Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 6 December 2018 [1]

Case C-566/17

Związek Gmin Zagłębia Miedziowego w Polkowicach
v
Szef Krajowej Administracji Skarbowej

(Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland))

(Reference for a preliminary ruling — Common system of value added tax — Right to deduct input tax incurred on supplies of goods and services used indissociably for the purpose of economic and non-economic activities — Determination of the deductible share of input tax — Principle of fiscal neutrality — Whether and to what extent calculation of input tax must be provided for by law — Absence of national rules on methods determining apportionment of input tax for goods and services used indissociably for the purpose of economic and non-economic activities)

1. The present request for a preliminary ruling arises in the context of a dispute concerning the scope of the right to deduct input VAT incurred on goods and services used indissociably by taxable persons for the purposes of both their economic and non-economic activities.

2. Whilst it appears to follow from the scheme of Directive 2006/112 [2] that that right can be claimed only in so far as the goods and services are used for the purpose of the former type of activity, that directive does not provide for methods or criteria for apportionment of input tax in such situations. The referring court seeks guidance on whether the fact that national law also lacks specific rules addressing that issue affects the extent to which a taxable person may exercise the right to deduct input VAT in relation to such goods and services. In particular, the question arises whether there is in EU law a general principle or a fundamental right that would preclude the national court in such circumstances from applying those limitations on the right to deduct in the case in the main proceedings.

Directive 2006/112

3. Article 9(1) of Directive 2006/112 defines 'taxable person' as 'any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity'. Pursuant to Article 13 of that directive, public bodies should not be regarded as taxable persons 'in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions'.

1 Original language: English.

2 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

4. Title X of Directive 2006/112 ('Deductions') is divided into several chapters. Article 168 in Chapter 1, which is entitled 'Origin and scope of right of deduction', provides that 'in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, [that] taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct … from the VAT which he is liable to pay: [3] (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person'. [4]

5. Within Chapter 2 ('Proportional deduction'), Article 173(1) provides that 'in the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible … and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible'. That article further specifies that 'the deductible proportion is to be determined in accordance with [the formula provided for in] Articles 174 and 175'. [5]

National law

Constitution of the Republic of Poland

6. In accordance with Article 217 of the Constitution of the Republic of Poland, measures relating to the imposition of taxes, including the determination of taxable persons, tax rates, as well as the rules for granting tax reliefs and remissions, together with the categories of taxable persons exempt from taxation should be provided by law.

Law on VAT

7. Directive 2006/112 was transposed into the Polish legal order by means of the Ustawa o podatku od towarów i usług (Law on tax on goods and services) of 11 March 2004, as amended. [6]

8. Article 15(6) of the Law on VAT provides that 'taxable persons' shall not include public authorities and the offices of such authorities as regards duties laid down by relevant provisions, for the accomplishment of which they have been appointed, with the exception of activities carried out under private law contracts.

9. Article 86(1) of the Law on VAT transposes Article 168 of Directive 2006/112 into the national legal order. It provides that '*in so far as* the goods and services are used to conduct taxable transactions [a] taxable person within the meaning of Article 15 shall have the right to deduct the amount of input tax from the amount of tax due …' (emphasis added).

10. Article 90(1) to (3) of the Law on VAT reflect Articles 173 to 175 of Directive 2006/112 in so far as those provisions govern the proportional deduction of VAT in the case of goods and services used by a taxable person both for economic activities in respect of which VAT is deductible and for those in respect of which VAT is not deductible.

3 The 'output VAT'.

4 The 'input VAT'.

5 Article 174 defines the elements to be included in the numerator and the denominator of the fraction that must be used to calculate the deductible proportion of the input VAT. Article 175 provides that the deductible proportion should be calculated or estimated on an annual basis provisionally by the taxable person on the basis of his own forecasts under the supervision of the tax authorities and should be adjusted during the following year when the exact proportion is known.

6 *Dziennik Ustaw* (Official Journal), 2011, No 177, item 1054 ('the Law on VAT').

11. As from 1 January 2016, paragraphs 2a to 2h were added to Article 86 of the Law on VAT. Those provisions insert a non-exhaustive list of methods that a taxable person may use for determining the deductible share of input VAT incurred on supplies used both for the purpose of that taxable person's economic and non-economic activities.

Facts, procedure and the question referred

12. Związek Gmin Zagłębia Miedziowego w Polkowicach ('the Local Government Association') is a public law entity to which several local authorities have conferred the task of carrying out their statutory duties regarding waste management in the geographical areas for which they are severally responsible. The Local Government Association receives a waste management fee for discharging those duties. Under national law the Local Government Association is not regarded as a taxable person in that respect and its activities are accordingly not subject to VAT.

13. Between 2013 and 2015, the Local Government Association provided additional services for payment consisting of making available and transporting containers for various types of waste. Supply of those services constitutes an economic activity for the purpose of Directive 2006/112. Some of those services are subject to VAT at different rates, whilst others are VAT-exempt.

14. During that period, the Local Government Association incurred capital and revenue expenditure. Some of that expenditure related to supplies made in relation to both its economic and non-economic activities.

15. The Local Government Association was in doubt as to how correctly to calculate the deductible share of input VAT levied on such supplies. It therefore requested the Szef Krajowej Administracji Skarbowej (Head of Fiscal Administration, Poland)[7] to give a ruling on its position under the VAT rules.

16. On 17 October 2016, the Head of Administration[8] ruled that to determine the deductible share of input tax, the Local Government Association should, first, determine the share of input tax connected with its economic activity, that is to say transactions liable to VAT or exempted from that tax and second since some of its activities were exempt from VAT, apply to the amount thus obtained the formula defined in Article 90 of the Law on VAT. The Head of Administration also held that it was the sole responsibility of the taxable person to select the method for calculation.

17. The Local Government Association contested that decision before the referring court. It argued that the Law on VAT does not provide for any initial apportionment of input VAT and that therefore its right to deduct that tax can be subject only to the application of the formula defined in Article 90 of the Law on VAT.

18. In that connection, the referring court states that at the material time there were no provisions in the national legal order laying down criteria or methods of calculation of the deductible share of input VAT incurred on supplies used indissociably both for the purpose of a taxable person's economic and non-economic activities. The referring court indicates that in case of legal persons who perform public law statutory duties, although only a fraction of such supplies effectively serves the purposes of economic activity whilst the remainder is used for activities which fall outwith the scope of Directive 2006/112, the absence of such rules led to an administrative practice recognising the right to deduct

7 The 'Head of Administration'.

8 My understanding is that that type of administrative act is, in essence, a formal statement by the authorities of their opinion as to the correct interpretation and application of a particular provision of tax legislation to the factual circumstances of a given taxable person. That procedure is provided for in Articles 14b to 14s of the Ordynacja podatkowa of 29 August 1997 (Law on procedure in tax matters), *Dziennik Ustaw*, 1997, No 137, item 926, as amended.

the entire input VAT incurred on such supplies.[9] The referring court adds that that practice was developed on the basis of the Naczelny Sąd Administracyjny's judgment (Supreme Administrative Court, Poland) of 24 October 2011[10] in conjunction with the principle, set out in Article 217 of the Constitution of the Republic of Poland, that the right to impose taxes and levies is the exclusive province of the legislature.

19. Against that background the referring court stayed the proceedings and referred the following question to this Court:

'Do Article 168(a) of Directive 2006/112 … and the principle of VAT neutrality preclude a national practice where the right is granted to a full deduction of input VAT in connection with the purchase of goods and services used both for the purposes of a taxable person's transactions falling within the scope of VAT (taxed and exempted) and falling outside the scope of VAT, owing to the absence in national law of methods and criteria for apportioning the input tax in relation to those types of transaction?'

20. The Local Government Association, the Republic of Poland and the Commission submitted written observations. At the hearing on 20 September 2018, all those parties together with the defendant in the proceedings before the referring court (the Head of Administration) made oral submissions.

