Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 31 May 2017 [1]

Case C-101/16

SC Paper Consult SRL
v
Direcția Regională a Finanțelor Publice Cluj-Napoca,
Administrația Județeană a Finanțelor Publice Bistrița Năsăud

(Request for a preliminary rulingfrom the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania))

(Reference for a preliminary ruling — Admissibility — Directive 2006/112/EC — Taxation — Right to deduct value added tax (VAT) — Refusal — Invoices issued by a taxpayer declared inactive by the tax authorities — List of taxpayers declared inactive — Risk of tax evasion — Limitation of the temporal effects of the judgment to be delivered)

I. Introduction

1. Does Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2] preclude national rules under which a taxpayer is denied the right to deduct value added tax (VAT) paid on the purchase of goods and services from other taxpayers declared 'inactive' under those national rules, a list of whom is published on the website of the national tax authorities?

2. That is, in essence, the subject matter of the question referred for a preliminary ruling by the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania).

3. The reference was made in the context of proceedings between SC Paper Consult SRL ('Paper Consult') and the Romanian tax authorities, who refused to allow Paper Consult to deduct the VAT paid on provisions of services purchased from SC Rom Packaging SRL ('Rom Packaging') under a contract concluded on 3 January 2011, on the ground that the latter company had been declared an inactive taxpayer as from 7 October 2010 and struck from the register of taxable persons for the purposes of VAT as from 1 November 2010, pursuant to Article 78a(1) of the ordonanța Guvernului nr. 92/2003 privind Codul de procedură fiscală, republicată, cu modificările şi completările ulterioare (Government Order No 92/2003 on the Code of tax procedure, republished, with subsequent amendments and additions ('Order No 92/2003').

4. Under Article 78a(1) of Order No 92/2003, taxpayers are declared inactive in one of the following three situations: (i) where they do not fulfil any of the statutory reporting obligations for a period of six months; (ii) where they evade tax supervision by declaring registered office identification that does not enable the tax authorities to identify it; or (iii) where the tax authorities have established that they do not pursue their activity at the registered office or declared tax domicile.

1 Original language: French.

2 OJ 2006 L 347, p. 1.

5. Taxpayers declared inactive are subject to Article 11(1a) and (1b) of legea nr. 571/2003 privind Codul fiscal (Law No 571/2003, 'the Tax Code').

6. Under Article 11(1a) of the Tax Code, taxable persons established in Romania who have been declared inactive must settle payment of the taxes provided for therein, but are not allowed to deduct expenses and VAT on purchases made during the period of inactivity.

7. Under Article 11(1b) of the Tax Code, persons acquiring goods and/or services from taxable persons established in Romania who have been registered as inactive are not entitled to deduct expenses and VAT on those purchases, except for purchases of goods made in enforcement proceedings and/or purchases of goods and/or services from taxable persons in bankruptcy proceedings.

8. Article 3(1) of ordinul Președintelui ANAF nr. 819/2008 (Decree No 819/2008 of the President of the National Agency for Fiscal Administration ('the NAFA')) provides that taxpayers are declared inactive as from the date of entry into force of the Decree of the President of the NAFA approving the list of taxpayers declared inactive. Article 3(2) of Decree No 819/2008 provides that that list is to be posted at the head office of the NAFA and published on its website whilst under Article 3(3) of Decree No 819/2008, the Decree of the President of the NAFA approving the list of taxpayers declared inactive is to enter into force within 15 of the date of posting.

9. At the time of the facts in the case in the main proceedings, Annex No 1 to Decision No 3347/2011 of the President of the NAFA, setting out the reporting obligations referred to in Article 78a(1)(a) of Order No 92/2003, listed the following reporting obligations:

– 100 'Declaration of obligations of payment into the State budget';

– 112 'Declaration on obligations of payment towards social security contributions, income tax and register of insured persons';

– 101 'Declaration on corporation tax';

– 300 'Declaration on [VAT]';

– 301 'Special declaration on [VAT]';

– 390 VIES 'Declaration summarising intra-Community deliveries/purchases of goods';

– 394 'Declaration on deliveries/provisions and purchases made on national territory'.

10. In the main proceedings, according to the information provided to the Court, the decision was taken to declare Rom Packaging inactive due to its failure to file its tax returns.

11. Given Rom Packaging's declaration of inactivity, the Romanian tax authorities found that, under Article 11(1b) of the Tax Code, Paper Consult could not deduct the amount of RON 45 680 (Romanian lei) for VAT paid on the provisions of services provided for in the contract concluded on 3 January 2011.

