Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 25 July 2018 [1]

Case C-414/17

AREX CZ a.s.
v
Odvolací finanční ředitelství

(Request for a preliminary ruling from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic))

(Reference for a preliminary ruling — Common system of value added tax — Products subject to excise duty — Exemption of supplies of goods dispatched or transported within the European Union — Chain transaction — Ascribing transport to one supply within a supply chain — Movement of excise goods under a duty suspension arrangement)

I. Introduction

1. The present case once again concerns the question of which transaction in a cross-border sales chain is to be regarded as the exempt intra-Community supply if there is only a single physical movement of goods. Unlike the cases previously decided, however, it does not relate to a simple two-link chain. [2] The proceedings will therefore give the Court the opportunity to clarify further the criteria for ascribing transport to a certain supply in the sales chain.

2. In the main proceedings an Austrian undertaking sold fuel, a product subject to excise duty, to Czech traders. A number of sales were first made among Czech intermediaries before the fuel was eventually sold to the Czech company Arex CZ ('Arex'), which collected it in Austria and transported it using its own vehicles to the Czech Republic.

3. Arex assumed that, as contractual partner of one of the Czech intermediaries, it was the consignee of a domestically taxable supply. For that reason, it claimed deduction of the VAT paid to its Czech contractual partner. The Czech Finance Board, on the other hand, takes the view that Arex is not entitled to deduct VAT as it is the consignee of an exempt supply and that, rather, it is liable for tax on an intra-Community acquisition in the Czech Republic.

1 Original language: German.

2 The Court has already dealt with the question of ascribing transport to a supply with regard to an 'intra-Community chain transaction' in a number of cases; see, for example, judgments of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232); of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592); of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599); and of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84).

4. In view of the large number of sales which gave rise to only a single cross-border transport, the referring court asks which of the transactions is the exempt intra-Community supply. In particular, the question arises whether it is relevant that the transport took place under a special excise duty suspension arrangement. [3]

II. Legal framework

A. EU law

5. The framework in EU law is defined by the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') [4] and Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC ('the Excise Duty Directive'). [5]

6. With regard to intra-Community trade in products subject to excise duty, recital 36 of the VAT Directive states:

'For the benefit both of the persons liable for payment of VAT and the competent administrative authorities, the methods of applying VAT to certain supplies and intra-Community acquisitions of products subject to excise duty should be aligned with the procedures and obligations concerning the duty to declare in the case of shipment of such products to another Member State laid down in Council Directive 92/12/EEC [6] of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.'

7. Article 2 of the VAT Directive provides:

'1. The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;

…

(iii) in the case of products subject to excise duty, where the excise duty on the intra-Community acquisition is chargeable, pursuant to Directive 92/12/EEC, within the territory of the Member State, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1).'

3 This is a special procedure for the movement of excise goods under which excise duty becomes chargeable only when the movement has ended, because the goods are released for free circulation only then.

4 OJ 2006 L 347, p. 1.

5 OJ 2009 L 9, p. 12.

6 Repealed by Directive 2008/118/EC.

8. Article 3(1) of the VAT Directive provides that certain intra-Community acquisitions of goods are not subject to VAT, by way of derogation from Article 2(1)(b)(i), in particular certain acquisitions by taxable persons or non-taxable legal persons not exceeding a certain threshold in a calendar year ('the special scheme for small undertakings').

9. 'Supply of goods' is defined in Article 14 of that directive as the transfer of the right to dispose of tangible property as owner.

10. Under Article 20 of the VAT Directive, 'intra-Community acquisition of goods' means the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.

11. In Chapter 4 of Title IX, 'Exemptions', Article 138 provides:

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

2. In addition to the supply of goods referred to in paragraph 1, Member States shall exempt the following transactions:

…

(b) the supply of products subject to excise duty, dispatched or transported to a destination outside their respective territory but within the Community, to the customer, by or on behalf of the vendor or the customer, for taxable persons, or non-taxable legal persons, whose intra-Community acquisitions of goods other than products subject to excise duty are not subject to VAT pursuant to Article 3(1), where those products have been dispatched or transported in accordance with Article 7(4) and (5) or Article 16 of Directive 92/12/EEC.'