Preliminary remarks

21. As I have explained above,[11] the principal statutory duty of the Local Government Association is the provision of services in the public interest. The referring court rightly points out that such activities do not constitute an economic activity within the meaning of Article 9 of Directive 2006/112 and fall outwith the scope of application of that directive. It follows that pursuant to Article 13 thereof the Local Government Association is not a taxable person in that respect.

22. It appears from the order for reference that only a residual share of the Local Government Association's activities is economic in nature within the meaning of Article 9(1) of Directive 2006/112 and that in consequence it is a taxable person for the purpose of that directive only in respect of the latter activities.

23. The Local Government Association collects *no output VAT* in connection with the services it supplies within its statutory public interest mission. Conversely, it has an obligation to add output VAT at the applicable rate to the price of the additional services it supplies to its clients and to collect that tax from them.

24. The suppliers of the Local Government Association levy *input VAT* at the applicable rates on the goods and services that the latter acquires, regardless of the purpose for which it subsequently uses those supplies. There, three categories of supplies can be distinguished: (i) supplies used exclusively for the purpose of economic activity; (ii) supplies used exclusively for the purpose of statutory public interest activity; and (iii) supplies used indissociably for the purpose of both types of activities.[12]

9 The 'right to full deduction'.

10 Case I FPS 9/10. The referring court stated that in that ruling, the Naczelny Sąd Administracyjny (Supreme Administrative Court) held that the formula laid down in Article 90 of the Law on VAT was *not* intended to apply to the input VAT incurred on supplies used indissociably both for the purpose of a taxable person's economic and non-economic activities. The referring court explained that in the grounds of that decision, the Naczelny Sąd Administracyjny (Supreme Administrative Court) stated that because the Polish legislature had omitted to lay down the methods and criteria for apportioning input VAT between transactions liable to VAT and transactions not liable to VAT, a taxable person has the right to full deduction of input VAT incurred on such supplies.

11 See points 12 to 14 above.

12 See point 14 above.

25. It is common ground in the main proceedings that input VAT levied on the first category of supplies *is fully deductible*, whilst input VAT levied on the second category of supplies *is not deductible*.

Assessment of the question referred

26. By its question, the referring court seeks guidance on the compatibility with EU law of the administrative practice of granting taxable persons exercising simultaneously a statutory public interest activity and an economic activity, such as the Local Government Association, the right to full deduction of input VAT in respect of supplies used indissociably both for the purpose of the taxable person's economic and non-economic activities (the third category referred to above).

27. The doubts of the referring court appear to arise from the absence of any provisions not only in the Law on VAT, but also in Directive 2006/112, dealing with this issue.

28. It is settled case-law that Directive 2006/112 does not harmonise the methods or criteria which the Member States are required to apply when adopting provisions permitting the apportionment of input VAT according to whether the underlying expenditure is used for economic activities or non-economic activities. [13]

29. In particular, the Court has held that the system of proportional deduction provided for in Articles 173 to 175 of Directive 2006/112 can be applied only to cases in which the goods and services are used by a taxable person to carry out both economic transactions which give rise to a right to deduct and those which do not. [14] It is therefore not intended to be applied in the context of input VAT on supplies used *indissociably* both for the purpose of a taxable person's economic and non-economic activities.

30. Out of respect for the residual competence of the Member States and for practical reasons related to the diversity and complexity of factual situations, which do not allow the Court to favour one method or formula over another, the Court has refused to substitute itself for the EU legislature and for the national authorities in order to determine a general method for calculating the proportion of economic activities to non-economic activities. [15]

31. In those circumstances, it is for the Member States to establish appropriate methods and criteria *consistent with the principles underlying* the common system of VAT to enable the taxable persons to make the necessary calculations. [16] Whilst the Member States are therefore under an obligation to establish such methods and criteria, they have a certain margin of discretion as regards those rules, [17] provided that they do not fail to have regard to the *aims* and *role* of Article 168 of Directive 2006/112 within the VAT scheme. [18]

13 Judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraph 33.

14 Judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 26. The Court has further explained that accordingly, in order not to compromise the objective of neutrality which the common system of VAT guarantees, transactions outside the scope of Directive 2006/112 which do not therefore give rise to a right to deduct must be excluded from the denominator of the fraction used to calculate the deductible share of input VAT under Article 173 (judgments of 29 April 2004, *EDM*, C-77/01, EU:C:2004:243, paragraph 54, and of 27 September 2001, *Cibo Participations*, C-16/00, EU:C:2001:495, paragraph 44).

15 Judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 32.

16 Judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraph 34.

17 Judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 27.

18 See, by analogy, judgment of 14 September 2006, *Wollny*, C-72/05, EU:C:2006:573, paragraph 28.

32. I shall therefore start my assessment by exploring the limits of that discretion. I shall do so in several stages: First, I shall examine whether Directive 2006/112 or the principle of fiscal neutrality preclude granting a taxable person the right to full deduction of input VAT incurred on supplies used indissociably both for the purpose of its economic and non-economic activities. If the answer to that question is affirmative, I shall then address the implications of that conclusion in terms of the discretion enjoyed by the Member States and the obligations of the national courts. Finally, I shall examine whether the Local Government Association may nevertheless rely on other provisions of Directive 2006/112 or on general principles of EU law to secure a right to full deduction.

Does Directive 2006/112 or the principle of fiscal neutrality preclude the right to full deduction?

33. I begin by recalling the basic characteristics of the VAT scheme as defined by Directive 2006/112.

34. The Court has consistently explained that the 'essential characteristics' of VAT are the following: (i) VAT applies generally to transactions (supply) relating to goods or services (principle of universality); (ii) it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; (iii) it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; and (iv) the amounts paid during the preceding stages of the production and distribution process are deducted from the VAT payable by a taxable person, with the result that that tax effectively applies, at any given stage, only to the value added at that stage and the final burden of that tax rests ultimately with the consumer, who has no right to deduct input VAT.[19] In economic terms, VAT is thus a general, multiple-stage, non-cumulative turnover tax.

Place of the right to deduct the input VAT in the common VAT scheme

35. The Court has consistently held that the right to deduct input VAT is an integral part of the VAT scheme and constitutes a fundamental principle underlying the common system of VAT.[20]

36. However, that right is not autonomous and thus should not be analysed in isolation.

37. First, the central feature of the VAT scheme is that each taxable person *collects VAT on behalf of the State* from its customers by charging it on the price of the goods and services supplied. That output VAT *is not the taxable person's property*: by definition, it has to be handed over to the public exchequer within specified time limits. Second, the taxable person has the right to limit the scope of that liability only if and in so far as he has previously paid input VAT to his suppliers, which they have included in the price of their supplies and which they have collected, likewise on behalf of the State.

38. That summarises the very essence of the right to deduct input VAT under Article 168 of Directive 2006/112. It could be said that whilst the principle of imposition is *primary*, the right to deduct is *ancillary* in nature.

39. It follows ineluctably that the right to deduct is meant *only* to relieve the taxable person, as tax collector on behalf of the State, of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT thus ensures that all such activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way (principle of fiscal neutrality).[21]

19 See, to that effect, for example, judgment of 3 October 2006, *Banca popolare di Cremona*, C-475/03, EU:C:2006:629, paragraph 28 and the case-law cited.

20 See, to that effect, judgment of 10 July 2008, *Sosnowska*, C-25/07, EU:C:2008:395, paragraphs 14 and 15.

21 Judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 23 and the case-law cited.

40. Furthermore, that right is subject to a number of conditions.

41. In particular, I observed in my Opinion in *Stradasfalti*[22] that the phrase '*in so far as* the goods and services are used for the purposes of … taxable transactions' in Article 17(2) of the Sixth Directive[23] (the predecessor of Directive 2006/112) constitutes a limitation on the scope of that right. Several years later, the Court explicitly confirmed my position by holding that it is apparent from the introductory part of Article 168 of Directive 2006/112, which lays down the requirements for the origin and scope of the right to deduct, that only operations subject to output tax may give rise to the right to deduct the VAT levied on the purchase of goods and services used to perform those operations.[24] It follows that the right to deduct presupposes that the taxable person has itself made taxable supplies within its economic activity.

