Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 6 September 2018 [1]

Case C-531/17

Vetsch Int. Transporte GmbH,
Third party:
Zollamt Feldkirch Wolfurt

(Request for a preliminary ruling
from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Request for a preliminary ruling — Common system of value added tax — Exemption from tax in the case of import and subsequent intra-Community supply — Refusal of exemption for the import as a result of subsequent fraudulent evasion of VAT by the purchaser in respect of the imported goods — Tax liability of the declarant of import VAT (as representative of the importer) — 'Infection' by subsequent fraudulent intent)

I. Introduction

1. Two Bulgarian undertakings purchased perfumery articles in Switzerland, imported them in free circulation to Austria through a third party and then transferred them on to Bulgaria. This was all properly done. Only in Bulgaria did someone evidently 'forget' duly to declare the taxable resale and to pay VAT to Bulgaria. Consequently, the Court is required once again to deal with the consequences of a VAT fraud.

2. The Court now has an abundant case-law regarding the 'possible sanctions' available to tax authorities in the event of VAT fraud. According to that case-law, a taxable person who knew or should have known [2] that he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the VAT Directive, be regarded as a participant in that fraud. [3] This requires the Member States to refuse the taxable person exemption [4] (where he is the supplier) or deduction of VAT (where he is the recipient). [5]

1 Original language: German.

2 In some earlier decisions the Court still used the wording 'could not know' (see judgment of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 60)). However, this excessively broad wording, stemming solely from the question referred, now seems to have been rightly abandoned.

3 Judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 94); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 48); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 27); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 54); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 39); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 56).

4 See judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 94); of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 42); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 54); and of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 42).

5 See judgments of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 47); of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 26); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 37); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraphs 59 and 61).

3. This wording used by the Court requires further clarification. It is uncertain, for example, whether a taxable person may be refused both exemption of his output and deduction of his inputs. This would amount to *double taxation* of a single transaction for a single person. In addition, it is necessary to clarify the criteria governing the time from which a transaction is *connected* with fraudulent evasion of VAT.

4. Exceptionally, the present case does not concern a conventional supply chain, but an import with a subsequent intra-Community transfer by the purchaser. This produces two specific features. First, the question arises whether a VAT fraud at the end of a supply, which is planned and carried out only later, also 'infects' the preceding intra-Community transfer. This would have the 'benefit', from a fiscal point of view, that the tax revenue can be multiplied (in this case quadrupled[6]) where VAT fraud is discovered.

5. Second, the person liable for payment of import VAT in the present case is an outside third party, namely the declarant of the import. It is neither involved in the supply nor had knowledge of the subsequent VAT fraud by its customer. Nevertheless, according to the Austrian tax authorities, the fraud by the recipient would mean that exemption of the import for the declarant would also not be applicable.

6. This request for a preliminary ruling thus gives the Court an opportunity to clarify its case-law on 'transactions vitiated by fraud' where a third party is involved (here the declarant as representative of the importer). Furthermore, the Court will also be able to develop further its case-law in respect of a fraudulent intention which is adopted only subsequently.

II. Legal framework

A. EU law

7. The framework of the case in EU law is formed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[7] ('the VAT Directive').

8. Article 143(1)(d) of that directive provides:

'1. Member States shall exempt the following transactions: …

(d) the importation of goods dispatched or transported from a third territory or a third country into a Member State other than that in which the dispatch or transport of the goods ends, where the supply of such goods by the importer designated or recognised under Article 201 as liable for payment of VAT is exempt under Article 138; …'

9. Article 138(1) of the VAT Directive states:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

6 The Republic of Austria could impose import VAT and at the same time refuse exemption for the transfer in Austria. The Republic of Bulgaria could in turn refuse deduction of VAT from the declared intra-Community acquisition and at the same time impose tax on the supply in Bulgaria.

