Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 22 April 2021 [1]

Case C-80/20

Wilo Salmson France SAS
v
Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București,
Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București – Administrația Fiscală pentru Contribuabili Nerezidenți

(Request for a preliminary ruling
from the Tribunalul București (Regional Court, Bucharest, Romania))

(Request for a preliminary ruling – Tax legislation – VAT – Directive 2006/112/EC – Article 167 and Article 178(a) – Origin of right of deduction – Time of origin of right of deduction – Possession of an invoice as a substantive requirement – Differentiation from the formal requirements for the right of deduction – Refund Directive (Directive 2008/9/EC) – Article 14(1)(a) and Article 15 – Enforceability of an uncontested refusal decision – Legal consequences of cancellation (annulment) and reissuing of invoices)

I. Introduction

1. An undertaking submitted a refund application in Romania in 2012. Only one invoice was issued in 2012, but it was apparently not issued in due form. The refund application for 2012 was refused, following which the invoice was cancelled (annulled) and re-issued in 2015, and a new refund application was submitted for 2015, on which a decision has to be adopted. The court is unsure as to when the right of deduction arose and when the refund application should have been submitted.

2. The Court has the opportunity here to answer one of the most important questions of VAT law in practice, namely whether an undertaking's right of deduction depends upon possession of an invoice.

3. If that question is answered in the affirmative, the need to hold an invoice is also important in terms of the tax period in which the right of deduction must be exercised or the refund application submitted. If the initial invoice is corrected at a later date and the correction is assumed to have retroactive effect, it would be when the incorrect invoice was held (in this case 2012); otherwise it

[1] Original language: German.

would be when the corrected invoice was held (in this case 2015). If, however, the above question is answered in the negative, then it will depend solely upon the supply of the goods or services (in this case in 2012).

4. If the right of deduction is subject to certain time limits (whether in the form of certain application time limits, as in this refund procedure under Directive 2008/9/EC, or in the form of limitation periods), it is important to know when those time limits start to run. This gives rise to an associated question, namely whether there is a particular time at which the taxable person must exercise the right of deduction or whether he or she is free to decide when to do so by asking his or her counterparty to issue a new invoice and annul the old invoice, and to procedural questions, if the VAT refund application submitted has since been refused by an enforceable decision.

II. Legal framework

A. EU law

– Directive 2006/112

5. Article 63 of Directive 2006/112/EC on the common system of value added tax[2] ('the VAT Directive') regulates when the chargeable event occurs and when the VAT becomes chargeable as follows:

'The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

6. Article 167 of the VAT Directive governing the origin of the right of deduction states:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

7. However, Article 178 of the Directive regulates the exercise of the right of deduction as follows:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI;

[…]

(f) when required to pay VAT as a customer where Articles 194 to 197 or Article 199 apply, he must comply with the formalities as laid down by each Member State.'

8. Amendments to an invoice are covered by Article 219 of the VAT Directive, which states:

'Any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice.'

[2] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1), in the version applicable in the year concerned (2015).

9. Article 168(a) of the VAT Directive regulates the substantive scope of the right of deduction:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.'

10. Article 169(a) of the Directive extends that right of deduction:

'In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State'.

11. Article 170 of the VAT Directive clarifies that, even if unable to exercise the right of deduction, the taxable person is entitled to obtain a refund:

'All taxable persons who, within the meaning of Article 1 of Directive 86/560/EEC …, Article 2(1) and Article 3 of Directive 2008/9/EC … and Article 171 of this Directive, are not established in the Member State in which they purchase goods and services or import goods subject to VAT shall be entitled to obtain a refund of that VAT in so far as the goods and services are used for the purposes of the following:

(a) transactions referred to in Article 169; …'

12. Article 171(1) of the VAT Directive sets out the procedure for refunding VAT to taxable persons who do not carry out transactions inland:

'VAT shall be refunded to taxable persons who are not established in the Member State in which they purchase goods and services or import goods subject to VAT but who are established in another Member State, in accordance with the detailed rules laid down in Directive 2008/9/EC.'

– *Directive 2008/9*

13. Article 5 of Directive 2008/9/EC laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State[3] ('the Refund Directive') clarifies the link to the VAT Directive.

[3] Council Directive of 12 February 2008 (OJ 2008 L 44, p. 23), in the version applicable in the year concerned (2015).

'Each Member State shall refund to any taxable person not established in the Member State of refund any VAT charged in respect of goods or services supplied to him by other taxable persons in that Member State or in respect of the importation of goods into that Member State, in so far as such goods and services are used for the purposes of the following transactions:

(a) transactions referred to in Article 169(a) and (b) of Directive 2006/112/EC;

(b) transactions to a person who is liable for payment of VAT in accordance with Articles 194 to 197 and Article 199 of Directive 2006/112/EC as applied in the Member State of refund.

Without prejudice to Article 6, for the purposes of this Directive, entitlement to an input tax refund shall be determined pursuant to Directive 2006/112/EC as applied in the Member State of refund.'

14. Article 10 of the Refund Directive allows the Member State of refund to request that additional documents be submitted with the application.