42. It also follows that the event giving rise to that right is not the moment when the input VAT is levied, but the moment when the taxable person uses the input supplies for the purpose of its economic activity. Where goods or services are used for the purposes of transactions that are taxable as outputs, deduction of the input tax on them becomes necessary in order to avoid double taxation.[25]

43. The Court has further consistently held that the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct. Thus, for VAT to be deductible, the input transactions must have a *direct and immediate link* with the output transactions giving rise to a right of deduction.[26] Where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, the taxable person has a right to deduct the input VAT provided that the costs of that transaction form part of general costs and, as such, constitute one of the components of the price of the goods or services which that taxable person itself supplies. Such costs do have a direct and immediate link with the taxable person's economic activity *as a whole*.[27]

44. Conversely, as soon as the direct and immediate link between the input expenditure incurred and the economic activities subsequently carried out by the taxable person is severed, no input VAT can be deducted. The case-law of the Court makes it clear that this is in particular the case where goods or services acquired by a taxable person are used for the purposes of transactions that are either exempt or do not fall within the scope of VAT. In those two situations, no output tax is collected on those transactions and, accordingly, no input tax may be deducted.[28]

45. The very structure of the common VAT scheme implies that the deduction of input taxes is linked to the collection of output taxes.[29] I therefore agree entirely with Advocate General Kokott that a taxable person may not assert the right to deduct input tax without paying tax on the output transactions. In the light of the logic of Directive 2006/112, such an 'asymmetrical reliance' is as a matter of principle excluded.[30]

22 Opinion in C-228/05, EU:C:2006:425, points 82 and 83 (emphasis added).

23 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) (now Article 168 of Directive 2006/112).

24 Judgment of 28 November 2013, *MDDP*, C-319/12, EU:C:2013:778, paragraph 42.

25 See, to that effect, judgment of 30 March 2006, *Uudenkaupungin kaupunki*, C-184/04, EU:C:2006:214, paragraph 24, and order of 5 June 2014, *Gmina Międzyzdroje*, C-500/13, EU:C:2014:1750, paragraph 19.

26 Judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 23.

27 Judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 24.

28 Judgments of 16 February 2012, *Eon Aset Menidjmunt*, C-118/11, EU:C:2012:97, paragraph 44, and of 22 October 2015, *Sveda*, C-126/14, EU:C:2015:712, paragraph 32.

29 Judgment of 16 June 2016, *Mateusiak*, C-229/15, EU:C:2016:454, paragraph 24.

30 See her Opinions in *VDP Dental Laboratory*, C-401/05, EU:C:2006:537, points 95 to 97, and in *MDDP*, C-319/12, EU:C:2013:421, points 38 and 39.

46. It is thus entirely clear to me that the Local Government Association cannot rely on Directive 2006/112 in order to obtain the right to full deduction of input VAT levied on the supplies made indissociably both for the purpose of its non-economic activities and its economic activities.

47. Although such supplies do present a link with the economic activity of the Local Government Association, only a small fraction of each of those supplies has actually been used for the purpose of activity on which the Local Government Association levied output VAT.

48. Clearly, the Local Government Association should be allowed to deduct the corresponding *fraction* of input VAT in accordance with Article 168(a) of Directive 2006/112. However, it would run counter to the principle of symmetry referred to above if the Local Government Association could also deduct the remainder of the input VAT, which does not correspond to any output VAT.

49. Advocate General Szpunar analysed the implications of granting such a right in his Opinion in *Český rozhlas*.[31] He concluded that to do so would be contrary to the logic of the common VAT system and, more specifically, to the categorical and clear wording of Article 168 of Directive 2006/112. That analysis is transposable here.

50. Thus, if the Local Government Association were entitled to deduct its entire input VAT, that amount would necessarily exceed the output VAT it collected by a considerable margin. The Local Government Association would therefore be entitled to obtain a refund of that difference by virtue of Article 183 of Directive 2006/112.[32] As a consequence of that refund, both its economic activity and a part of its public activity would be entirely relieved from VAT, even though in respect of that latter activity, the Local Government Association finds itself at the end of the supply chain and, accordingly, by virtue of Article 13 of Directive 2006/112, its position is assimilated to that of a final consumer. Given that no output VAT is passed on to the clients of the Local Government Association in the framework of its statutory activity, the share of input supplies used for the purpose of that activity would remain untaxed throughout the chain of supply. In other words, it would create a *ratione personae* exemption for a certain category of supplies to taxable persons exercising both non-taxable and taxable activities. Such an exception is unknown to Directive 2006/112. It would also infringe the principle of *universality* of VAT and the very logic of the VAT scheme.[33]

51. Based on the foregoing, I reach the interim conclusion that Article 168 of Directive 2006/112 manifestly precludes granting to taxable persons exercising both non-taxable and taxable activities the right to full deduction of input VAT incurred on supplies used indissociably for both those types of activities.

Principle of fiscal neutrality

52. In its submissions in support of its claim to the right to full deduction, the Local Government Association relies on the principle of fiscal neutrality, which it sees as a fundamental right of taxable persons. It argues that any limitations to that right must be interpreted strictly.

31 C-11/15, EU:C:2016:181, point 51.

32 That provision provides that where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period. Here, the excess would be necessarily structural and even if carried forward, would only cumulate over time. Ultimately this imbalance necessarily leads to an effective refund.

33 Opinion of Advocate General Szpunar in *Český rozhlas*, C-11/15, EU:C:2016:181, EU:C:2016:181, point 51.

53. It is true that the principle of fiscal neutrality is inherent in the common system of VAT [34] and that it is a fundamental principle underlying that system. [35] However, I am not persuaded by the Local Government Association's arguments.

54. *First*, it is certainly correct that the principle of fiscal neutrality was intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment. [36] However, whilst that latter principle has constitutional status under EU law, the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary law and may, consequently, be the subject, in such a legislative measure, of detailed rules. [37] Moreover, as the Court has already held, the principle of fiscal neutrality is not a rule of primary law but a principle of interpretation, to be applied concurrently with other coexisting principles of the VAT scheme. [38] Contrary to what the Local Government Association asserts, therefore no fundamental right of a taxable person can be derived from that principle.

55. *Second*, the Court has held that the principle of fiscal neutrality does not apply to transactions falling outwith the scope of the VAT scheme. Thus, in the face of an unambiguous limitation in the introductory phrase in Article 168 of Directive 2006/112, it does not allow the scope of deduction from the output VAT to be extended beyond transactions used strictly for the purposes of a taxable person's economic activity. [39]

56. Under the guise of calling for respect for the principle of strict interpretation of exceptions to the right to deduct, the Local Government Association puts forward an interpretation that leads to eliminating any such limitations and that — in my opinion — is manifestly *contra legem*.

57. To allow a taxable person exercising both non-taxable and taxable activities to rely on a right to full deduction would grant it an advantage in respect of both its input transactions (the right to deduct input VAT) and output transactions (the right not to charge the output VAT). Obviously, that would render the economic effect of VAT *not neutral*, but *positive* (in its favour). The position of the Local Government Association would therefore be improved beyond the level that would result from applying the principle of fiscal neutrality.

58. The result would be to grant such a taxable person more favourable treatment than other categories of economic operators in comparable situations and would thus entail a *distortion of competition* within the internal market, which the principle of fiscal neutrality precisely seeks to avoid. [40] It would also result in granting an *unjustified economic advantage* to such a taxable person by comparison to a final consumer. [41]

59. If such an interpretation were to be followed, it would be enough for an entity falling within the scope of Article 13 of Directive 2006/112 to engage in an economic activity, even on a very marginal scale — such as for example, a municipality making available a soft-drinks vending machine in the town hall or selling Christmas trees to local residents — to be able to deduct the totality of its input VAT incurred on supplies used indissociably for both its public and economic activities. Such an impermissible advantage could not have been intended by the EU legislature.

