outcome, while in the former case the legislation was largely silent. Ultimately, in both cases the Court would have to disregard the wording of the law in a specific case, but would not effectively quash it, i.e., cases would remain where it still applied as drafted: In *LATAM*, the passenger still needs to present themselves at the airport where boarding is not pre-emptively denied. In *Mensing II*, there are still ample cases where “purchase price” under Article 312 of the Directive only covers amounts paid to the seller.

Other justifications could of course be contemplated: *Mensing II* concerned a tax intended to apply broadly on all transactions, so one might say “*in dubio pro fisco*” – while *LATAM* concerned a Regulation intended to provide sweeping protection for consumers, so one could argue “*in dubio pro cive*”. Really convincing however looks different. Instead of putting forward further half-hearted attempts at making sense of it all, it might be more productive to discuss which approach is preferable going forward.

The Preferable Approach

There is plenty of literature discussing the benefits of textual methods (usually legal certainty being one), and those of more contextual or purposive nature (more sensible law). The current President of the CJEU, Koen Lenaerts, has released a number of publications on the issue (see for example [here](#)). And yet, after all that has been published, if one reads *LATAM* and *Mensing II* one after the other, it is hard not to be reminded of a famous quote in Goethe’s *Faust*: “And here I am, for all my lore, the wretched fool I was before”.

While it would not be appropriate to discuss the complex matter of benefits of different interpretative methods in the context of a blog post, there is ample authority for the proposition that a pure textual interpretation of EU law would not do justice to its character as a body of law ultimately based on treaties. Indeed, *Mensing II* and *LATAM* show why reliance on the literal meaning of EU law instruments can result in unsatisfying outcomes. By contrast, sweeping disregard of legislative wording can at times border a judicial coup d'état.

As long as several methods go hand in hand, it is however necessary that the Court clearly explains when which one is appropriate. Otherwise, there is a risk that the Court has virtually unlimited discretion where the wording of a provision and its context or purpose are in conflict: It is effectively free to decide the case as it sees fits, while placing in its judgment either more emphasis on the wording (as in *Mensing II*) or alternatively on the purpose (as in *LATAM*), depending on which of them conveniently happens to better support the decision it has reached. If that was indeed so, judgments would become arbitrary and unforeseeable, hence undermining legal certainty as a general principle of EU law.

That being said, in direct comparison, perhaps the judgment *Mensing II* deserves more criticism than *LATAM*. What happened in the latter case is not unusual for the Court, while, by contrast, it is clear from a consideration of precedent that cases where the Court alleges the meaning of a provision to be "absolutely plain from its very wording" are a tiny minority. In fact, it [appears](#) that the Court availed itself of this precise terminology in a mere seven judgments so far. While there is nothing wrong with this doctrine forming part of the interpretative principles under EU law, where the Court's judgment results in an outcome that is clearly unsystematic, it owes a very clear explanation as to why it could not depart from the legislative wording to achieve a better result.

In order to avoid the impression that the Court can and will arbitrarily brush purposive, teleological and contextual considerations aside, and might simply resort to a strict literal interpretation whenever it feels like it, three aspects should be clearly explained in its reasoning: (i) Why the Court considers the meaning of the legislative language to leave no room for interpretation, specifying the precise provision and terms relied upon, as well as their effect; (ii) why it is necessary to stick to the wording (e.g., a provision would otherwise become an entirely hollow shell that *never* applies) and (iii) why the consequential violation of the underlying systematic principles, and the respective party's interest to be subject to a *sensible* (as opposed to literal) application of the law, is appropriate and proportionate.

Disappointingly, *Mensing II* does not even remotely come close to meeting even one out of the three.

The Court should therefore be encouraged to clarify the interaction between textual or literal interpretative methods on the one hand, and contextual and/or purposive interpretation on the other hand, in future case-law.