12. Following the dismissal of its claim brought under administrative proceedings, Paper Consult brought an action before the Tribunalul Bistrița-Năsăud (High Court, Bistrița-Năsăud, Romania), which was also dismissed on 8 July 2015.

13. Paper Consult then instituted appeal proceedings before the Curtea de Apel Cluj (Court of Appeal, Cluj), arguing that Rom Packaging's declaration of inactivity is ineffective against it because it was not notified individually and that, in order to be entitled to the VAT deduction, Rom Packaging must satisfy the conditions laid down in Article 178 of Directive 2006/112, that is to say, it must hold an invoice drawn up in accordance with the provisions of sections 3 to 6 of Chapter 3 under Title XI of that directive.

14. The referring court observes that, according to the Court of Justice's case-law, the need to combat tax avoidance, evasion and abuses is an objective that is recognised and encouraged by Directive 2006/112, provided that the national measures in question are proportionate. It considers that Article 273 of Directive 2006/112, which provides that Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, authorises national rules such as those applicable in the main proceedings. According to the referring court, taxpayers do not accept a burden they consider to be excessive in the form of a minimal check on the NAFA's website to see whether or not persons with whom they intend to conclude a contract have been declared inactive.

15. Given that there was no case-law on the matter, the Curtea de Apel Cluj (Court of Appeal, Cluj) decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) Does Directive 2006/112/EC preclude national rules under which a taxable person is denied the right to deduct VAT on the ground that the person upstream, who issued the invoice on which the expenditure and VAT are indicated, has been declared as inactive by the tax authorities?

(2) If the answer to the first question is in the negative, does Directive 2006/112/EC preclude national rules under which it is sufficient to display the list of registered inactive taxpayers at the headquarters of the Agenției Naționalã de Administrare Fiscalã (National Agency for Fiscal Administration) and to publish that list on the website of that agency, in the section Public information — Information relating to economic operators, in order that the right to deduct VAT in the circumstances described in the first question may be refused?'

16. Paper Consult, the Romanian Government and the European Commission submitted written observations on those questions. The latter two parties presented oral argument at the hearing which was held on 26 January 2017.

II. Analysis

Admissibility

17. The Romanian Government submits that the questions referred are inadmissible on the ground that the referring court failed to explain why it considers that the answer to its questions is necessary to resolve the dispute before it, since Paper Consult's arguments focus solely on the declaration of inactivity being ineffective and do not discuss the actual effects of the inactivity as they follow from the national rules.

18. The Romanian Government's objection must, in my view, be rejected.

19. It is true that, in accordance with the task assigned to it under the system of cooperation instituted by Article 267 TFEU of contributing to the administration of justice in the Member States, the Court refuses to deliver advisory opinions on hypothetical questions.[3] In such cases, the request for interpretation of EU law made by the national court is not objectively required for that court to make a decision and resolve the dispute before it.

20. In the present case, as observed by the Romanian Government, it is apparent from the order for reference that the dispute in the main proceedings raises a legal issue involving an individual maintaining that the tax authorities are bound to recognise its entitlement to a VAT deduction, even when that entitlement arises from a transaction concluded with a taxpayer declared inactive. It is also apparent from the reasons in the order for reference that Paper Consult argues that its entitlement to a deduction of VAT paid upstream need comply only with Article 178(a) of Directive 2006/112.

21. That statement of reasons, although succinct, is sufficient to convey the reasons why the referring court seeks guidance on the interpretation of Directive 2006/112.

22. Moreover, to my mind, it is not for the Court, as part of the presumption of relevance attaching to questions referred for a preliminary ruling on the interpretation of EU law, to question the assessment made by the referring court of the exact scope of the arguments put forward by the parties to the main proceedings, as presented before that court. The national court retains sole responsibility for defining the legal and factual framework giving rise to the order for reference, which it is not for the EU Court to question.[4]

23. Moreover, even if, as suggested by the Romanian Government in its written observations, the referring court has gone beyond the pleas of illegality put forward before it, nor may the EU Court in that situation, in examining the admissibility of a reference for a preliminary ruling, ascertain whether the reference was made in accordance with national procedural rules.[5]

24. I therefore suggest to the Court that it declare the reference for a preliminary ruling admissible.

Substance

25. As I indicated in my introductory remarks, by the present reference for a preliminary ruling, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as precluding national rules that do not allow a deduction for VAT paid upstream to taxable persons procuring goods or services from other taxable persons, on the ground that the latter have been declared 'inactive' under those national rules, where the list of those inactive persons is published on the national tax authorities' website.