34 Judgment of 28 November 2013, *MDDP*, C-319/12, EU:C:2013:778, paragraph 25.

35 Judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 40.

36 Judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 41.

37 Judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraphs 42 and 43.

38 See judgment of 19 July 2012, *Deutsche Bank*, C-44/11, EU:C:2012:484, paragraph 45, in which the Court endorsed the conclusion that I reached in point 60 of my Opinion in that case (EU:C:2012:276).

39 Judgment of 13 March 2014, *Malburg*, C-204/13, EU:C:2014:147, paragraphs 42 and 43.

40 Judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 44.

41 Judgment of 14 September 2006, *Wollny*, C-72/05, EU:C:2006:573, paragraph 35.

60. I reach therefore a preliminary conclusion that both Article 168 of Directive 2006/112 and the principles underlying the common VAT scheme, in particular that of fiscal neutrality, manifestly preclude granting to a taxable person exercising both non-taxable and taxable activities the right to full deduction of input VAT.

Member States' discretion and the obligations of national courts

61. It follows from the foregoing analysis that the underlying purpose and the common aim of the VAT scheme is the *correspondence between deduction of input tax and charging of output tax*.[42] In exercising their discretion in respect of the rules for apportionment of VAT, Member States must avoid as far as possible, in the interests of equality between different categories of taxable persons and between taxable persons exercising both non-taxable and taxable activities and final consumers, cases of *untaxed end use*.[43]

General obligation to give full effect to EU law

62. In those circumstances, Member States must exercise their discretion in such a way as to ensure that deduction is made *only* for that part of the input VAT that relates to transactions giving rise to the right to deduct. They must therefore ensure that the calculation of the proportion of economic activities to non-economic activities *objectively reflects* the share of the input expenditure actually to be attributed, respectively, to those two types of activity.[44]

63. As I understand the position that prevailed in Poland up to 1 January 2016, the administrative practice described by the referring court consisted in granting the right to full deduction of input VAT incurred on supplies used indissociably both for the purpose of a taxable person's economic and non-economic activities.

64. Such a practice upsets the balance between the deduction of input VAT and collection of output VAT, affecting the level of taxation and leading to unequal treatment between different categories of taxable persons and between the Member States and thus to distortions of competition in the internal market. It is therefore liable to undermine the principle of *uniformity of application* of the common scheme of VAT.[45]

65. Since any modification of the scope of the right to deduct VAT has an impact on the level of the tax burden and must therefore be applied in a similar manner in all Member States, that practice affects the very essence of the functioning of the common VAT scheme.[46] Recital 39 in Directive 2006/112, which states that 'the deductible proportion should be calculated in a similar manner in all the Member States', confirms that such was indeed the intention of the EU legislature.

42 See, to that effect, judgment of 14 September 2006, *Wollny*, C-72/05, EU:C:2006:573, paragraphs 33 and 37.

43 See, to that effect, judgment of 14 September 2006, *Wollny*, C-72/05, EU:C:2006:573, paragraph 48.

44 Judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraphs 34 and 37. The Court has held that in that respect Member States have the right to apply, where appropriate, an investment formula or a transaction formula or *any other appropriate formula*, without being required to restrict themselves to only one of those methods (paragraph 38 of that judgment).

45 See, to that effect, judgment of 12 July 1988, *Direct Cosmetics and Laughtons Photographs*, 138/86 and 139/86, EU:C:1988:383, paragraph 23. See also judgment of 6 May 2010, *Commission* v *France*, C-94/09, EU:C:2010:253, paragraph 40.

46 See, to that effect, judgment of 6 September 2012, *Portugal Telecom*, C-496/11, EU:C:2012:557, paragraph 35.

66. Furthermore, pursuant to Article 2(1)(b) of Decision 2007/436/EC, Euratom [47] the EU's own resources are based, inter alia, on VAT. [48] It follows that there is a direct link between the collection of revenue deriving from VAT and the availability of the corresponding resources to the EU budget. Any failure in the collection of the former, in particular through extending the scope of the right to deduct input VAT, erodes the tax base and accordingly causes a reduction in the latter. In order to ensure that the EU's financial interests are protected as required by Article 325 TFEU, the Member States are obliged to adopt the measures necessary to guarantee the effective and comprehensive determination and collection of VAT on their territories. [49]

67. It follows that the application of the national practice at issue in the main proceedings would clearly run counter to the purpose and the basic principles of the common system of VAT established by Directive 2006/112 and would be liable to impede its effectiveness and thus to undermine the financial interests of the EU.

68. Whilst the Member States enjoy freedom to choose the applicable method of apportionment of deductible VAT, pursuant to Article 288 TFEU, they must nonetheless ensure that the scope of the right to deduct corresponds to that required by Directive 2006/112. They enjoy no discretion in that respect. [50]

69. In such circumstances, the primary responsibility lies with the national legislature to adopt the measures necessary to meet those obligations. [51]

70. I understand from the order for reference that the Polish legislature amended the Law on VAT with effect from 1 January 2016 and that that amendment put an end to the administrative practice of granting the right to full deduction of input VAT on supplies used indissociably both for the purpose of a taxable person's economic and non-economic activities. [52]

71. However, the proceedings before the referring court concern the period between 2013 and 2015. It is therefore for the referring court to give full effect to Directive 2006/112 also during that period by interpreting the applicable legislation so far as at all possible in the light of Article 168(a) of that directive as interpreted by the Court or, as necessary, disapplying that legislation. [53] If interpretative methods recognised by national law in that context enable a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive. [54] Obviously, those obligations should not require the referring court to have recourse to an interpretation *contra legem* of the applicable national provisions. [55]

47 Council Decision of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17).

48 For example, in 2014, which is one of the tax years for which the Local Government Association seeks to be granted the right to full deduction, the resources based on VAT constituted 13.2% of the overall EU budget. See Multiannual financial framework 2014-2020 and EU budget 2014, p. 24.

49 See, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraphs 51 and 52. If Poland wished to maintain a more favourable treatment of taxable persons, such as the Local Government Association, it could — subject to compliance with the Treaty provisions on State aid — provide for a subsidy, financed from its own resources, rather than allowing exemption from input VAT at the expense of EU budget.

50 See, by analogy, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 38 and the case-law cited.

51 See, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 64.

52 See point 11 above.

53 See, to that effect, judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 49.

54 Judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 116.

55 Judgment of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 63.

72. The Court has also held in that connection that the requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law. [56]

73. I conclude that, as a matter of principle, Directive 2006/112 should be interpreted as requiring a national court, in proceedings concerning a taxable person such as the Local Government Association, to interpret its national law to the greatest extent possible in a way that ensures that deductions are made only in respect of the share of input VAT that objectively reflects the extent to which the input expenditure has been used for the purpose of that taxable person's economic activity.

Exception on account of general principles and fundamental rights

74. Since the case at issue before the referring court involves an implementation of, in particular, Article 168 of Directive 2006/112 and thus the application of EU law within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union, [57] the referring court must also satisfy itself that the fundamental rights guaranteed by the Charter to the taxable persons in the main proceedings are respected. Those rights cannot summarily be overridden by the obligation to ensure the effective collection of the Union's resources. [58]

75. In other words, the principle that national law is to be interpreted in conformity with EU law reaches its limits where its application to the facts in the main proceedings would lead to a breach of fundamental rights enshrined in the Charter or general principles of EU law. [59] Importantly, the Court has held that if a national court is satisfied that such an interpretation would lead to a breach of those rights or principles, it is relieved from the obligation to apply that interpretation, even if compliance with that obligation would otherwise allow a national situation incompatible with EU law to be remedied. [60]

76. In what follows, I shall therefore examine whether the obligation to apply that interpretation in the main proceedings would be liable to lead to a breach of a fundamental right or a general principle of EU law. To that end, I shall first identify the relevant fundamental rights or general principles and then examine the consequences of applying the interpretation of EU law that I have set out above to the facts in the main proceedings.