12. Article 139(1) of that directive stipulates:

'The exemption provided for in Article 138(1) shall not apply to the supply of goods carried out by taxable persons who are covered by the exemption for small enterprises provided for in Articles 282 to 292.

Nor shall that exemption apply to the supply of goods to taxable persons, or non-taxable legal persons, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1).'

13. Until they were repealed by the Excise Duty Directive, Article 7(4) and (5) and Article 16 of Directive 92/12/EEC contained provisions concerning the duty suspension arrangement. Under Article 4(7) of the Excise Duty Directive, 'duty suspension arrangement' means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended.

14. Article 4(9) of that directive defines 'registered consignee' as a natural or legal person authorised by the competent authorities of the Member State of destination, in the course of his business and under the conditions fixed by those authorities, to receive excise goods moving under a duty suspension arrangement from another Member State.

15. Under Article 17(1)(a) of the Excise Duty Directive, goods may be moved under suspension of excise duty only by a warehousekeeper or registered consignor to a tax warehouse or to a registered consignee. Under certain circumstances, a direct delivery to the country of destination is possible where the place of direct delivery has been designated by the warehousekeeper or by the registered consignee (Article 17(2) of the Excise Duty Directive).

16. Under Article 7(1) of the Excise Duty Directive, excise duty becomes chargeable at the time, and in the Member State, of release for consumption. The time of release for consumption is, inter alia, the time of receipt by a registered consignee (Article 7(3)(a) of the Excise Duty Directive).

B. Czech law

17. As far as the applicable Czech law is concerned, reference should be made in particular to Article 64 of the Law on value added tax, which transposes Article 138 of the VAT Directive into national law. Under that provision, intra-Community supplies of products subject to excise duty which are exported under a duty suspension arrangement are exempt from VAT where they are made for a taxable person or a non-taxable legal person who is not registered for tax purposes in another Member State.

III. Facts and reference for a preliminary ruling

18. The main proceedings concern multiple sales of fuel which had originally been loaded in refineries of Shell Austria GmbH in Austria. It was sold by the Austrian company Doppler Mineralöle GmbH ('Doppler') to four different companies, Burley s.r.o., Profikredit s.r.o., Bore s.r.o. and Top Ten Development s.r.o ('the Czech first purchasers'), each of which is established in the Czech Republic.

19. The Czech first purchasers had entered into a contract with Garantrans s.r.o. ('Garantrans'), which acted for them as registered consignee within the meaning of the Excise Duty Directive in order to facilitate transport under a duty suspension arrangement.

20. The Czech first purchasers sold the fuel to a further link in the chain, established in the Czech Republic. That link was in some cases TM Truck s.r.o. and in other cases Cllaruss Gall s.r.o. Those companies in turn sold the fuel to Kont Fuel Distribution s.r.o ('Kont Fuel') and in other cases to Benaft s.r.o. ('Benaft'), the direct contractual partners of Arex. For the sale to Arex, Kont Fuel and Benaft invoiced the Czech VAT which was paid by Arex and then remitted by Kont Fuel and Benaft. Arex claimed deduction of the VAT paid to Kont Fuel and Benaft.

21. The fuel was transported from Austria to the Czech Republic under a duty suspension arrangement at the expense of Arex, using the company's own vehicles. A product subject to excise duty must generally first be transported to a place across the border designated by a registered consignee within the meaning of the Excise Duty Directive, where it is released for consumption. Only then can the transport to the final place of consignment take place. Garantrans paid excise duty on behalf of the Czech first purchasers in the Czech Republic.

22. On the basis of a tax inspection of Arex, the tax office took the view that, as consignee of an exempt intra-Community supply, Arex was liable for tax on an intra-Community acquisition. It therefore conducted a reassessment of the VAT payable with concurrent VAT deduction. However, it denied Arex the right to deduct the VAT paid to Kont Fuel and Benaft, as that VAT had not been due at all because it related to an exempt intra-Community supply.

23. Arex, on the other hand, considers that the Czech first purchasers had made an intra-Community acquisition, that this follows from Article 138(2)(b) of the VAT Directive, under which the supply relating to the transport under a duty suspension arrangement is always the exempt intra-Community supply, and that the acquisition associated with that supply is therefore subject to tax whilst all subsequent supplies are subject to VAT in the Czech Republic.