26. Although, in the wording of its questions, the referring court does not identify any specific provision of Directive 2006/112, it is indubitable, as understood by the interested parties who lodged observations in the present case, that it is intended to seek clarification as to the articulation between the principle of entitlement to a VAT deduction, as provided for in Article 167 et seq. of Directive 2006/112, and those obligations for which the Member States may deem necessary to make provision in order to ensure correct VAT collection and to prevent evasion pursuant to Article 273 thereof.

3 See, inter alia, to that effect, judgment of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraphs 38 and 47 and the case-law cited).

4 On that settled case-law, see, inter alia, judgment of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel* (C-231/15, EU:C:2016:769, paragraph 16 and the case-law cited).

5 See, inter alia, to that effect, judgments of 3 March 1994, *Eurico Italia and Others* (C-332/92, C-333/92 and C-335/92, EU:C:1994:79, paragraph 13), and of 29 June 2010, *E and F* (C-550/09, EU:C:2010:382, paragraph 35). See also my Opinion in pending case *Santogal M-Comércio e Reparação de Automóveis* (C-26/16, EU:C:2017:79, point 21).

27. It is apparent from the case file and the observations of the Romanian Government that refusing entitlement to a VAT deduction to operators who are taxable persons for VAT purposes in Romania and who effect procurements from taxpayers declared inactive in that Member State is aimed at discouraging those operators from purchasing from such taxpayers — whose situation carries with it a risk of evasion due to non-compliance with their tax reporting obligations — and, ultimately, to help eliminate those taxpayers from the market if they do not regularise their situation.

28. The relationships between the principle of entitlement to a deduction for VAT paid upstream and the obligations that the Member States may impose on operators in order to ensure correct collection of VAT and prevent evasion have been covered in abundant case-law. [6]

29. The point of departure in that case-law consists in referring back to the 'fundamental' nature of the common system for VAT put in place by the EU legislation on the entitlement of taxable persons to deduct from the VAT they owe the VAT due or paid for goods purchased and services received by them upstream. [7]

30. Thus, as a rule, no restrictions can be placed on the entitlement to deduction provided for by Article 167 et seq. of Directive 2006/112 and it is available immediately for all of the taxes levied on the operations effected upstream. [8] Under Article 167 of Directive 2006/112, a right of deduction is to arise at the time the deductible tax becomes chargeable.

31. As the Court has repeatedly held, the deduction system is meant to relieve traders entirely of the burden of the VAT payable or paid in the course of all their economic activities. Consequently, the common system of VAT consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way. [9]

32. Entitlement to the VAT deduction is nevertheless contingent on compliance with both substantive requirements or conditions and formal requirements or conditions.

33. As regards substantive requirements or conditions, it is apparent from the wording of Article 168(a) of Directive 2006/112 that, in order to have a right of deduction, it is necessary, first, that the interested party be a taxable person within the meaning of that directive and, second, that the goods or services relied on to give entitlement to that right be used by the taxable person for the purposes of his own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person. [10]

6 See, inter alia, judgments of 19 September 2000, *Ampafrance and Sanofi* (C-177/99 and C-181/99, EU:C:2000:470); of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446); of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373); of 6 September 2012, *Tóth* (C-324/11, EU:C:2012:549); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774); orders of 28 February 2013, *Forvards V* (C-563/11, not published, EU:C:2013:125); of 16 May 2013, *Hardimpex* (C-444/12, not published, EU:C:2013:318); judgments of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719); and of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614).

7 See, inter alia, judgments of 25 October 2001, *Commission* v *Italy* (C-78/00, EU:C:2001:579, paragraph 28); of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 37); and of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 43).

8 See, to that effect, inter alia, judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 38); of 6 September 2012, *Tóth* (C-324/11, EU:C:2012:549, paragraph 24); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 26); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 44); and order of 10 November 2016, *Signum Alfa Sped* (C-446/15, not published, EU:C:2016:869, paragraph 30).

9 See, to that effect, inter alia, judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 39); of 6 September 2012, *Tóth* (C-324/11, EU:C:2012:549, paragraph 25); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 27); and order of 10 November 2016, *Signum Alfa Sped* (C-446/15, not published, EU:C:2016:869, paragraph 31).

10 See, inter alia, to that effect, judgments of 6 September 2012, *Tóth* (C-324/11, EU:C:2012:549, paragraph 26), and of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 28 and the case-law cited).