77. The Local Government Association argues that it follows not only from the Polish law, but also from EU law that no method of calculation can be applied to it so that it affects its right to full deduction of input VAT, unless that method is expressly provided for by law.

56 See, to that effect, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraphs 33 and 34 and the case-law cited. See also judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 72 and 73.

57 OJ 2010 C 83, p. 389 ('the Charter').

58 See, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 68 and the case-law cited.

59 Recent case-law provides several examples of situations in which the Court has considered that the efficiency of the EU may need to give way to the protection of fundamental rights. See, to that effect, judgments of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127 (prohibition of inhuman or degrading treatment in the context of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31)); of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936 (principle *nulla poena sine lege* in the context of Article 325 TFEU); and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586 (right to an effective remedy in the context of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1)).

60 See, to that effect, judgments of 7 January 2004, *X*, C-60/02, EU:C:2004:10, paragraphs 61 and 63, and of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 61.

78. I am prepared to accept the proposition that the principle that no tax can be levied unless it is provided for by law (in other words the principle of fiscal legality: *nullum tributum sine lege*) does form part of the EU legal order. It may be seen as a specific expression, in the context of tax law, of the freedom to conduct business, the fundamental right to property and the general principle of legal certainty.

79. Nonetheless, I do not think that the Local Government Association can succeed in the main proceedings by relying on EU law so as to claim a right to full deduction of input VAT incurred on supplies used indissociably for the purpose of economic and non-economic activities. As I shall show below, the principle of fiscal legality under EU law deals with the right of the Member State to impose taxes, whereas the case in the main proceedings is merely about the method of calculating the amount of tax due.

80. I shall start by analysing the scope of the principle of fiscal legality under EU law. Having regard to Article 6(3) TEU[61] and Article 52(3) of the Charter,[62] I shall do so by reference first to the ECHR and then to the constitutional traditions common to the Member States.

Examination in the light of the ECHR

81. The European Court of Human Rights ('the Strasbourg Court') established the principle of fiscal legality in the context of Article 1 of Protocol No 1.[63] That article provides that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law' without that 'in any way impair[ing] the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

82. The Strasbourg Court has held, in particular, that a tax amounts to an interference with the right to peaceful enjoyment of possessions and thus falls within the scope of Article 1 of Protocol No 1.[64] It has recognised that the Contracting States enjoy a 'wide margin of discretion' in tax matters[65] and that they should 'be afforded some degree of additional deference and latitude in the exercise of their fiscal functions under the lawfulness test'.[66] It has further held that that test is limited to verifying that the tax is 'in compliance with the domestic law and that the law itself [is] of sufficient quality to enable an applicant to foresee the consequence of his or her conduct', which requires that 'the applicable provisions of domestic law [be] *sufficiently accessible, precise and foreseeable*'.[67]

61 That article provides that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950 ("the ECHR")] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

62 That provision of the Charter provides that 'in so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention', without prejudice to the EU providing 'more extensive protection'. Thus, the criteria developed by the Strasbourg Court in interpreting the corresponding provisions of the ECHR should be applied in determining that minimal standard of protection guaranteed by the Charter (judgment of 28 February 2013, *Review of Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2013:134, paragraph 28).

63 Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952 ('Protocol No 1').

64 ECtHR, 9 July 2002, *Orion Břeclav s.r.o. v. Czech Republic*, CE:ECHR:2002:0709DEC004378398, p. 7.

65 ECtHR, 29 January 2003, *Masa Invest Group v. Ukraine*, CE:ECHR:2005:1011DEC000354003, p. 12.

66 ECtHR, 14 May 2013, *N.K.M. v. Hungary*, CE:ECHR:2013:0514JUD006652911, § 50.

67 ECtHR, 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia*, CE:ECHR:2011:0920JUD001490204, § 559 (emphasis added).

83. The notion of 'law' within the meaning of Article 1 of Protocol No 1 alludes to the same concept to be found elsewhere in the ECHR.[68] It therefore has an autonomous, broad scope that is not limited to acts emanating from the legislature. It includes constitutions, statutory law *sensu stricto*, secondary legislation and international treaties to which a Contracting State is a party.[69]

84. Importantly, case-law is to be considered as falling within the scope of the notion of 'law' within the meaning of Article 1 of Protocol No 1.[70] Thus, 'clear, consistent and publicly available case-law may provide a sufficient basis for "lawful" interference with the rights guaranteed by the Convention, where that case-law is based on a reasonable interpretation of the primary legislation'.[71]

85. Finally, the Strasbourg Court has recognised that attaining absolute precision in the framing of laws is *objectively impossible*, especially in the sphere of taxation. In consequence, many laws are inevitably couched in *general terms* and their interpretation and application should be settled by practice.[72]

86. It follows that the principle of legality under Article 1 of Protocol No 1 implies that the *essential elements* of tax must be provided for by law or in the case-law, whilst no such requirement exists with regard to certain other, secondary elements defining the scope of tax liability.

Examination in the light of the constitutional traditions common to the Member States

87. The principle of fiscal legality appears to be recognised in the majority of Member States. In some, it forms part of a longstanding constitutional tradition.[73] In most, that principle is explicitly enshrined in an act of constitutional rank, whilst in others it is derived from the constitutional principle of the rule of law.[74]

88. As a rule, the constitutions of the Member States enshrine that principle in quite general terms,[75] which leaves the task of its interpretation to constitutional and ordinary courts. Several, however, go on to specify the elements that need to be defined by law. That is in particular the case in France,[76] Greece,[77] Portugal[78] and Poland.[79]

68 ECtHR, 14 October 2010, *Shchokin v. Ukraine*, CE:ECHR:2010:1014JUD002375903, § 51.

69 Grgić, A., Mataga, Z., Longar, M., and Vilfan, A., Council of Europe – Directorate General of Human Rights and Legal Affairs, '*Le droit à la propriété dans la convention européenne des Droits de l'Homme. Un guide sur la mise en oeuvre de la convention européenne des Droits de l'Homme et de ses protocoles*', Précis sur les droits de l'homme nº 10, September 2007, p. 13 (publically available via the following link: https://rm.coe.int/168007ff64).

70 ECtHR, 9 November 1999, *Špaček v. Czech Republic*, CE:ECHR:1999:1109JUD002644995, § 54.

71 ECtHR, 25 July 2013, *Khodorkovskiy and Lebedev v. Russia*, CE:ECHR:2013:0725JUD001108206, § 881 to § 885.

72 ECtHR, 29 January 2003, *Masa Invest Group v. Ukraine*, CE:ECHR:2005:1011DEC000354003, p. 12 and 13.

73 That is, inter alia, the case of the United Kingdom, where that principle was first enacted in the Bill of Rights of 1689 (still applicable), of France where it results from the Declaration des droits de l'homme et du citoyen of 26 August 1789 (*idem*) and Poland where it was enshrined in Artykuły henrykowskie of 1573, which remained in force until 24 October 1795.

74 That appears to be the case in Austria and Germany.

75 Such appears to be the case, in particular, of: Belgium (Article 170(1) of the Belgian Constitution), Cyprus (Article 24(2) of the Cypriot Constitution), Estonia (Article 113 of the Estonian Constitution), Finland (Article 81(1) of the Finnish Constitution), Italy (Article 23 of the Italian Constitution), Ireland (Articles 22.2.1 to 22.2.6 of the Irish Constitution), the Netherlands (Article 104 of the Dutch Constitution), the Czech Republic (Article 11(5) of Czech Charter of Fundamental Rights), Lithuania (Article 127(3) of the Lithuanian Constitution), Luxembourg (Article 99 of the Luxemburgish Constitution), Romania (Articles 56(3) and 139(1) of the Romanian Constitution), Slovakia (Article 59(2) of the Slovak Constitution) and Sweden (Article 4 in Section 1 of Regeringsformen, which – together with three other acts – forms the Swedish Constitution).