7 OJ 2006 L 347, p. 1.

10. Article 17(1) of the VAT Directive provides:

'The transfer by a taxable person of goods forming part of his business assets to another Member State shall be treated as a supply of goods for consideration. "Transfer to another Member State" shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable person, for the purposes of his business, to a destination outside the territory of the Member State in which the property is located, but within the Community.'

11. Article 201 of the VAT Directive reads as follows:

'On importation, VAT shall be payable by any person or persons designated or recognised as liable by the Member State of importation.'

B. Austrian law

12. The provisions of the VAT Directive were transposed into Austrian law in the Umsatzsteuergesetz 1994 (1994 Law on turnover tax).[8] Under Article 6 of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt, Annex Internal Market), the importation of goods used by the declarant following importation directly for making intra-Community supplies is exempt; the declarant must provide evidence in the accounts that the conditions laid down in Article 7 of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt) are met.

13. Under the second sentence of Article 6(3) of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt), exemption is applicable only where the person for whose undertaking the goods have been imported makes the subsequent intra-Community supply. Under Article 6(1) of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt), intra-Community supplies are exempt.

14. Article 7(2)(1) of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt) provides that the transfer of goods treated as a supply within the meaning of Article 3(1)(1) of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt) is also considered an intra-Community supply.

15. Under Article 3(1)(1) of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt), the transfer of goods forming part of business assets from national territory to another part of the Community by a trader in order to be disposed of by it, other than for use only on a temporary basis — defined in further detail — is to be treated as a supply for consideration, even where the trader imported the goods into national territory. The trader is to be regarded as a supplier.

16. Under Paragraph 26(1) of the Umsatzsteuergesetz 1994, the legal provisions governing customs duties apply *mutatis mutandis* to import turnover tax, with some exceptions which are not relevant in the case to which the appeal on a point of law relates. Paragraph 71a of the Zollrechts-Durchführungsgesetz (Law on the implementation of customs law)[9] provides that in cases of exemption from import turnover tax under Article 6(3) of the Umsatzsteuergesetz 1994 (Anhang Binnenmarkt) the declarant is liable for an import turnover tax debt incurred pursuant to Article 204(1) of the Zollkodex (Customs Code) even where he may not already be a debtor under Article 204(3) of the Zollkodex.

8 For declarations made before 31 December 2010 still as amended by Bundesgesetz BGBl. No 756/1996, for declarations accepted subsequently as amended by the Abgabenänderungsgesetz 2010 (2010 Tax Amendment Law), BGBl. I No 34.

9 In the version amended by the third Zollrechts-Durchführungsgesetz-Novelle (Law amending the Law on the implementation of customs law, BGBI. I No 13/1998), which is still applicable in the case to which the appeal on a point of law relates.

III. Main proceedings

17. Two Bulgarian undertakings (B and K) purchased goods from an undertaking in Switzerland and were given the right of disposal over the goods in Switzerland. The goods were imported into Austria for B and K by Vetsch Int. Transporte GmbH ('Vetsch'), which is established in Austria and operates inter alia as a declarant. The goods were then to be transported on to B and K in Bulgaria by a forwarder engaged by B and K, to which Vetsch submitted the relevant consignment notes.

18. In the period from 10 December 2010 to 5 July 2011, Vetsch submitted declarations for release of the goods from Switzerland for free circulation and for consumption to an Austrian Customs Office as the indirect representative of the Bulgarian recipients in question under 'customs procedure 42'.[10] At the same time, in each declaration it applied for exemption from import turnover tax under Article 6(3) of the Austrian Umsatzsteuergesetz 1994 (Anhang Binnenmarkt). That application was granted. It is not evident from the order for reference that Vetsch infringed the statutory obligations of proof.

19. In three cases Vetsch represented the Bulgarian trader K and in two cases the Bulgarian trader B. On the basis of the application, the goods were released for free circulation and for consumption without import turnover taxes being entered in the accounts. Subsequently, a forwarder transferred the goods to Bulgaria for the purchaser.