34. As to the detailed rules for exercising the right to a deduction, which may be considered formal requirements or conditions,[11] Article 178(a) of Directive 2006/112 provides that the taxable person must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240 of that directive. In particular, under Article 226(3) of Directive 2006/112, the invoice must state the VAT identification number under which the taxpayer made the supply of goods or services.

35. The Court of Justice has had numerous references concerning situations in which a taxable person has been refused the benefit of a VAT deduction by the national tax authorities on grounds of irregularities or formal lacunae but the substantive conditions provided for by Directive 2006/112 are otherwise satisfied.

36. In order to remain at the general level at this stage of the analysis, suffice it to note that it is apparent from the Court of Justice's judgments that entitlement to a VAT deduction paid upstream is granted where the substantive conditions required for that right to arise are met, even if taxable persons have omitted some formal requirements.[12]

37. Since refusal of entitlement to a VAT deduction paid upstream is an exception to the application of the fundamental principle constituted by that right,[13] it is only in particular circumstances that the Court will be prepared to accept that lacunae in formal requirements may allow the tax authorities to refuse the benefit of such a right to a taxable person.

38. It follows from the case-law to date that the loss of entitlement to a VAT deduction may arise in two distinct scenarios. One is where the infringement of the formal requirements prevents production of certain proof that the substantive conditions for entitlement to the VAT deduction have been met.[14] The other, in essence, allows the VAT deduction to be refused when it is established, in the light of objective proof, that the right is relied on fraudulently or abusively, where the taxable person knew or ought to have known that the operations in question were involved, directly or indirectly, in a fraud.[15]

39. The rationale for the first scenario is that the formal requirements are provided for precisely in order to ensure application of the VAT and to enable supervision by the Member States' tax authorities. It is therefore perfectly logical to refuse the benefit of the entitlement to deduction where the infringement of such requirements is so great that it makes it impossible or overly difficult to ascertain whether the substantive conditions for entitlement to a deduction have been met.

40. However, that is not the case in the dispute in the main proceedings.

41. It is apparent from the order for reference that Paper Consult, which was refused entitlement to the deduction, is a taxable person for the purposes of Directive 2006/112 and that it purchased and paid for the provisions of services covered by the contract of 3 January 2001, as part of its economic activity, from another economic operator, Rom Packaging, which was also bound to pay VAT but had been declared inactive due to its failure to comply with its tax reporting obligations under the national rules. There is nothing in the case file indicating that the Romanian tax authorities were unable to ascertain the veracity of the services billed by Paper Consult or that they were unable to verify the identity and status of those two economic operators.

11 See, in that regard, judgments of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 44), and of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 41).

12 See, to that effect, inter alia, judgments of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 45 and the case-law cited); of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 42); and of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 38 and the case-law cited).

13 See judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 52).

14 See, to that effect, inter alia, judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 46 and the case-law cited).

15 See, to that effect, inter alia, judgments of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraphs 59, 60 and 64); and of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraphs 47 to 50).

42. Regarding more specifically Rom Packaging's status as a taxable person and in the light of the Romanian Government's written observations denying that status, I note that, under Article 11(1a) of the Tax Code, taxpayers who have been declared inactive retain their status as taxable persons because they remain bound to pay VAT, although they are not entitled to a VAT deduction during their period of inactivity.

43. In any event, the status as taxable person for the purposes of Directive 2006/112, which under Article 9(1) thereof includes 'any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity' is not contingent on either the obligation to file a tax return and pay VAT or the obligation to register for VAT purposes.[16] The Court of Justice held recently that, notwithstanding the declaration of 'non-existence' of an economic operator under national rules on the grounds, inter alia, that the operator in question was not registered for VAT purposes, did not file tax returns and did not pay its taxes, such an operator could be recognised as having the status of taxable person for the purposes of Directive 2006/112.[17] That status was also recognised for the issuer of an invoice who had previously had his business operator's licence withdrawn and accordingly no longer had the right to use his tax identification number.[18]

44. The second scenario in which the Court has recognised that entitlement to a deduction could be refused can be essentially traced back to the Member States' power under the first paragraph of Article 273 to 'impose other obligations which they deem necessary to ensure the correct collection of VAT and to *prevent* evasion'.[19]

45. As I mentioned earlier, the Romanian scheme for declaration of inactivity of certain taxpayers is based on three alternative scenarios in which the Romanian rules presume that there is a risk of tax evasion. They include failing to file any tax returns, including VAT returns, for a period of six months, as was the situation of Rom Packaging. That failure is sanctioned by a refusal to allow entitlement to a deduction of VAT paid on purchases made by those taxpayers during the period covered by the declaration of inactivity, in accordance with Article 11(1a) of the Romanian Tax Code. In my view, that provision clearly contains measures aimed at preventing situations deemed to present a risk of tax evasion from actually becoming tax evasion. Since a failure to file tax returns, including for VAT, is likely to cover up an attempt at tax evasion by the taxpayer concerned, the objective pursued is indeed that of preventing such an evasion from occurring, by not allowing that taxpayer entitlement to deduct the VAT paid upstream throughout the period of inactivity.