76 Article 14 of the Declaration des droits de l'homme et du citoyen of 26 August 1789 requires that the following elements be provided for by law: basis for assessment of the tax, tax rate and the procedures for collection of taxes of all kinds.

77 Article 78(1) and (4) of the Greek Constitution requires that the following elements be provided for by law: the indication of taxable person, type of income, assets, expenditure or transactions subject to taxation, tax rate, exemptions and tax credits.

78 Article 103(2) of the Portuguese Constitution requires that the following elements be provided for by law: the basis for assessment of the tax, tax rate, tax advantages and guaranties for the taxable persons.

79 See Article 217 of the Polish Constitution cited in point 6 above.

89. A detailed analysis of the legislation and the case-law of a cross-section of 11 Member States [80] indicates that the constitutional traditions of those Member States coincide in requiring that *all the essential elements* inherent to tax be provided for by law. In eight out of 11, the following elements are considered essential: indication of who is a taxable person, the chargeable event giving rise to taxation, the basis for assessment of the tax, the tax rate and the procedural guarantees that taxable persons enjoy. [81]

90. Only some Member States consider certain additional elements essential. Those additional elements include an indication of the beneficiary of the tax (Estonia), the procedures for payment (Poland and Estonia), time limits governing when the tax becomes chargeable (Estonia), the rules for granting tax reliefs and remissions, together with the categories of taxable persons exempt from taxation (Poland and Greece) and the procedures for payment and recovery of tax and the definition of penalties and sanctions (Portugal).

91. Furthermore, it would appear to be generally accepted in those Member States that whilst it is *objectively not possible to define all of the rules concerning a tax in a law*, the law must nevertheless allow the taxable person to *know in advance and calculate* the amount of the tax chargeable.

92. For example, whilst the German constitutional order seems to require the fiscal legislation to enable a taxable person to calculate the tax due, detailed material enabling the tax liability to be calculated with arithmetical accuracy is not required. It suffices that the legislation enables a taxable person to anticipate the scope of the tax burden allowing him to adapt his behaviour. Similarly, in Portugal, the principle of legality appears not to impose the strict requirement that the applicable legislation provide the taxpayer with the elements necessary to calculate the exact amount of the tax due without the slightest doubt. It is necessary, however, that — in the light of the essential elements defined by law — the tax burden be quantifiable and, to a certain extent, predictable and calculable. It appears that also in Greece, the method for calculation of revenue for the purpose of its taxation is not considered to be one of the constitutive elements of tax.

93. When it comes to what constitutes the 'law', it appears to be generally accepted in those Member States that, as a matter of principle, a tax must be defined in a legally binding act of general application adopted by the legislature and duly published. That said, in several Member States the legislation itself may be supplemented by secondary instruments adopted by the executive within the scope of powers specifically delegated to it [82] or within its general competence. [83] In several other Member States, certain specific elements, most often technical in nature, appear to be determined by the competent authorities through non-binding tax rulings or recommendations. [84]

94. Another feature common to those 11 Member States appears to be the requirement for *precision, clarity and foreseeability* of fiscal legislation. [85] Thus, there may be a prohibition on applying fiscal legislation by analogy and where there is doubt, the requirement that legislation be interpreted in favour of the taxable person. [86]

80 That is to say: Bulgaria, the Czech Republic, Estonia, France, Germany, Greece, Netherlands, Poland, Portugal, Sweden and the United Kingdom.

81 The position under the ECHR appears to be quite similar in that respect (see points 85 and 86 above).

82 That appears to be the case in the Czech Republic, Estonia, Germany, Greece, Poland and the United Kingdom.

83 That appears to be the case in France.

84 That appears to be the case in the Netherlands and Sweden.

85 I note that a similar requirement follows from the case-law of the Strasbourg Court, discussed earlier in this Opinion (see point 82 above).

86 That appears to be the case in Bulgaria (before 1 January 2017), the Czech Republic, Germany, Greece (since 2000), the Netherlands, Sweden and the United Kingdom.

95. In several Member States that I have examined, like in Poland, there seem not to be any specific rules on apportionment of input VAT by taxable persons exercising both non-taxable and taxable activities. [87]

96. In the Netherlands, [88] Sweden [89] and the United Kingdom the absence of such legislation was remedied through secondary acts of the competent fiscal authorities. In those three Member States, taxable persons appear to be under a general obligation to choose and apply an appropriate method of apportionment, subject to review by the competent authorities.

97. Thus for example, in the United Kingdom, by virtue of Section 26(3) of the Value Added Tax Act 1994 (the Law on VAT), Her Majesty's Revenue and Customs Commissioners (the central tax authority in the United Kingdom) made statutory instruments setting out examples of criteria and methods for apportionment. [90] Furthermore, pursuant to Section 102ZA(1) of that law, that authority may approve a method proposed by a taxable person or indicate to it another more appropriate method.

98. The practice of the courts in that Member State appears to me to confirm that in the absence of any binding criterion or method, the choice of a method securing a fair and reasonable attribution of input tax rests with the taxable person and depends on his specific circumstances. It also appears to be accepted that the right to full deduction of input VAT on transactions used indissociably for non-economic and economic activities would be in breach of the principle of fiscal neutrality.

99. In Germany, the rules intended to transpose Articles 173 and 174 of Directive 2006/112 into the German legal order appear to be considered to apply by analogy for the purpose of determining the deductible share of input VAT incurred on transactions used indissociably for non-economic and economic activities.

100. Interestingly, in the Czech Republic, the Nejvyšší správní soud (Supreme Administrative Court) relied on the judgment of this Court in *Český rozhlas* [91] along with the Opinion of Advocate General Szpunar in that case [92] to reject the applicant's argument that he was entitled to the right to full deduction since the applicable legislation did not provide for any method of apportionment of input VAT. The Nejvyšší správní soud appears to consider that the applicant was required to choose the most appropriate method and to calculate the deductible share of input VAT itself. [93]

101. It would appear from this cross-section that the constitutional traditions common to the Member States, like the case-law of the Strasbourg Court on Article 1 of Protocol No 1, require that the essential elements of a tax be provided for by law in a sufficiently clear, precise and foreseeable manner, but do not impose an obligation to regulate every detail exhaustively.

102. Save for the elements discussed in points 96 to 100 above, I am not aware of measures or decisions in any of the remaining Member States governing the method of apportionment of the deductible share of input VAT incurred on supplies used indissociably for non-economic activity and economic activity or precluding any limitation of the right to deduct such tax on the grounds that no method or criteria for calculation of the amount of the tax due are specified in the corpus of domestic tax law. Seen from that perspective, the administrative practice described in the order for reference appears to stand out as an exception.

87 In addition to Poland, that appears to be the case in Bulgaria, the Czech Republic, Greece and Sweden.

88 Thus, in the Netherlands a relevant decision of Staatssecretarissen van Financiën (Finance Minister) on deduction of VAT indicates square metres, cubic metres, relevant income or costs as possible criteria for calculation of the deductible share of input VAT.

89 See, in Sweden, non-binding instructions of fiscal administration No 131 446423-15/111 of 25 August 2015 and No 202 377677-17/111 of 19 December 2017.

90 See VAT Notice 700 of 17 December 2014 (the guide to VAT covering the rules and procedures), Section 32(5).

91 Judgment of 22 June 2016, C-11/15, EU:C:2016:470.

92 Opinion in *Český rozhlas*, C-11/15, EU:C:2016:181.

93 Judgment of 30 August 2016, No 5 Afs 124/2014-178.

Examination in the light of the Charter and the general principles of EU law

103. Article 16 of the Charter recognises the freedom to conduct a business 'in accordance with Union law and national laws and practices'. Pursuant to Article 17(1) of the Charter, 'everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions'. That provision further specifies that 'no one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss' and that 'the use of property may be regulated by law in so far as is necessary for the general interest'.