24. Arex first lodged an objection, unsuccessfully, with the Odvolací finanční ředitelství (Finance Board of Appeal, the respondent in the main proceedings) against the reassessment notice issued by the tax office and the denial of the right to deduct and then brought an action against the decision rejecting that objection. The Krajský soud v Českých Budějovicích (Regional Court, České Budějovice, Czech Republic) dismissed the action. The appeal against that decision is being heard by the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic). That court has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'(1) Must any taxable person be regarded as a taxable person within the meaning of Article 138(2)(b) of the VAT Directive? If not, to which taxable persons does that provision apply?

(2) If the Court of Justice's answer is that Article 138(2)(b) of the VAT Directive applies to a situation such as that in the main proceedings (that is, the acquirer of the products is a taxable person registered for tax), must that provision be interpreted as meaning that, where the dispatch or transport of those products takes place in accordance with the relevant provisions of the Excise Duty Directive, a supply connected with a procedure under the Excise Duty Directive must be regarded as a supply entitled to exemption under that provision, even though the conditions for exemption under Article 138(1) of the VAT Directive are not otherwise satisfied, having regard to the assignment of the transport of goods to another transaction?

(3) If the Court of Justice's answer is that Article 138(2)(b) of the VAT Directive does not apply to a situation such as that in the main proceedings, is the fact that the goods are transported under an excise duty suspension arrangement decisive for deciding the question of which of several successive supplies the transport is to be ascribed to for the purposes of the right to exemption from VAT under Article 138(1) of the VAT Directive?'

25. In the proceedings before the Court, the Finance Board, the Czech Republic and the European Commission submitted written observations. Those parties also took part in the hearing on 13 June 2018. Arex was not validly represented at the hearing. For that reason, the statements made by it could not be taken into consideration.

IV. Legal assessment

26. All the questions concern Article 138 of the VAT Directive, which establishes the exemption of intra-Community supplies. The existence of such a supply determines whether Arex was rightly denied the right to deduct because, if the supply to Arex was in fact exempt, Arex should not have paid any VAT to Benaft and Kont Fuel. Consequently, it also would not be entitled to deduct VAT in this regard. Rather, Arex would have to initiate civil proceedings seeking the refund of the VAT wrongly paid to Benaft and Kont Fuel.

27. As far as the lawfulness of the subsequent taxation by the tax office of the intra-Community acquisition is concerned (which is financially neutral for Arex on account of the concurrent deduction of VAT), the Court can also provide the referring court, through the requested interpretation of the provision, with useful guidance for the resolution of the dispute.[7] This is because, although taxation of intra-Community acquisitions is regulated by Article 2(1)(b) of the directive, the rules on exemption of intra-Community supplies are also relevant in this connection. As a matter of fact, the intra-Community supply of goods and their intra-Community acquisition are two sides of the same coin.

28. The provisions of the VAT Directive regarding the cross-border dispatch of goods seek to realise the destination principle. According to this principle, it is to be ensured that, as a consumer tax, VAT is payable in the Member State of final consumption. Accordingly, in the case of a cross-border supply under Article 2(1)(b)(i) and Article 40 of the VAT Directive, the acquisition of goods is taxed in the country of destination. To avoid double taxation, however, the supply of those same goods must be previously exempt in the country of origin.[8] The intra-Community supply and the intra-Community acquisition are thus one and the same financial transaction.[9]

29. By its first two questions, the referring court wishes to clarify whether Article 138(2)(b) of the VAT Directive contains a special rule in this regard governing how the exempt intra-Community supply is to be determined in the context of cross-border transport of products subject to excise duty.

30. Before that, it would like to know whether Article 138(2)(b) of the VAT Directive is actually applicable to a situation like the main proceedings. For this reason, the first two questions should be examined together.

31. The third question is asked in the event that Article 138(2)(b) of the directive is not applicable in the main proceedings or no specific elements are apparent for the purposes of ascribing the exempt cross-border transport to a certain transaction. The referring court thus asks about the criteria on which ascription must be based. In particular, it wishes to know whether it is relevant in ascribing transport that the goods were transported under an excise duty suspension arrangement. I will examine this point after answering the first two questions.