46. The present case, however, does not concern the tax situation of a taxpayer who has been declared inactive, but that of taxable persons who, like Paper Consult, effect procurements from such a taxpayer, despite the latter's declaration of inactivity.

47. In also sanctioning taxable persons who purchase goods and/or services from an operator declared inactive by not allowing them a VAT deduction, Article 11(1b) of the Romanian Tax Code indubitably forms part of the objective of combating tax evasion pursued by the declaration of inactivity scheme.

48. Read in conjunction with the declaration of inactivity scheme, that article is aimed at obliging those taxable persons, at the very least indirectly, to make inquiries about the potentially inactive status of their future co-contractor (which implies a risk of tax evasion).

16 See judgment of 22 October 2015, PPUH *Stehcemp* (C-277/14, EU:C:2015:719, paragraphs 39 and 40).

17 See judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraphs 19, 31, 39 and 42).

18 See judgment of 6 September 2012, *Tóth* (C-324/11, EU:C:2012:549, paragraphs 28 to 33).

19 Emphasis added. See, in that regard, inter alia, judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 55), and of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 49).

49. Such an obligation goes beyond the requirement, recognised by the Court of Justice, according to which, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness. [20]

50. The obligation to make inquiries about the potentially inactive status of taxable persons, introduced into Romanian law, is compulsory for any trader carrying on economic activity in Romania intending to effect procurements from any other trader in Romania, irrespective of whether that operator has in fact been declared inactive and therefore did commit the irregularities established by the Romanian tax authorities. It is thus a general obligation, imposed on all traders, to verify the fiscal 'trustworthiness' of their future co-contractor, by consulting the public list of traders declared inactive drawn up by the Romanian tax authorities, irrespective of any indications that the future co-contractor might have engaged in irregularities or VAT evasion.

51. However, given that the inactive status under Romanian law is administrative in nature, public and easily accessible, that obligation does not, to my mind, place an excessive burden on taxable persons subject to VAT in Romania, who can be expected not to be unaware of the national rules and to exercise the normal diligence of at least a reasonably informed trader, in consulting the list of taxpayers declared inactive by the Romanian tax authorities published on the NAFA's website.

52. In my view, that obligation can be equated with a measure that may reasonably be imposed on the taxable person to make inquiries as to whether the intended transaction entails a risk of participation in tax evasion.

53. Moreover, both the Romanian Government and the Commission state that the national system of online publicity bears a number of points in common with the system in place at Union level: the VIES (VAT Information Exchange System) on-the-web, which enables operators to obtain confirmation of the VAT identification number of their trading partners and the national tax administrations to monitor intra-Community transactions and to detect any irregularities. [21]

54. Unlike the cases in which the Court of Justice found that there was a transfer to taxable persons of tasks involving supervision and detection of irregularities and evasion which, as a rule, fall to the national tax authorities, [22] the Romanian rules only require taxable persons to check that the trader with whom they intend to effect purchases is on the list — which is public and accessible on the NAFA's website — of operators declared inactive following checks conducted by the national tax authorities themselves. That requirement to consult the list of operators declared inactive is clearly not a transfer to those taxable persons of supervisory tasks which are properly the remit of national tax authorities.

55. Accordingly, it must be presumed that a taxable person who concludes transactions subject to VAT with an operator declared inactive must, in any event, know or ought to have known that the completion of such transactions carries with it a risk of tax evasion.

56. Does knowledge or reasonably presumed knowledge of such a risk warrant entitlement to a VAT deduction being refused to that taxable person?

57. In my opinion it does not.

20 See, inter alia, judgment of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 60); orders of 28 February 2013, *Forvards V* (C-563/11, not published, EU:C:2013:125, paragraph 40); of 16 May 2013, *Hardimpex* (C-444/12, not published, EU:C:2013:318, paragraph 25); and of 15 July 2015, *Koela-N* (C-159/14, not published, EU:C:2015:513, paragraph 47).