20. B and K duly declared and paid tax on the intra-Community transfer from Austria to Bulgaria both in Austria and in Bulgaria. According to the referring court, the goods can be considered to have entered Bulgaria and B and K had the right of disposal over the goods for the whole time during transport.

21. The two Bulgarian undertakings B and K then sold on the goods (evidently subject to tax). However, they did not declare that sale but instead declared an exempt intra-Community supply to Vetsch, which had previously acted as intermediary for the customs declaration. It is common ground, however, that such a supply never took place. According to the referring court, B and K are thus responsible for tax evasion in Bulgaria. There is nothing in the request for a preliminary ruling to suggest that Vetsch was involved in that VAT fraud in any way.

22. By decision of 6 September 2011, Vetsch was found liable for payment of import turnover tax because the conditions for exemption claimed in the abovementioned declarations were not met in each case. Under Paragraph 71a of the Zollrechts-Durchführungsgesetz, the declarant was also liable for payment of import turnover tax.

23. By document of 15 September 2011, Vetsch lodged an appeal against that decision with the Customs Office, which dismissed the appeal on 31 January 2012. Vetsch brought an action against that decision by document of 2 March 2012. By judgment of 30 March 2016, the Bundesfinanzgericht (Federal Finance Court, Austria) dismissed the action as unfounded.

24. On the basis of the Court's case-law on 'transactions vitiated by fraud', exemption of the intra-Community supply (to be precise the intra-Community transfer) was also to be refused in Austria, in the view of the Bundesfinanzgericht, (Federal Finance Court) because of the subsequent tax evasion by the Bulgarian undertakings B and K. One of the conditions for exemption from import turnover tax was therefore also not met because this in turn required the existence of an exempt supply following importation.

10 See also, in a similar case, judgment of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473) and the more detailed explanations of 'customs procedure 42' in the Opinion of Advocate General Mengozzi in *Enteco Baltic* (C-108/17, EU:C:2018:215, point 20, footnote 4).

25. Vetsch brought an appeal on a point of law against the judgment of the Bundesfinanzgericht (Federal Finance Court), on which the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) is now required to rule.

IV. Request for a preliminary ruling and procedure before the Court

26. By decision of 29 June 2017, received on 8 September 2017, the Verwaltungsgerichtshof (Supreme Administrative Court) referred the following questions to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'(1) Is the exemption under Article 138 of Directive 2006/112/EC for an intra-Community transfer from a Member State to be refused where the taxable person carrying out that transfer in another Member State does declare in the other Member State the intra-Community acquisition linked to the intra-Community transfer, but commits tax evasion in connection with a subsequent taxable transaction with the goods concerned in the other Member State by wrongfully declaring an exempt intra-Community supply from that other Member State?

(2) Is it relevant to the answer to Question 1 whether the taxable person had intended at the time of the intra-Community transfer to commit tax evasion in respect of a subsequent transaction with those goods?'

27. In the proceedings before the Court, Vetsch, the Republic of Austria, the Hellenic Republic and the European Commission submitted written observations and, except for the Hellenic Republic, took part in the hearing on 27 June 2018.

V. Assessment

A. Scope of the questions referred

28. The referring court expressly asks only about the conditions for refusal of exemption under Article 138 of the VAT Directive.[11] However, it is clear that in both questions it is essentially seeking to determine the scope of the refusal of exemption for an import at the level of the declarant of import VAT (Vetsch).

29. In essence, the referring court would thus like to know whether the declarant, as representative of the importer, can be refused exemption under Article 143(1)(d) of the VAT Directive where, after the transfer of the goods from the importing State to another Member State (country of destination), the recipient later commits tax evasion and the intention to do so was made only following the transfer. I therefore suggest examining the first question with regard to the conditions laid down in Article 143(1)(d) in conjunction with Article 138 and Article 201 of the VAT Directive.