A. The first two questions

32. The referring court asks the first two questions because it takes the view that Article 138(2)(b) of the directive does not merely provide for an exemption for the intra-Community supply of products subject to excise duty. Instead, it considers that the provision might possibly also offer an indication as to how transport under a duty suspension arrangement can be ascribed to a certain supply in a sales chain. In the view of the referring court, it can be inferred from Article 138(2)(b) of the directive that the supply with which the transport of goods under a duty suspension arrangement is connected must always be regarded as exempt.

33. Article 138(2)(b) of the directive would in that case be the decisive rule for classifying the supply by Doppler to the Czech first purchasers as an exempt intra-Community supply. All subsequent supplies would then have been liable to tax as domestic supplies in the Czech Republic. Arex would thus have correctly claimed deduction of the VAT paid to Benaft and Kont Fuel.

7 The efforts made by the Court to provide national courts with useful guidance regarding the interpretation and application of EU law are consistent with settled case-law; see, among many others, judgments of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraphs 49 to 51); of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraphs 17 and 19); of 13 July 2017, *Kleinsteuber*, C-354/16, EU:C:2017:539, paragraph 61); and of 26 July 2017, *Europa Way and Persidera* (C-560/15, EU:C:2017:593, paragraphs 35 and 36).

8 See my Opinion in *EMAG Handel Eder* (C-245/04, EU:C:2005:675, points 23 to 25).

9 Judgments of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraphs 23 and 24); of 18 November 2010, *X* (C-84/09, EU:C:2010:693, paragraph 28); and of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 31).

34. However, it is a prerequisite that Article 138(2)(b) of the directive is actually applicable to the elements of the supply between Doppler and the Czech first purchasers. That is the subject of the first question (see under 1.). By the second question, the referring court would then like to clarify whether it actually follows from that provision that the supply in a supply chain in which transport is under a duty suspension arrangement is always to be regarded as the exempt supply (see under 2.).

1. Scope of Article 138(2)(b) of the VAT Directive (first question)

35. Under Article 138(2)(b) of the VAT directive, Member States must exempt the supply of products subject to excise duty 'dispatched or transported … within the Community for taxable persons, or non-taxable legal persons, *whose intra-Community acquisitions of goods other than products subject to excise duty are not subject to VAT pursuant to Article 3(1)*, where those products have been … transported [under a duty suspension arrangement]'. Article 3(1) of the directive covers inter alia small undertakings.

36. It is common ground that the Czech first purchasers are not 'taxable persons …, whose [other] intra-Community acquisitions … are not subject to VAT pursuant to Article 3(1).' The referring court nevertheless asks whether Article 138(2)(b) of the directive is still applicable to the Czech first purchasers because, in its view, the additional clause 'whose intra-Community acquisitions … are not subject to VAT pursuant to Article 3(1)' relates only to the non-taxable legal persons immediately preceding it.

37. This is suggested by the wording of the Czech language version, which refers to *a* taxable person and *a* non-taxable person in the singular, while the additional clause 'whose intra-Community acquisitions...' is introduced by a relative pronoun in the singular ('*jejíž*'). It thus refers grammatically only to the latter non-taxable legal person.

38. However, this appears to be a peculiarity of the Czech language version. Most other language versions refer to taxable persons and non-taxable persons in the plural, as a result of which the subsequent relative pronouns, which can each also refer to more than one person, do not permit a grammatical attribution to one of the two categories of persons.[10]

39. According to the Court's case-law, all language versions have the same standing in principle,[11] with the result that no inferences can be drawn from the fact that the majority of the language versions use a certain variant of the provision. Where there is divergence between the language versions of an EU legal text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[12]

40. According to this interpretation, Article 138(2)(b) concerns only the intra-Community supply of products subject to excise duty for taxable persons and non-taxable legal persons, whose *respective* other intra-Community acquisitions are covered by Article 3(1) of the directive. The exemption of the intra-Community supply of products subject to excise duty for 'normal' taxable persons already follows from Article 138(1) of the VAT Directive.

41. It follows from an overall appraisal of the directive that, in the system of value added tax, products subject to excise duty are to be regarded in principle as 'goods' for the purposes of Article 138(1) of the directive. Article 3(1)(b) of the directive also proceeds on that basis, providing for an exception to taxation for acquisitions 'of goods, other than … products subject to excise duty …'.