21 See, in that regard, judgment of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 28).

22 See, inter alia, judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraphs 61, 62 and 65), and of 6 September 2012, *Tóth* (C-324/11, EU:C:2012:549, paragraphs 42 to 44).

58. In the first place, this scenario does not correspond to the situations envisaged in the case-law, according to which entitlement to a VAT deduction may legitimately be refused where a taxable person knew, or should have known, that *he was taking part in a transaction connected with VAT fraud*, in particular when that fraud is (or was) committed by his supplier. [23]

59. Consequently, under EU law and the case-law as they currently stand, a mere risk of VAT fraud, the degree of which will likely be contentious, does not warrant a refusal to allow entitlement to a deduction.

60. In the second place, it must be remembered that the Court has held that national measures pursuing the objectives referred to in Article 273 of Directive 2006/112 must observe the principle of proportionality and, accordingly, cannot be used in such a way that they would have the effect of *systematically* undermining the right to deduct VAT and, consequently, the fundamental principle of VAT neutrality. [24]

61. In the present case, the refusal to allow entitlement to the VAT deduction is a sanction the dissuasive effect of which is, in reality, aimed not so much at ensuring the effectiveness of the obligation to consult the list of operators declared inactive drawn up by the President of the NAFA as discouraging taxable persons from making purchases from operators declared inactive, with the ultimate objective of excluding the latter from the market if they do not regularise their situation, as explained by the Romanian Government.

62. That being so, a taxable person who, after consulting the list of operators declared inactive and having found that the operator from which it intends to purchase is on that list, nevertheless goes ahead and purchases from that operator, [25] will in any event not be entitled under Romanian law to benefit from the VAT deduction relating to those transactions, irrespective of any assurances it may have been given by that operator to the effect that the specific transactions giving rise to entitlement to a deduction are not involved in tax evasion and that the VAT will moreover be paid into the State Treasury.

63. In other words, as rightly pointed out by the Commission during the hearing, the Romanian rules lay down, in respect of all taxable persons who conclude transactions subject to VAT with operators declared inactive, an irrefutable presumption of participation in tax evasion. Those rules provide for systematic refusal of entitlement to a VAT deduction for any taxable person making purchases from an operator declared inactive, notwithstanding the fact that, in the light of the material and evidence that that taxable person and that operator are able to produce, including following a tax inspection, any risk of tax evasion in relation to the transactions in question may be legitimately ruled out, that they satisfy the substantive and formal requirements for entitlement to a VAT deduction for the purposes of Directive 2006/112 and that there has been no loss of tax revenue.

64. National rules such as these, to my mind, go beyond what is necessary to attain the objectives aimed at ensuring the correct collection of VAT and preventing tax evasion.

23 See, to that effect, judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraphs 48 and 49 and the case-law cited).

24 See, to that effect, inter alia, judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 57), and of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 49). For the record, the Court reiterates regularly that Member States must, in accordance with the principle of proportionality, employ the means which, whilst enabling them to attain that objective effectively, are the least detrimental to the objectives and principles laid down by EU legislation, such as the fundamental principle of the right to deduct VAT, see, inter alia, judgments of 18 October 2012, *Mednis* (C-525/11, EU:C:2012:652, paragraph 32 and the case-law cited), and of 16 March 2017, *Bimotor* (C-211/16, not published, EU:C:2017:221, paragraph 27).

25 That decision may be based on perfectly legitimate economic reasons, such as the presence of a selective or exclusive distribution circuit or particular properties of goods or services sold by the operator declared inactive.

65. In the main proceedings, the referring court has not provided any material suggesting that the transactions concluded between Paper Consult and Rom Packaging concealed tax evasion or that the VAT entered on the invoices issued by the latter to Paper Consult relating to those transactions did not correspond to the amount paid into the State Treasury.

66. Moreover, to my mind the disproportionate nature of the national rules is further illustrated by the fact, highlighted by Paper Consult in its written observations and not disputed by the Romanian Government, that, under Article 11(1b) of the Romanian Tax Code, refusal of entitlement to a VAT deduction to the co-contractor of the operator declared inactive is definitive, that is to say, that co-contractor continues to bear the burden of that tax even after the operator declared inactive has regularised its situation in terms of its tax obligations. That situation stands in contrast to and is inconsistent with that of the operator declared inactive who, under Article 11(1a) of the Romanian Tax Code, is allowed to recover VAT deduction of which was refused during the period of inactivity, during a subsequent fiscal year following its being 'reactivated' by the Romanian tax authorities.