30. The referring court has made clear that it was not found in the present case that the Bulgarian purchaser's intent to commit subsequent tax evasion already existed at the time of the intra-Community transfer. It must therefore be assumed that at the time of importation to Austria and transfer to Bulgaria there was not yet any fraudulent intent. This is important for the first question and, for that reason, the second question can also be answered within the framework of the first question.

11 This provision governs exemption of the intra-Community supply. An intra-Community transfer, as in the present case, is to be treated as a supply of goods for consideration under Article 17(1) of the directive.

B. Legal assessment

31. The objective conditions laid down in Articles 143 and 138 of the VAT Directive are all met. The evidence required by Article 143(2) of the VAT Directive (in the applicable version) can also be assumed to exist because the referring court has not expressed any doubts in this regard. It is also clear from the request for a preliminary ruling that the goods were imported to Austria and then transferred to Bulgaria. There are to date no indications to the contrary, only generalised presumptions on the part of the Customs Office and the Republic of Austria.

32. Should the tax authority, on the other hand, be able to prove [12] that the goods did not in fact enter another Member State, the objective conditions for exemption under Article 143 of the VAT Directive would not be met. The referring court would then have to address the question whether Vetsch was able to assume in good faith that the import was exempt. [13] It has not asked the Court about this, however.

33. It should be borne in mind that any assessment of the facts in the case is a matter for the national court or tribunal, which must determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling to enable it to give judgment and the relevance of the questions which it submits to the Court.

34. The refusal of exemption for the import would thus be possible under the abovementioned premiss (point 31) only in two ways. Vetsch would have to be refused exemption under Article 143 of the VAT Directive 'directly', according to the Court's case-law (see 1.), if it knew or should have known of the subsequent VAT fraud (see under 2.a). It is also conceivable that exemption for the import under Article 143 of the directive is connected with exemption for the subsequent intra-Community supply in such a way that a refusal of exemption for the intra-Community supply (or the intra-Community transfer) has a bearing on exemption for the import (see under 2.b and 2.c), even if Vetsch should not have known anything about the subsequent VAT fraud. To that end, however, the subsequent fraudulent intent of B and K would have to be able somehow to affect the assessment of the prior transfer (see under 2.d).

1. Refusal of exemption for the import as a fraud prevention measure

35. Preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive. In addition, no one may rely on provisions of EU law for abusive or fraudulent ends. [14]

36. However, the measures adopted by the Member States in this regard must not go beyond what is necessary to achieve the objectives pursued. In particular, they cannot be used in such a way that they would have the effect of undermining the neutrality of VAT. [15] On several occasions the Court has held that the authorities may not oblige a taxable person to undertake complex and far-reaching checks as to that person's supplier, thereby de facto transferring their own investigative tasks to that person. [16]

12 The Court has already rejected a duty for the taxable person to satisfy himself that the goods transported by the purchaser actually entered the destination country — see judgment of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 40 et seq.). See also, recently, judgment of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 67 et seq.).

13 See the Court's case-law in this regard: judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 95 et seq.); of 14 June 2017, *Santogal M-Comércio e Reparação de Automóveis* (C-26/16, EU:C:2017:453, paragraph 74 et seq.); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 47 et seq.); and of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 68).

14 Judgments of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 43); of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 42); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 54).

15 Judgment of 19 October 2017; *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 50). See also, to that effect, judgments of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 52), and of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 57).

16 See, to that effect, judgments of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 51); of 31 January 2013, *Stroy trans* (C-642/11, EU:C:2013:54, paragraph 50); and of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 65).

37. By contrast, it is not contrary to EU law to require a trader to take every step which could reasonably be required of him to satisfy himself that the transaction which he is carrying out does not result in his participation in tax evasion. [17]

38. In this regard, it is possible to refuse deduction or exemption not only where tax fraud is committed by the taxable person himself, but also where a taxable person knew, or should have known, that, by his purchase, he was taking part in a transaction connected with VAT fraud. [18] In such circumstances, the taxable person concerned must, for the purposes of VAT, be regarded as a participant in such fraud, whether or not he profits from the resale of the goods or the use of the services in the context of the taxable transactions subsequently carried out by him. [19]

2. Refusal of exemption for the import at the level of the representative of the importer

(a) Direct refusal of exemption for the import?