10 At least the German, English, French, Spanish, Polish, Bulgarian, Portuguese and Italian versions.

11 Judgments in *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 18); *EMU Tabac and Others* (C-296/95, EU:C:1998:152, paragraph 36); *Givane and Others* (C-257/00, EU:C:2003:8, paragraph 36); and *Kyocera* (C-152/01, EU:C:2003:623, paragraph 32).

12 Judgments of 26 April 2012, *DR and TV2 Danmark* (C-510/10, EU:C:2012:244, paragraph 45); of 7 June 2018, *EP Agrarhandel* (C-554/16, EU:C:2018:406, paragraph 36); and of 5 June 2018, *Kolev and Kostadinov* (C-612/15, EU:C:2018:392, paragraph 87).

42. If, however, the supply of 'goods' for taxable persons is now already exempt under Article 138(1) of the directive, Article 138(2)(b) of the directive would be redundant as it lays down an exemption for the supply of products subject to excise duty for 'normal' taxable persons.

43. In order to give Article 138(2)(b) of the directive regulatory content going beyond Article 138(1) of the directive (see the wording: 'In addition to the supply of goods referred to in paragraph 1…'), it must mean taxable persons whose other acquisitions fall under Article 3(1) of the directive. This category is not otherwise covered by the exemption in Article 138(1) by virtue of the second subparagraph of Article 139(1) of the directive.

44. Article 138(1), the second subparagraph of Article 139(1) and Article 138(2)(b) thus establish a rule/exception/counter-exception structure.

45. Under Article 138(1) of the directive, the intra-Community supply of goods for taxable persons is exempt in principle in the country of origin. However, the exemption is appropriate only if the acquisition is taxed in the country of destination (Article 2(1)(b)(i) of the directive).[13] As the intra-Community acquisitions of certain taxable persons and non-taxable persons are not subject to VAT under Article 3(1) of the directive, the second subparagraph of Article 139(1) provides that the intra-Community supply to this category of persons is not exempt. The intra-Community supply of goods to those consignees is thus taxed, by way of derogation from Article 138(1) of the directive, in the country of origin.

46. The situation is different, however, for the supply of excise goods for these consignees which are transported under a duty suspension arrangement. Their intra-Community supply is exempt in the country of origin under Article 138(2)(b) of the directive as a counter-exception. Accordingly, the acquisition of these goods is taxed in the country of destination pursuant to Article 2(1)(b)(iii) of the directive.

47. The reason for the counter-exception — as is clear from recital 36 of the directive — is the effort to achieve a certain degree of parallelism between VAT and excise duty. Through the counter-exception, VAT — like excise duty[14] — becomes chargeable in these cases in the country of destination.

2. Importance of the provision for determining the exempt intra-Community supply in the case of a supply chain (second question)

48. In the light of the above considerations, Article 138(2)(b) of the directive does not give any indication on how transport under a duty suspension arrangement is to be ascribed to a certain supply within a chain, as the provision is intended to exempt the intra-Community supply of products subject to excise duty in the country of origin, mirroring the taxation of the acquisition in the country of destination under Article 2(1)(b)(iii) of the directive.

49. The additional clause '... where those products have been … transported in accordance with Article 7(4) and (5) or Article 16 of Directive 92/12/EEC', namely under a duty suspension arrangement, does not therefore mean that the supply connected with the transport under a duty suspension arrangement is always the exempt supply. The supply under a duty suspension arrangement is an additional *condition* for exemption.

13 See above, point 28 of this Opinion.

14 See immediately below, point 50 of this Opinion.

50. In the cross-border trade in products subject to excise duty, excise duty becomes chargeable, as a rule, in the State of consignment (country of destination) [15] only when goods enter the territory of that Member State under a duty suspension arrangement. [16] Otherwise the tax would become chargeable before that in the territory of the country of origin (Article 7(2)(b) of the Excise Duty Directive). Only in the case of dispatch under a duty suspension arrangement can the parallelism of VAT and excise duty desired according to recital 36 therefore be achieved. [17]

51. If the goods are not transported under a duty suspension arrangement, on the other hand, there is no need for an additional exemption and the second subparagraph of Article 139(1) of the directive still applies. In this case excise duty and VAT become uniformly chargeable in the country of origin.