104. To the extent that the taxable person's obligation can be seen merely to hand over to the public exchequer the *output VAT* that he has collected from his customers on behalf of that State, the right to property is immaterial. The provisions of the Charter intended to protect that right are however relevant to the scope of the right to deduct *input VAT*.[94]

105. The Court has held consistently that the right to property and the freedom to pursue an economic activity are not absolute. Their exercise may be subject to restrictions justified by objectives of public interest, provided that those restrictions in fact correspond to those objectives and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. With regard more specifically to the freedom to pursue an economic activity, the Court has held — in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter — that that freedom may be subject to a broad range of interventions on the part of the public authorities which may limit the exercise of an economic activity in the public interest.[95]

106. In addition, the principle of legal certainty is also relevant in the present context. In accordance with the Court's settled case-law, that principle requires that rules of law must be *clear, precise and predictable in their effects* especially where they may have negative consequences for individuals and undertakings.[96] In addition, the principle of legal certainty applies all the more strictly in the case of rules liable to entail financial consequences in order that those concerned may *know precisely the scope of obligations* which such rules impose on them.[97] Finally, it is contrary to the principle of legal certainty, except in exceptional circumstances justified by an objective in the general interest, for the point in time from which a measure falling within the scope of EU law takes effect to be set by a national legislature as being before its publication (prohibition of retroactivity).[98]

Interim conclusion on the meaning of principle of fiscal legality

107. Here, I emphasise that determining the standard of protection under EU law in the light of constitutional traditions common to the Member States and of the Charter is not an exact science.

108. Whether a given tax complies with the standard of protection resulting from the principle of fiscal legality thus construed can be assessed only on a case-by-case basis, taking as a reference point the position of a taxable person in the legal order concerned *taken as a whole*. In my view, the Court should therefore resist the temptation to identify, in its judgment, an exhaustive list of the elements defining a tax which *must* be provided by law.

94 See point 39 above.

95 Judgment of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776 paragraphs 121 to 123.

96 Judgment of 10 September 2009, *Plantanol*, C-201/08, EU:C:2009:539, paragraph 46.

97 Judgment of 16 September 2008, *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 47.

98 Judgment of 26 April 2005, «*Goed Wonen*», C-376/02, EU:C:2005:251, paragraph 33.

109. At the same time, I accept that it is necessary to define certain common parameters of compliance with that principle. So far as I have been able to ascertain, the standard of protection in the context of taxation varies slightly between the Member States examined above. To my mind those differences in the required level of completeness or precision merely reflect the fact that different Member States rely on different means to reach a *common result*. I have no reason to believe that the situation is otherwise in the remaining Member States.

110. I consider that, generally speaking, all the essential elements defining the substantive features of a tax should be set out unequivocally in the applicable provisions. Here, that means the elements having a direct or indirect impact on the scope of the taxable person's liability to account for input VAT. The tax at issue is provided for by law to the requisite standard where the applicable rules, seen as a whole, enable the taxpayer to foresee and calculate the amount of tax due and determine the moment when it becomes payable.

111. Conversely, I do not accept that the mere absence in the applicable provisions of an ancillary element not capable of producing any such impact amounts *by itself* to a breach of the principle of fiscal legality.

112. Thus, for example, the absence of a method for calculating the amount of the tax due is not *in itself* detrimental to the rights of a taxable person, where otherwise applicable provisions contain a set of the necessary parameters to enable that person to foresee and determine that amount.[99] In the same spirit, if a given situation is not exhaustively regulated, the mere fact that the taxable person has to choose one of several possible lines of conduct within the discretion that the Member State has decided to grant him does not in itself have an adverse effect on his rights, unless it results in an increase in the scope of his fiscal liability.

113. By contrast, if the application of a newly introduced requirement or formality leads retroactively to increasing the amount of the tax chargeable, that manifestly does not meet the standard of protection set out above no matter how ancillary or insignificant the requirement or formality in question. That however is not the case under Article 168 of Directive 2006/112 which — read in the light of the settled case-law of this Court — unequivocally defines the extent of the right to deduct input VAT.[100]

114. To sum up, in so far as is here relevant, I consider that the following elements should be regarded as forming part of the common *functional* standard of protection: a tax should be defined in legally binding rules accessible to taxable persons in advance in a manner that is sufficiently clear, precise and exhaustive so as to allow the taxable person in question to foresee and determine the amount of tax due at a given point in time on the basis of the texts and data available or accessible to him. Accordingly, those rules cannot impose or aggravate the tax burden retroactively.

115. I therefore conclude that that standard implies in particular that, in the absence in the applicable rules of any method for calculation of the amount of tax due, the competent tax authorities should allow the taxable person in question to rely on a method of his choice, provided that, having regard to the nature of the economic activity exercised, that method is apt to reflect objectively the extent to which the input expenditure has been used for the purpose of economic activity, is based on objective criteria and credible data and that it enables the competent authority to verify the accuracy of its application.

99 The same could be said *a priori* of procedural or technical requirements. However, since that issue does not fall within the scope of this Opinion, I shall not discuss it further.

100 See points 41, 48 and 55 above.

Can the Local Government Association rely on the general principle of fiscal legality to claim the right to full deduction?

116. In accordance with the case-law cited above,[101] it is for the referring court alone to determine whether the application of EU law in the main proceedings leads to a breach of general principles of EU law. Nonetheless, the Court in the preliminary reference procedure is solely competent to provide the national court with all the criteria for the interpretation of EU law which may enable it to determine the issue of compatibility.[102]

117. With that objective in mind, I shall now outline various elements that the referring court may consider relevant when analysing the consequences of applying the principle of fiscal legality — viewed in the light of the ECHR, the constitutional traditions common to the Member States and the Charter — to the facts in the main proceedings.

Position of the Local Government Association under Polish law

118. It emerges clearly from the explanations of the referring court and the oral pleadings that at the material time, that is until 1 January 2016, the Law on VAT did not provide for a method or criteria for calculating the deductible share of input VAT incurred on supplies used indissociably both for the purpose of a taxable person's economic and non-economic activities.

119. All the participants at the hearing agreed that the terms used in Article 86(1) of the Law on VAT closely mirror Article 168 of Directive 2006/112. In particular, the former provision includes the expression 'in so far as', which to me appears clearly to define the *scope* of the right to deduct, limiting it to input VAT strictly corresponding to supplies used for the purpose of taxable activities. Nothing before the Court suggests that that former provision should be interpreted differently from the latter.[103]

120. The following elements may prove relevant in that respect:

121. *First*, at the hearing counsels for Poland and the Head of Administration confirmed — without being contradicted by the Local Government Association — that, as a matter of principle, the general obligation to *calculate* and declare the amount of tax due as well as to pay that tax within specified time limits clearly rests with the taxable person.[104]

122. *Second*, the participants agreed in their oral submissions that, under Polish law, taxable persons such as the Local Government Association are subject to very detailed rules on bookkeeping for budgetary and public finance supervision purposes which imply, inter alia, the obligation to record all transactions, including those relevant for the purposes of VAT.

123. In that respect, counsel for the Local Government Association claimed that, in the absence of a method provided by law, determining the amount of deductible input VAT is very complex and burdensome, whilst counsel for the Head of Administration insisted — again, without being contradicted by the other participants — that public entities like the Local Government Association are much better placed to make necessary calculations than the tax authorities themselves.

101 See the case-law cited in points 74 and 75 above.

102 Judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 126.

103 For the interpretation of Article 168 of Directive 2006/112, see points 41, 48 and 55 above.

104 As I understand, that obligation stems from Article 103(1) of Law on VAT, which appears to implement Article 250(1) of Directive 2006/112.

124. *Third*, in their oral submissions the participants confirmed that whenever a taxable person entertains doubts as to the correct interpretation of applicable provisions, he is entitled to request and obtain from the authorities a tax ruling assessing his specific situation and indicating how to apply the law correctly.[105] Counsel for the Head of Administration confirmed that, like the Local Government Association in the main proceedings, a number of other taxable persons in comparable situations had relied on that procedure and obtained such a ruling in respect of the deductible share of input VAT.