39. This case-law in connection with fraud relates to both the input side and the output side of a transaction. It thus allows both refusal of exemption [20] and refusal of deduction, [21] potentially for one and the same person. The tax revenue would increase as the supply chain grows longer and more persons are involved.

40. In the present case, too, the Republic of Austria imposes import VAT on Vetsch and can at the same time refuse exemption for the transfer in Austria for B and K. The Republic of Bulgaria, for its part, can refuse deduction for K and B in respect of the declared intra-Community acquisition and at the same time impose tax on the supply in Bulgaria. This would quadruple the tax revenue for a single supply. As the Commission rightly submits, however, the fiscal damage from loss of VAT occurs only once, in Bulgaria.

41. The Court has not been required thus far to decide whether such a multiple tax burden on a person is compatible with the principle of neutrality [22] and proportionate having regard to the aim of preventing VAT fraud. Nor has it had to take a position on potential problems in relation to the *ne bis in idem* principle. [23] Because of the questions referred for a preliminary ruling, the Court has thus far only ever dealt with the consequences for one person or with regard to one transaction in isolation.

17 See, to that effect, judgments of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 52); of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 54); and of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraphs 65 and 68).

18 Judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 48).

19 Judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 94); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 48); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 27); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 39); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 56).

20 See judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 94); of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 42); and of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 54).

21 See judgments of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 47); of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 26); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 37); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraphs 59 and 61).

22 See judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); and of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57); and my Opinion in *Di Maura* (C-246/16, EU:C:2017:440, point 42).

23 Judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197); ECtHR, judgment of 18 May 2017, *Jóhannesson and others v. Iceland* (22007/11); and judgment of 15 November 2016, *A and B v. Norway* (24130/11 and 29758/11). See also Kokott, J., 'Bedeutung und Wirkungen deutscher und europäischer Grundrechte im Steuerstrafrecht und Steuerstrafverfahren', *NZWiSt* 2017, 409 (414 et seq.).

42. The present case could give rise to a general approach. However, in this case Vetsch cannot be criticised, as declarant of import VAT, on the ground that it should have known that it was somehow assisting its customer in a planned VAT fraud in Bulgaria. Consequently, the conditions developed by the Court for the direct limitation of exemption are not met in this case.

43. As the Customs Office asserted when questioned by the Court at the hearing, such a criticism also cannot be raised, for example, on account of the mere use of a special customs procedure provided by the Member State (here customs procedure 42). If that procedure were in fact particularly susceptible to fraud,[24] it is then the duty of the Member State to organise it differently or even to abolish it. However, a taxable person certainly cannot be retrospectively criticised solely for complying with the law. Accordingly, Vetsch may in principle 'rely' on exemption for the import.

(b) Link between exemption for the import and exemption for the subsequent intra-Community supply

44. Exemption for the import for Vetsch would thus be refused only if a refusal of exemption for the subsequent intra-Community supply also affected exemption under Article 143(1)(d) of the directive. This seems to be the reason why the referring court asks only about the conditions under Article 138 of the VAT Directive.

45. Accordingly, the point at issue is how the constituent element in Article 143(1)(d) of the VAT Directive, according to which the supply subsequent to import into another Member State 'is exempt under Article 138', is to be construed. Does exemption thus depend only on whether the conditions for a subsequent exempt intra-Community supply are met in the abstract? Or does the supplier (here the transferring Bulgarian undertakings B and K) also have to be able to 'rely' specifically on exemption?