52. Furthermore, Article 138(2)(b) of the directive does not concern the situation of a supply chain specifically and for that reason alone that provision cannot be regarded as a rule on how transport is ascribed to a certain supply of products subject to excise duty.

53. The answer to the first two questions is therefore that Article 138(2)(b) of Directive 2006/112/EC is applicable only to the supply of products subject to excise duty to taxable persons, whose other acquisitions are not subject to VAT pursuant to Article 3(1) of that directive. Other than the exemption laid down therein, Article 138(2)(b) of the directive does not contain any provision for the purpose of ascribing transport under a duty suspension arrangement to a certain supply in the case of a cross-border supply chain.

B. The third question

54. It must therefore be determined, on the basis of the general rules, which supply in the chain in the main proceedings is to be regarded as the exempt intra-Community supply. By its third question, the referring court wishes specifically to clarify whether transport under a duty suspension arrangement suggests that the cross-border transport must be ascribed to the supply by Doppler to the Czech first purchasers, although it was effected at Arex's expense, using its vehicles.

55. In the light of the Court's case-law, it can be stated with regard to the main proceedings that in the case of a sales chain with a single physical movement of goods only one of the supplies can be classified as an intra-Community and thus exempt supply. [18]

56. Which of the supplies this is depends on to which legal relationship the cross-border transport is to be attributed, as the cross-border dispatch or transport of the goods is the necessary element which distinguishes an intra-Community supply (or intra-Community acquisition [19]) from a 'normal' domestic supply. [20]

15 Regard is thus had to the excise duty becoming chargeable in the State of consignment in Article 2(1)(b)(iii) of the directive, which mirrors Article 138(2)(b).

16 This situation was regulated by Article 7(4) of Directive 92/12, to which Article 138(2)(b) of the VAT Directive refers.

17 For trade between taxable persons not covered by Article 3(1) of the directive (in particular, not constituting small undertakings), whose intra-Community acquisitions are in any case subject to VAT pursuant to Article 138(1) of the directive, the directive assumes that cross-border transport typically takes place under a duty suspension arrangement and no special scheme is therefore necessary.

18 Judgments of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232, paragraph 45), and of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 34); and my Opinion in *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 35).

19 The intra-Community supply and the intra-Community acquisition have identical constituent requirements as they are one and the same financial transaction; see point 32 and footnote 9 of this Opinion.

20 See judgment of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 37), and my Opinion in *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 41).

57. All other supplies in the sales chain which do not have this additional necessary element of cross-border transport are therefore to be regarded as domestic supplies for the purposes of Article 14(1) of the directive. The place of those supplies is then, pursuant to Article 32 of the VAT Directive, in the country of origin for all supplies before the exempt intra-Community supply and in the country of destination for all subsequent supplies. [21]

1. Ascribing cross-border transport to a supply in the sales chain

58. According to the Court's case-law, the basis for ascribing cross-border transport to a supply in a sales chain is an overall assessment of all the specific circumstances of the case. [22]

59. The Court has held in this connection that it is immaterial who is the owner of the goods under national law during transport or who has actual physical control of the goods. [23] The Court has also ruled that it cannot be concluded from the mere fact that the goods have already been sold on that the transport is to be ascribed to the subsequent supply. [24] Simply selling on is thus irrelevant for the purposes of ascribing transport to one of the supplies.

60. According to the Court's case-law, it must be borne in mind, however, by whom or on whose behalf transport is effected. [25] More precisely, the crucial factor is who bears the risk for the accidental loss of the goods during transport.

61. Accordingly, in a number of cases concerning a two-link sales chain (first vendor — intermediary — final purchaser), the Court has ruled that the transport can no longer be ascribed to the 'first' supply if the right to dispose of the goods as owner was transferred prior to transport to the final purchaser, that is, to the consignee of the 'second' supply. [26]

62. The person who already disposes of goods 'as owner' [27] will generally also bear the risk for their accidental loss, as the right to dispose of property as one sees fit, to destroy or use it, for example, is a typical expression of ownership. [28] The reverse side of this right is that the holder bears the risk of accidental destruction of the goods. The person who has to bear the risk of accidental loss can therefore also be considered to hold the right to dispose of the property as owner.

63. This holds regardless of who outwardly effects the transport in such cases (this was mostly the intermediary in the cases decided) [29] and irrespective of the legal classification of the relationship of the person holding the power of disposal [30] (that is to say, whether he is already the owner or merely has a right to transfer of ownership).

