

FLEMISH LANGUAGE REQUIREMENTS FOR CROSS-BORDER INVOICES INFRINGE PRINCIPLE OF FREE MOVEMENT OF GOODS

On 21 June 2016, the Grand Chamber of the European Court of Justice (the “ECJ”) ruled that the Flemish Language Decree restricts the Free Movement of Goods in cross-border transactions beyond what is strictly necessary.

Pursuant to the Flemish Language Decree of 1973, all *company acts and documents prescribed by law* of undertakings having a place of business in Flanders must be drawn up in Dutch, under penalty of nullity. This also means that an invoice issued in any other language will be null and void, even if it is addressed to a foreign undertaking.

Court ruling

According to its judgment of 21 June 2016 (Case C-15/15), however, the ECJ ruled that the requirements of the Flemish Language Decree for invoices restrict the principle of free movement of goods in a disproportionate manner for cross-border transactions.

The Court first accepted the justifications submitted by the Belgian government for the restrictive effects of the Flemish Language Decree:

- encouraging the use of an official language of the linguistic region concerned (i.e. Flemish regions); and
- ensuring the effectiveness of checks by the competent VAT authorities.

However, the Court subsequently ruled that the Flemish Language Decree was *not proportionate* to those objectives.

In particular, the Court explicitly referred to an alternative suggested by the Advocate General. According to the ECJ, legislation requiring the use of the official language for the drawing-up of invoices relating to cross-border transactions but, *in addition, permitting an authentic version of such invoices to be drawn up in a language known to the parties concerned*, would be *less prejudicial* to the free movement of goods.

Future amendments

Based on this ruling, enterprises must be enabled in the future to (also) draw up their invoices in the preferred language governing their contractual relationship. As a result, the Flemish Parliament will now have to adapt the Flemish Language Decree accordingly.

In 2013, the ECJ already ruled that certain provisions of the Flemish Language Decree infringed the European principle of the *Free Movement of Workers*. Following that judgment, the Flemish Language Decree now provides the possibility for undertakings to draft cross-border employment agreements in Dutch and in any other language.

During the plenary sitting of the Flemish Parliament on 22 June 2016, Mr. Muyters, the Flemish minister of economy, suggested to also apply the rules on cross-border employment to cross-border invoices. Under forthcoming legislation, an undertaking having a place of business in Flanders *would be thus permitted* to issue, in addition to the invoice in Dutch, a second invoice in one of the official languages of the EU (or EEA) Member States. In case of any inconsistency or discrepancy, the Dutch version would prevail.

Our view

It is uncertain whether the suggested approach will be able to remove all objections of the ECJ with respect to the current version of the Flemish Language Decree, and its compliance with EU law.

Under the current Flemish legislation, undertakings can already send a (non-official) translation, together with the original invoice in Dutch. The proposal of minister Muyters does not seem to give “authentic” value to the additional invoice. Indeed, he declared that in case of inconsistency or discrepancy, the Dutch version of the invoice would prevail.

As such, it is not clear what the future amendment will change in practice.

In general, we question the approach suggested by the ECJ and minister Muyters. The increased administrative and accounting obligations following a system of double invoices (whether authentic or unofficial translations) appears to be disproportionately burdensome.

Moreover, a system of “double invoices” would generate a risk for discrepancy between the invoice in Dutch and the invoice in the chosen language. This may result in an increased risk of non-payments, exactly the risk such legislation intends to avoid.

Finally, in our view it should be examined whether it is not appropriate to introduce a general solution for the concerns of the ECJ with respect to the entire scope of the Flemish Language Decree: i.e. *all* acts and documents prescribed by law, instead of just invoices.

The requirement to draw up commercial and company documents in Dutch shall always constitute a restriction on cross-border trade to some extent. In the absence of a general solution, the conformity of the Flemish Language Decree with EU law in respect of “corporate” documents other than cross-border employment agreements or invoices, may be challenged in the near future.