46. In an abstract analysis, subjective intentions of a third party are irrelevant. In a specific analysis, on the other hand, it would additionally be required that the person for whom the declarant, as representative of the importer, handled the import can also rely on exemption for the subsequent intra-Community supply in a specific case. If the Bulgarian undertakings (B and K) are unable, on account of their subsequent VAT fraud, to rely on exemption for the intra-Community supply subsequent to import, exemption for the import for Vetsch under Article 143(1)(d) of the VAT Directive would also cease to apply.

47. The referring court has made clear that for a declarant of import VAT like Vetsch, which had no knowledge of the subsequent VAT fraud by its customer and is held liable, there is a special procedure by which remission of that tax can be claimed. However, remission of import VAT necessarily requires that it becomes chargeable with the result that this point must be examined first.

24 See, in this connection, the Press release of the European Court of Auditors of 12 December 2011 (available at http://europa.eu/rapid/press-release_ECA-11-47_en.doc).

(c) Abstract assessment of exemption for the transfer

48. It is uncertain whether EU law (in particular Article 201 of the VAT Directive) also permits the Member State to allow a VAT liability to arise in respect of a third party who is (jointly and severally) liable for tax only because the person actually liable for payment of VAT has committed tax evasion, about which the third party (here Vetsch) did not know or should not have known. This would be the effect if a link between exemption for the import and exemption for the subsequent intra-Community supply were accepted in a specific case. It would therefore amount to strict liability on the part of the third party, as provided for in customs law. [25]

49. On closer inspection of the Court's case-law, doubts do arise, however. First, the Court has ruled that the application of customs duties and the imposition of VAT are not comparable transactions. [26] Contrary to the suggestion made by the Customs Office at the hearing, the Court's determinations on customs law are not necessarily transposable to the interpretation of the VAT Directive. [27]

50. Second, the tax liability of the third party (here the declarant) in the present case is based on Article 201 of the VAT Directive and in any event constitutes interference with the freedom to conduct a business under Article 16 and possibly also with the right to property under Article 17 of the Charter of Fundamental Rights. The second sentence of Article 52(1) of the Charter requires in this regard that the interference is proportionate. Limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union. [28]

51. Against this background, it is incompatible with the VAT Directive 'to impose a penalty, in the form of refusing that right to a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier, or that another transaction forming part of the chain of supply prior or subsequent to that transaction carried out by the taxable person was vitiated by VAT fraud'. [29] This militates against a specific assessment of the constituent element 'is exempt under Article 138'.

52. A different interpretation is also precluded by the spirit and purpose of the link between exemption for the import and exemption for a subsequent intra-Community transfer.

53. The purpose of exemption under Article 143(1)(d) of the VAT Directive, [30] as the Commission rightly stated at the hearing, is simplification. Because of exemption for the import, deduction of import VAT otherwise incurred (see Article 168(e) of the VAT Directive), which would exist alternatively, can cease to apply. Cross-border movement of goods (here the import and subsequent intra-Community supply) is thus made easier for undertakings. This simplification purpose also suggests that preference should be given to an abstract approach to the exemption of the subsequent intra-Community supply.

25 See in particular judgments of 17 July 1997, *Pascoal & Filhos* (C-97/95, EU:C:1997:370, paragraph 61), and of 14 May 1996, *Faroe Seafood and Others* (C-153/94 and C-204/94, EU:C:1996:198, paragraph 114).

26 Judgment of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 56).

27 See my Opinion in *Teleos and Others* (C-409/04, EU:C:2007:7, point 80).

28 The Court applied this principle of proportionality even before the Charter entered into force; see judgment of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 58).

29 Judgments of 18 July 2013, *Evita-K* (C-78/12, EU:C:2013:486, paragraph 41); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 41); and of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 47). Similarly, see judgment of 12 January 2006, *Optigen and Others* (C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 55).

30 This point is left open in the judgment of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473), and the Opinion of Advocate General Mengozzi in *Enteco Baltic* (C-108/17, EU:C:2018:215).