21 Judgment of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2005:675, paragraph 50).

22 Judgments of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 27); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 32); of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 35); and of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84, paragraph 32); and my Opinion in *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 56).

23 It is not disputed that, for example, although a forwarder currently has actual physical control of goods, it does not act as a participating supplier, but as a carrier for a supplier. See, to that effect, judgment of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 40.)

24 Judgment of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraphs 36 and 37).

25 Judgment of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 40).

26 The cases decided thus far all concerned chains of just two successive supplies; see judgments of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 33); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 34); and of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 36).

27 Only this is required by the definition of supply and intra-Community acquisition (see Article 14(1) and Article 20(1) of the directive), but not legal ownership. See judgments of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraphs 7 and 8), and of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73, paragraph 32).

28 See my Opinion in *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 58).

29 The carrier or forwarder does not hold the power to dispose of the goods as owner; see judgments of 3 June 2010, *De Fruytier* (C-237/09, EU:C:2010:316, paragraph 25), and of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 88).

30 See, to that effect, judgments of 3 June 2010, *De Fruytier* (C-237/09, EU:C:2010:316, paragraph 24), and of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 86).

64. For this reason, the transport in the cases decided thus far would have to be ascribed to the supply involving the consignee who bore the risk for accidental loss during transport (in so far as this was established by the national court).

65. In the main proceedings this means that the crucial factor is whether Arex had already acquired the power to dispose of the fuel during its cross-border transport such that it bore the risk for its accidental loss. This would not be the case if it merely acted as a forwarder during the cross-border transport (from the refinery until release for consumption in the Czech Republic). [31]

66. However, it is for the referring court to make a definitive assessment of this question. [32]

2. Importance of the transport of the fuel under an excise duty suspension arrangement

67. It is clear from the grounds of the order for reference that the referring court considers that the cross-border transport under a duty suspension arrangement — even though it took place using Arex's vehicles and at its expense — can be ascribed only to the first transaction between Doppler and the Czech first purchasers because only then are the requirements governing this kind of transport satisfied. Under the Excise Duty Directive, this kind of transport is reserved for warehousekeepers and registered consignors and can only be to a registered consignee, like Garantrans.

68. Arex cannot therefore have transported the fuel itself under a duty suspension arrangement to a freely selected place. Rather, the registered consignee usually designates a place across the border at which the products subject to excise duty are released for consumption. Only then is transport by persons other than those mentioned in the Excise Duty Directive possible.

69. Transport under a duty suspension arrangement may be a factor to be considered by the national court in its decision ascribing movement. According to recital 36 of the VAT Directive, a parallelism is in fact *intended* to be created between VAT taxation and excise duty. It cannot be inferred, however, contrary to the view taken by the referring court, that the chargeable event for excise duty for a certain person inevitably also determines the existence of an exempt supply for that person. This was also underlined by the Commission at the hearing.

70. As the Court has already held in this regard, the chargeable event for VAT, by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled, is the supply of the goods, not the levying of excise duty on them. [33] The differing conception of VAT as an all-stage tax and excise duty as a kind of one-time tax also mitigates against such a link being made.

71. Transport under a duty suspension arrangement is thus decisive for the decision ascribing movement only if it affects the assumption of risk between the parties during transport.

72. If the national court were thus to conclude that the risk of accidental loss during transport under a duty suspension arrangement was borne by Doppler, the transport — which would thus have been effected by Arex merely as a forwarder — would have to be ascribed to the first supply.

31 See also judgment of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 89).

32 See also, to that effect, judgments of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 45), and of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 37).

33 Judgment of 14 July 2005, *British American Tobacco and Newman Shipping* (C-435/03, EU:C:2005:464, paragraph 41).

73. This is because, in my view,[34] inferences can be drawn from the assumption of risk for the role of the person concerned in a supply chain. There is in fact a factual presumption that the person who *supplies goods for another person* and bears the risk for the accidental loss of those goods during the supply also acts as a supplier. His supply must therefore be the exempt intra-Community supply.