67. Regarding this aspect of the national rules, the Romanian Government stated at the hearing — in the context of the questions put by the Court concerning the proportionality of the refusal to allow entitlement to a VAT deduction imposed on the co-contractor of an operator declared inactive — that, by virtue of an amendment to the Romanian Tax Code, since 1 January 2017 it henceforth allows any taxable person having made purchases from an operator declared inactive to benefit from the VAT deduction relating to the transactions completed during the period of inactivity of that operator, where the operator subsequently regularised its situation, in particular in terms of its tax reporting obligations.

68. It is for the referring court to ascertain the scope of that amendment, inter alia with regards to the possibility of retroactive application to the facts giving rise to the main proceedings, having regard also to the fact that, according to the information provided by the Commission in its written observations, Rom Packaging was 'reactivated' by decision of the President of the NAFA of 24 April 2012.

69. Irrespective of the facts of the main proceedings, the amendment made to the Romanian Tax Code and the explanations provided by the Romanian Government at the hearing nevertheless give the impression that the Romanian authorities themselves realised that a systematic and definitive refusal to allow entitlement to a VAT deduction imposed on the business partners of an operator declared inactive was disproportionate when the operator had subsequently regularised its situation in terms of its tax reporting obligations.

70. A mere suspension of entitlement to a VAT deduction pending regularisation of the transactions giving rise to that entitlement seems to me a more suitable measure than systematic and definitive refusal of the benefit of that entitlement when a taxable person in Romania purchases goods and/or services from an operator declared inactive in that Member State.

71. It is true that, where a person subject to VAT in Romania has purchased from an operator declared inactive after having failed to consult the list of operators declared inactive, that taxable person has failed to comply with one of its obligations under the national rules by which it is bound. As I have stated above, such an obligation does not appear to me to be excessive in and of itself. To my mind, EU law does not preclude non-compliance with such a formality from being sanctioned by a penalty that is dissuasive and proportionate to the seriousness of the non-compliance which may take the form of, say, a fine. However, failure to comply with such an obligation does not mean that, with respect to the specific transactions giving rise to entitlement to a VAT deduction, the taxable person was unable to obtain from the operator declared inactive the assurances referred to by me above, to the effect that those transactions are not linked to any tax evasion and that the VAT will be paid into the State Treasury.

72. In any event, the irrefutable presumption on which the Romanian rules are based, which makes it impossible for any taxable person to produce the slightest evidence enabling it to demonstrate that the transactions concluded with the operator declared inactive meet the conditions laid down in Directive 2006/112 to be entitled to a VAT deduction in respect of those transactions, in my view exceeds what is necessary to attain the legitimate objectives pursued by those rules.

73. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the national court as follows: Directive 2006/112 must be interpreted as precluding national rules such as those at issue in the main proceedings under which, even where no tax evasion and no loss of tax revenue has been established, a systematic and definitive refusal of entitlement to a VAT deduction is imposed on a taxable person who has paid the VAT relating to transactions concluded with an operator declared 'inactive' under those rules, notwithstanding the fact that the declaration of inactivity of the operator concerned, which is based on there being a risk of tax evasion, is public and easily accessible to any taxable person in the Member State in question.

The Romanian Government's request for limitation of the temporal effects of the Court's judgment delivered

74. Should the Court concur in my analysis, it will have to rule on the Romanian Government's request that the temporal effects of the judgment to be delivered be limited.

75. In support of its request, the Romanian Government submits, firstly, that the Romanian authorities acted in good faith. That good faith is based on two grounds, the first being the objective doubts as to the Court's case-law, the second being the conduct of the Commission, who in May 2014 accepted the response of the Romanian authorities given further to a complaint lodged under the 'EU Pilot' procedure concerning the national rules at issue in the present case, which led those authorities to believe that the rules were compatible with EU law. Secondly, the Romanian Government highlights the serious financial consequences that would arise if, following the Court's judgment, the VAT deduction had to be granted to all operators having concluded transactions with operators declared inactive since 2007. The Romanian Government submits that that additional burden would amount to 0.5% of the Romanian gross domestic product.

76. In its oral observations, the Commission asks the Court to dismiss that request on the ground that the conditions established by the case-law are not met.

77. I concur with the Commission's submissions.

78. In accordance with settled case-law of the Court, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before delivery of the judgment ruling on the request for interpretation, provided that in other respects the conditions under which an action relating to the application of that rule may be brought before the courts having jurisdiction are satisfied. [26]

26 See, inter alia, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 58); of 18 October 2012, *Mednis* (C-525/11, EU:C:2012:652, paragraph 41); and of 22 January 2015, *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 49).

79. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. [27]

80. As those criteria are cumulative, if one of them is not fulfilled it is not necessary to examine whether or not the other one is. [28]

81. I further point out that the Court limits the temporal scope of its judgments delivered by way of preliminary ruling only in very specific circumstances, inter alia when there is a risk of serious financial repercussions due, in particular to the high number of legal relationships established in good faith on the basis that the rules deemed to be validly in force and it appears that individuals and the national authorities were encouraged to adopt conduct that did not comply with EU law due to considerable objective uncertainty as to the scope of EU law provisions, which uncertainty was reinforced by the very conduct adopted by other Member States or by the Commission. [29]

82. In the present case, I take the view that the criterion relating to good faith on the part of the interested parties, including the Romanian tax authorities, is not fulfilled.

83. As to the doubts — and not already the considerable objective uncertainty within the meaning of the case-law — highlighted by the Romanian Government concerning the interpretation of EU law, although it is true that the situation giving rise to the present set of proceedings is somewhat different from the cases having been examined previously by the Court, the fact remains that, as I pointed out in my analysis above, a refusal to allow entitlement to a VAT deduction imposed on taxable persons is an exception to a fundamental principle of the common system of VAT, the legality of which, according to settled case-law, is allowed only in exceptional circumstances. Although that case-law has been refined in recent years, the principles on which it is based date back many years and, in any event, go back to before 1 January 2007, the date on which Romania acceded to the European Union. [30] Therefore, if a situation of considerable and objective uncertainty were to be recognised, it would undeniably have its origin not in the scope of the provisions of EU law, but in Romania's maintaining the rules giving rise to the present case following its accession to the European Union.

84. The Commission's closing of an 'EU Pilot' procedure has no bearing on this analysis.

85. That informal procedure, which was established by the Commission in its communication 'A Europe of results — applying [Union] law', [31] involves voluntary cooperation between the Commission and the Member States and is aimed generally both at ensuring the correct application of EU law and at resolving at an early stage issues arising from that application. Although such a procedure may have as its sole purpose requests for information, most of the time it is aimed at avoiding, in so far as possible, the initiation of infringement proceedings pursuant to Article 258 TFUE. [32] In any event, the

27 Judgment of 22 January 2015, *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 50 and the case-law cited).

28 See, inter alia, judgments of 27 February 2014, *Transportes Jordi Besora* (C-82/12, EU:C:2014:108, paragraph 28), and of 22 January 2015, *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 53).

29 See, to that effect, judgment of 22 January 2015, *Balazs* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 51 and the case-law cited).

30 As to the fundamental and, in principle, unlimited nature of the entitlement to deduct VAT paid upstream, see, inter alia, the judgment of 6 July 1995, *BP Soupergaz* (C-62/93, EU:C:1995:223, paragraphs 16 to 18); and on observance (and infringement) of the principle of proportionality in the context of a measure systematically refusing entitlement to VAT deduction to taxpayers' categories of expenses in order to prevent tax avoidance and evasion, see the judgment of 19 September 2000, *Ampafrance and Sanofi* (C-177/99 and C-181/99, EU:C:2000:470, paragraphs 60 to 62).

31 COM(2007) 502 final.

32 On the various characteristics of that procedure in the context of EU legal rules on access to documents of the institutions, see, inter alia, the Opinion of Advocate General Sharpston in *Sweden* v *Commission* (C 562/14 P, EU:C:2016:885, points 40 to 54).

Commission's attitude can in no way per se give rise to a legitimate expectation on the part of a Member State as to the compliance of national rules with EU law where, as in the present case, it is apparent from the case-law that there is no considerable and objective uncertainty as to the scope of EU law, in particular the provisions of Directive 2006/112.

86. In those circumstances, I propose that the Court refuse the Romanian Government's form of order seeking limitation of the temporal effects of the judgment to be delivered, without its being necessary to examine the criterion relating to the existence of a risk of serious difficulties.

III. Conclusion

87. In the light of all the foregoing considerations, I propose that the Court should answer the question referred by the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) as follows:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national rules, such as those at issue in the main proceedings, which entail, even where no tax evasion and no loss of tax revenues has been established, systematic and definitive refusal of a value added tax deduction to a taxpayer having paid value added tax on transactions concluded with an operator declared 'inactive' under those rules, notwithstanding the fact that the declaration of inactivity of the operator in question, which is contingent on there being a risk of tax evasion, is publicly and easily accessible to any taxable person in the Member State in question.