54. Furthermore, on the basis of the Court's case-law regarding transactions vitiated by fraud the intra-Community supply does not cease to apply (the necessary conditions are still met). It merely means that the perpetrator of the fraud (or anyone who knew or should have known about the fraud) may not rely on the exemption which actually exists. [31]

55. The spirit and purpose underlying this case-law of the Court also militates in favour of an abstract approach. According to that case-law, deduction or exemption is refused only if and on the ground that in a specific case the undertaking concerned can be individually criticised (it knew about the fraud or failed to take the steps which could reasonably be required of it). Being subject to this criticism, the undertaking may no longer rely on rules that are favourable to it for tax purposes. [32] In this regard, the Court also ruled in the similar case *UAB 'Enteco Baltic'* that exemption under Article 143(1)(d) of the VAT Directive may not be refused if the purchaser committed a VAT fraud about which the importer should not have known. [33]

56. This must also hold good for another third party. If such a criticism also cannot be made against that third party, then it is not possible, in my view, to limit exemption under EU law for the declarant too (as representative of the importer), even if the transferor could not rely on exemption in the specific case.

57. Last but not least, the fundamental rights of the third party (see point 50) and the principle of proportionality also argue in favour of an abstract approach. It would be contrary to the principles of legal certainty and proportionality to make exemption for a taxable person dependent on the (subsequent) conduct of a third party, over which the taxable person has no influence (see point 51).

58. Because Vetsch (as declarant and representative of the importer) cannot be criticised in this regard, it is still also able to rely on exemption for the import. The situation may be different — subject to the abovementioned cumulation and overcompensation effect (see above, point 39 et seq.) — for B and K, which, for that reason, are possibly unable to rely on exemption for the import in Austria.

(d) In the alternative: specific assessment of exemption for the transfer

59. If, however, the Court were to conclude that exemption for the import in respect of the representative of the importer (here Vetsch) depends on whether the person making the subsequent intra-Community transfer (here B and K) is able to rely on exemption under Article 138 of the VAT Directive in a specific case, it must then be examined whether the relevant conditions are met.

60. B and K would have to be refused exemption for the intra-Community transfer, according to the Court's case-law, if they committed a tax fraud themselves or knew, or should have known, that they were taking part in a transaction connected with VAT fraud. [34] However, if the Bulgarian recipients had not planned a VAT fraud at the time of importation, according to the referring court, this cannot be claimed. Neither did they commit tax evasion at that time nor did they knowingly participate in tax evasion at that time.

31 See the wording adopted by the Court ('In that connection, the Court has held that EU law cannot be relied on for abusive or fraudulent ends') in the judgment of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 36 and the case-law cited), which goes back to the judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68).

32 I would like to leave open at this point the question whether exemption of the intra-Community supply and deduction of input tax are really privileges, as they are not intended to favour the owner, but are an expression of the legal principle and necessary conditions for the functioning of indirect taxation of consumption (here, at the place of destination). Systemic rules to implement a method of taxation would seem to be difficult to describe as privileges.

33 Judgment of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 100).

34 Judgments of 18 July 2013, *Evita-K* (C-78/12, EU:C:2013:486, paragraph 40), and of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraphs 38 and 39 and the case-law cited).

61. The crucial question is thus whether a subsequent change in the intention of the taxable person retroactively nullifies exemption (or the possibility of relying on exemption). I wish to reject this view for a number of reasons.

(1) Wording and scheme of the VAT Directive

62. First, subsequent changes in the intention of the taxable person do not in principle have retroactive effect in VAT law. This is shown, for example, by the Court's case-law on deduction. The right to deduct does not cease to apply retroactively, for instance, where planned commercial activity is abandoned before it has begun (unsuccessful undertaking). For costs incurred in preparation for an economic activity, deduction may be claimed even if the economic activity is not successfully taken up and the intended taxable transactions do not occur.[35] According to the Court's recent case-law, a modified assessment of the tax rate and a corresponding retrospective tax statement also do not result in retroactive deduction,[36] but deduction *ex nunc*.