74. This presumption applies to bilateral ('normal') intra-Community supplies and to chain transactions.[35] Of course, there may also be cases — both bilaterally and in chain transactions — where the consignee of the goods bears the risk during transport. In a chain transaction, however, such a consignee is inevitably always at the end of the chain (otherwise he acts as a person providing a service). If the consignee is at the end of the supply chain, there is no doubt to which legal relationship (the latter) the transport is to be attributed.

75. Therefore, if the first vendor bears the risk for accidental loss during transport, he can thus assume that his supply is exempt. If, on the other hand, his contractual partner bears the risk, the existence of an exempt intra-Community supply depends on whether there is a chain transaction.

76. To that end, as the Court has already required in its settled case-law, the first vendor must be informed that his contractual partner has already resold the goods.[36] Otherwise he may assume, even if he does not bear the transport risk himself, that the transaction is exempt for him, as in a bilateral relationship the consignee can also bear the risk without there ceasing to be an exempt intra-Community supply.[37]

77. If, however, he is informed that there is a chain transaction, he can infer from the fact that someone else bears the risk for the accidental loss of the goods that that person makes a cross-border and thus exempt supply of the goods as a person providing a service. His supply is therefore subject to tax.

3. Risk borne by an intermediary

78. If, however, the referring court were to conclude that the Czech first purchasers bore the risk of accidental loss during transport under a duty suspension arrangement, the second supply (by the Czech first purchasers to the next links in the chain) would have to regarded as the exempt supply.[38]

79. It also follows from the above considerations that the transfer of the power of disposal to the final purchaser represents only the last possible moment after which a subsequent transport can no longer be ascribed to one of the preceding supplies.

34 See point 62 of this Opinion.

35 In principle, the risk of accidental loss is transferred to the consignee only when he is able to dispose of the goods. The situation may be different if the consignee wishes the goods to be dispatched to a certain place.

36 See judgments of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 34 et seq.); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 35); and of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 44).

37 With regard to the first vendor, the expectation in the information from his contractual partner must be protected, for reasons of legal certainty, with the result that he may not be charged tax. This does not mean, however, that his supply actually becomes the exempt intra-Community supply; see judgment of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84, paragraph 37). The *Kreuzmayr* case concerned only the protection of legitimate expectations of the parties in the second supply. This rightly had to be rejected as it was clear to the parties in the second supply that one of them had taken over the risk for the transport of the goods; see judgment of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84, paragraph 36).

38 Under these circumstances, even though a border was actually crossed during the transport by Arex, there would be no intra-Community acquisition. As I have already stated elsewhere, the determination of the exempted supply does not depend on which place was the actual point of departure for the movement of goods; see my Opinion in *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 40).

80. As a matter of fact, it is quite possible that the transport facilitating an intra-Community acquisition takes place before the transfer of the power of disposal. This is even typically the case outside of chain transactions. In a normal cross-border supply, the consignee is generally given the power to dispose of the goods as owner only when they are handed over. Nevertheless, there is undoubtedly an exempt supply to him.

81. In this regard, the contrary inference drawn by the Court in a single decision to the effect that, where the power of disposal is transferred to the person finally acquiring the goods only in the country of destination, the 'first' supply in a two-link chain must be the exempt supply is not compelling.[39] This can also be seen from the example of sales chains with more than two supplies, as in the main proceedings. If the power of disposal is transferred to the final purchaser only in the country of destination, it is preceded by a whole series of other supplies, among which a decision to ascribe must still be made. It is not therefore possible to infer from this fact alone (the transfer of the power of disposal to the final purchaser in the country of destination) to which of the preceding supplies transport is to be ascribed. In any case it must be determined who bears the risk for the accidental loss of the goods during transport.

V. Conclusion

82. In summary, I propose that the Court answer the questions referred by the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) as follows:

(1) Article 138(2)(b) of Directive 2006/112/EC is applicable only to the supply of products subject to excise duty for taxable persons, whose other acquisitions are not subject to VAT pursuant to Article 3(1) of that directive. Other than the exemption laid down therein, Article 138(2)(b) of the directive does not contain any provision for the purpose of ascribing transport under a duty suspension arrangement to a certain supply in the case of a cross-border supply chain.

(2) In ascribing the single cross-border transport to a certain supply in a supply chain, the crucial factor is who bears the risk for the accidental loss during the transport of the goods to another link in the supply chain.

39 See judgment of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 45).