125. *Fourth*, counsel for the Head of Administration explained at the hearing that both before 1 January 2016 and after that date taxable persons were free to apply a method of their choice for the apportionment of VAT. It was stated that the competent authority could object to that choice only if that method were not appropriate in the sense that it did not objectively reflect the extent to which the input expenditure has been used for the purposes of a taxable person's transactions giving rise to the right to deduct. He also confirmed that the right to deduct could not be refused on the sole ground that the authority did not agree with the method relied on by the taxable person. None of those declarations was contradicted by counsel for the Local Government Association.

126. As I understand it, the combined effect of the provisions and circumstances referred to above is that, at the material time, all the essential elements of VAT having an impact on the chargeable amount of VAT (the *tributum*) *were* provided for by law (*lex*) in such a manner that taxable persons were able to undertake the necessary calculations and declare the amount of VAT due, based on the documents and other data in its possession.

127. Against that background, the actual method for calculating the deductible share of input VAT appears to be merely one of the technical means the taxable person ineluctably has to apply in order correctly to determine the scope of his right to deduct, where indeed he decides to rely on that right. The necessity to choose an appropriate method, implicit at the material time, appears to be an obvious corollary of that right, rather than an autonomous, additional obligation that would need to be specifically provided by law.[106]

128. Bearing in mind the possibility for the Local Government Association to obtain an individual tax ruling, the absence of a specific method in the applicable provisions does not appear to have rendered its reliance on the right to deduct impossible or excessively difficult or to have resulted in an unsurmountable uncertainty as to the scope of its obligations vis-à-vis the public exchequer.

129. Rather, it appears from the pleadings that, given the wide range of possible factual situations, it would be optimistic and perhaps objectively too demanding to expect the national legislature to regulate exhaustively all the technical aspects of a taxable person's conduct for the purpose of taxation.[107] That conclusion is perfectly in line with the case-law of the Strasbourg Court and the position in other Member States.[108]

130. I am thus of the view that the legislation applicable at the material time to the Local Government Association contained no *lacuna* in the definition of the tax.

105 See footnote 8 above.

106 See point 112 above.

107 Here, I note that counsel for the Head of Administration insisted — without being contradicted by the other participants — that it would be objectively impossible to do so.

108 See points 85 and 91 above.

Concluding remarks

131. The foregoing considerations appear to me to dispose of all the arguments put forward by the Local Government Association. Judged by the standard of protection that I have set out above,[109] no breach of a fundamental right or a general principle of EU law is likely to arise in the main proceedings as a consequence of interpreting the applicable rules in conformity with Directive 2006/112, as consistently interpreted by the Court.[110]

132. In particular, that interpretation does not appear to lead to any legal uncertainty or retroactive application of new obligations that are not provided for by law. Likewise, since all the elements constitutive of the tax (*tributum*) were at the material time provided for by law, that interpretation does not appear to lead to the imposition by virtue of Directive 2006/112 of an obligation not provided for in the national legal order.[111] Finally, it does not seem to make the exercise of the right to deduct input VAT impossible or excessively difficult.

133. The conclusions that I have reached in points 73 and 115 above are not called into question by the fact that, where an EU legal act calls for national implementing measures — as in the present case — national authorities and courts remain free by virtue of Article 53 of the Charter to apply national standards of protection of fundamental rights and general principles of EU law.[112]

134. The information before the Court suggests that — despite the existence of the administrative practices mentioned in the question referred — there is no apparent conflict between the position which I propose that the Court should adopt in the present case and the principles resulting from Article 217 of the Polish Constitution.

135. As the referring court has explained, in the light of that provision, measures relating to the imposition of taxes, including the determination of taxable persons, tax rates, as well as the rules for granting tax relief and remission, together with the categories of taxable persons exempt from taxation should be provided by law. It would appear from the oral submissions of counsels for Poland and for the Head of Administration before the Court that that provision is consistently interpreted by the Trybunał Konstytucyjny (Constitutional Court, Poland) as requiring that the *essential elements* of tax having an impact on the scope of fiscal liability of the taxable person must be provided for by law, rather than *all of the elements* of that tax.[113]

136. As I understand matters, those requirements do not appear to pose an obstacle for the referring court to interpret the national legislation in conformity with EU law in the manner set out above.

137. If the referring court nevertheless considers that the national law thus interpreted does not meet the standard of protection guaranteed in the Polish Constitution, it cannot content itself by simply granting the Local Government Association the right to full deduction of input VAT at the expense of the EU general budget and in violation of the principle of equality of treatment.[114]

109 See the discussion of principle of fiscal legality in points 78 to 115 above.

110 That is to say in accordance with the parameters discussed in points 35 to 60 above.

111 The position here may be contrasted with that which pertained in *Pfeiffer and Others* (judgment of 5 October 2004, C-397/01 to C-403/01, EU:C:2004:584, paragraph 108).

112 See judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 60. In that case, however, the Court concluded that, precisely *because* the relevant rules had been harmonised completely at EU level, the national court was *no longer permitted* to apply the higher standard of fundamental rights protection provided by its national constitutional law.

113 Judgment of Trybunał Konstytucyjny (Constitutional Court, Poland) of 16 June 1998, U 9/97, paragraph 51. The hearing also revealed that that court has not yet had the opportunity to examine the constitutionality of the absence of methods for apportionment of input VAT.

114 See points 61, 64 and 65 above.

138. I do not accept that a mere inconsistency between the national standards of protection is such as to relieve the national court from its primary obligation to give full effect to EU law. A fortiori that is the case where the result would be to grant a considerable impermissible economic advantage not intended by the EU legislature.[115] Rather, when interpreting the national legislation the referring court must deploy all its capacities, in the light of a comprehensive examination of the national legal order as a whole, to choose the solution that respects the essential characteristics of the EU legal order, namely the primacy, unity and effectiveness of EU law.[116]

139. Having regard to the above considerations, I conclude, in addition to what I have said in points 73 and 115 above, that the national court may be relieved from the obligation to interpret its national law in conformity with EU law only if that interpretation would entail a breach of the principle that tax should be defined in legally binding rules, accessible to taxable persons in advance, in a manner that is sufficiently clear, precise and exhaustive so as to allow the taxable person in question to foresee and determine the amount of tax due at a given point in time on the basis of texts and data available or accessible to him. Such would be the case if those rules resulted in uncertainty as to the amount of the tax due or if they retroactively imposed or aggravated that amount.

Conclusion

140. In the light of the foregoing, I suggest that the Court give the following answers to the question referred by Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland):

– Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as requiring a national court, in proceedings concerning a taxable person such as the Związek Gmin Zagłębia Miedziowego w Polkowicach (the Local Government Association), to interpret its national law to the greatest extent possible in a way that ensures that deductions are made only in respect of the share of input VAT that objectively reflects the extent to which the input expenditure has been used for the purpose of that taxable person's economic activity.

– In the absence in the applicable rules of any method for calculation of the amount of tax due, the competent tax authorities should allow the taxable person in question to rely on a method of his choice provided that, having regard to the nature of the economic activity exercised, that method is apt to reflect objectively the extent to which the input expenditure has been used for the purpose of economic activity, is based on objective criteria and credible data and that it enables the competent authority to verify the accuracy of its application.

– A national court may be relieved from the obligation to interpret its national law in conformity with EU law only if that interpretation would entail a breach of the principle that tax should be defined in legally binding rules, accessible to taxable persons in advance, in a manner that is sufficiently clear, precise and exhaustive so as to allow the taxable person in question to foresee and determine the amount of tax due at a given point in time on the basis of texts and data available or accessible to him. Such would be the case if those rules resulted in uncertainty as to the amount of the tax due or if they retroactively imposed or aggravated that amount.

115 See points 57 to 59 above.

116 Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 47.