63. Similarly, Article 63 and, for the transfer, Article 68 of the VAT Directive have regard to the time at which the supply was made for the purposes of determining the basis of assessment in a selective approach to the point when tax becomes chargeable. That time is thus crucial in assessing exemption, the place of supply or the tax rate. This was recently reiterated by the Court in *Kollroß and Wirtl*.[37] By the same token, the criteria for adjustment under Article 184 et seq. of the VAT Directive assume a correction *ex nunc* as a result of changed circumstances.

64. Lastly, VAT as an indirect tax is designed to be passed on to the contractual partner in civil law. This requires in principle that the VAT to be passed on is established at the time when the supply is made and not merely determinable retroactively.[38]

(2) The Court's case-law on 'transactions vitiated by fraud'

65. Furthermore, in its case-law the Court requires that the taxable person takes part in a transaction 'connected' with fraudulent evasion of VAT. If no VAT fraud was planned at the time of import or at the time of transfer, there can be no question of participation in a transaction connected with fraudulent evasion of VAT. At that time there is no connection with a (planned) fraudulent evasion of VAT in the absence of intent on the part of the perpetrator.

66. In addition, the Court's existing case-law on 'transactions vitiated by fraud' is manifestly geared to situations where — unlike in the present case — a VAT fraud was planned from the outset. It essentially relates to the area of organised (generally cross-border) crime.

67. The existence of a perpetrated or intended fraud, and thus fault in individual conduct at the time of the supply (here the transfer), constitutes a crucial element in refusing the perpetrator (and all 'accomplices', that is, anyone who knew or should have known about the fraud[39]) exemption and/or deduction.

35 Judgments of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 24); of 29 February 1996, *INZO* (C-110/94, EU:C:1996:67, paragraph 17); and of 22 October 2015, *Sveda* (C-126/14, EU:C:2015:712, paragraph 20).

36 Judgments of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 43), and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 50) (it was only following adjustment of the invoices that all the substantive and formal conditions for deduction of VAT were met). See also my Opinion in *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2017:927, point 53 et seq.).

37 Judgment of 31 May 2018, *Kollroß and Wirtl* (C-660/16 and C-661/16, EU:C:2018:372, paragraph 48).

38 Likewise rejecting such retroactive effect as a result of a subsequent fraud: judgment of 31 May 2018, *Kollroß and Wirtl* (C-660/16 and C-661/16, EU:C:2018:372, paragraph 48).

39 Judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 94); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 48); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 54); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 39); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 27); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 56).

(3) Adequate repair of damage in Bulgaria

68. Lastly, the fiscal damage from loss of VAT subsequently arising in Bulgaria was also compensated by a corresponding tax assessment and can be sanctioned under Bulgarian criminal law.

69. As the Commission has argued, a retroactive 'infection' of the transfer, which is exempt in Austria, is neither appropriate nor necessary (and thus not proportionate) for repairing damage arising in Bulgaria. As the Court has already stated elsewhere, according to the principle of territorial application, such revenues belong to the Member State in which final consumption occurred.[40] In this case, as the Commission has rightly stated, this was Bulgaria and not Austria.

70. Consequently, even in the case of a specific assessment of the exemption of the intra-Community transfer, there would be an exempt supply, with the result that the import by Vetsch is also exempt pursuant to Article 143(1)(d) of the VAT Directive and continues to be exempt despite the subsequent fraud by B and K.

VI. Conclusion

71. I therefore propose that the Court answer the two questions in the request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) together as follows:

Article 143(1)(d), in conjunction with Article 138, of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax is to be interpreted to the effect that the reference to exemption under Article 138 relates solely to its abstract existence. It is not therefore possible to refuse the declarant of import VAT exemption for the import where the recipient of the goods alone knew or should have known that, by the intra-Community transfer, he was taking part in a transaction connected with fraudulent evasion of VAT.

40 Judgment of 27 September 2007, *Collée* (C-146/05, EU:C:2007:549, paragraph 37).