'Without prejudice to requests for information under Article 20, the Member State of refund may require the applicant to submit by electronic means a copy of the invoice or importation document with the refund application where the taxable amount on an invoice or importation document is EUR 1 000 or more or the equivalent in national currency. Where the invoice concerns fuel, the threshold is EUR 250 or the equivalent in national currency.'

15. Article 14 of the Refund Directive specifying the content of the refund application states:

'1. The refund application shall relate to the following:

(a) the purchase of goods or services which was invoiced during the refund period, provided that the VAT became chargeable before or at the time of the invoicing, or in respect of which the VAT became chargeable during the refund period, provided that the purchase was invoiced before the tax became chargeable; …'

16. Article 15(1) of the Refund Directive regulating the date by which a refund application must be submitted states:

'The refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11. …'

17. Article 23 of the Refund Directive concerning refusal of the refund application states:

'1. Where the refund application is refused in whole or in part, the grounds for refusal shall be notified by the Member State of refund to the applicant together with the decision.

2. Appeals against decisions to refuse a refund application may be made by the applicant to the competent authorities of the Member State of refund in the forms and within the time limits laid down for appeals in the case of refund applications from persons who are established in that Member State. …'

B. Romanian law

18. Article 145 of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 on the Tax Code, 'the Tax Code') regulates the right of taxable persons to deduct VAT on purchases.

19. Article 146 of the Tax Code provides that the taxable person must hold an invoice in order to exercise that right.

20. Article 147²(1)(a) of the Tax Code allows taxable persons resident in a Member State other than Romania and not required to register for VAT in Romania to obtain a refund of VAT charged on imports into Romania and on the purchase of goods/services in Romania.

21. Paragraph 49(15) of the Hotărârea Guvernului nr. 44/2004 privind Normele metodologice de aplicare a Codului fiscal (Government Decree No 44/2004 on the implementation of the Tax Code) provides for a refund application to be submitted in connection with 'purchases of goods or services invoiced within the refund period and paid for before the refund application is submitted' and for 'invoices not paid before the refund application is submitted to be included in refund applications for the periods in which they were paid'.

22. Paragraph 49(16) of that Decree states that 'without prejudice to the transactions referred to in point 15 …, the refund application may also relate to invoices or import documents not covered by previous refund applications which concern transactions completed during the calendar year in question'.

III. Main proceedings

23. ZES Zollner Electronic SRL ('ZES'), a company established and registered for VAT purposes in Romania, supplies Pompas Salmson SAS with goods produced in Romania. Pompas Salmson is a company with a right of deduction whose economic activity is based in France. It is neither established nor registered for VAT purposes in Romania.

24. Pompas Salmson also concluded a contract with ZES for the purchase of tooling, which ZES sold to Pompas Salmson SAS and which Pompas Salmson then made available to ZES for the purposes of manufacturing the goods subsequently supplied to Pompas Salmson ('tooling').

25. ZES issued invoices in 2012 in respect of the sale of that tooling, on which VAT was charged. It is unclear if and when Pompas Salmson paid those invoices.

26. Pompas Salmson applied for a refund of the VAT paid in Romania pursuant to the Refund Directive and Article 147²(1)(a) of the Tax Code, read in combination with Paragraph 49 of Government Decree No 44/2004.

27. By decision of 14 January 2014, the Romanian tax authorities refused the refund application relating to the period from 1 January 2012 to 31 December 2012 in respect of the sum of 449 538.38 Romanian leu (RON) (approx. EUR 92 000) on grounds to do with the documents accompanying the application and the fact that the attached invoices apparently[4] did not meet

[4] Unfortunately, the reference for a preliminary ruling does not explain exactly why the invoices did not comply and what errors they contained.

statutory requirements. According to the Romanian authorities, there was no proof of payment of the invoices submitted, which was still a requirement under the law in force at the time. In the view of the Romanian authorities, the invoices themselves were all in due form.

28. In any event, ZES cancelled the invoices initially issued (in 2012) and issued new invoices in 2015 for the sale of the tooling.

29. Pompas Salmson was taken over by Wilo France SAS in 2014. That transaction gave rise to Wilo Salmson France SAS ('the applicant').

30. In November 2015, the applicant submitted an application for a refund of VAT on the basis of the new invoices issued by ZES for the period from 1 August 2015 to 31 October 2015. The tax authorities refused the application for a VAT refund as unfounded, stating that the applicant had not complied with Paragraph 49(16) of Government Decree No 44/2004 and had already applied for a refund for the invoices.

31. The applicant lodged an appeal against that decision on 13 June 2016, which the Direcția Generală Regională a Finanțelor Publice (DRFP) București – Administrația Fiscală pentru Contribuabili Nerezidenți (Bucharest Regional Directorate-General of Public Finances – Fiscal Administration for Non-Resident Taxpayers, Romania) dismissed as unfounded. It stated that the VAT referred to in the refund application had already been the subject matter of a different refund application and that the transactions for which the VAT refund application had been submitted concerned 2012, not 2015. The applicant initiated proceedings against that decision.

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

32. By order of 19 December 2019, the Tribunalul București (Regional Court, Bucharest) seised of the dispute referred the following questions to the Court of Justice for a preliminary ruling:

'1. As regards the interpretation of Article 167 of Directive 2006/112/EC, read in conjunction with Article 178 thereof, is there a distinction between the moment the right of deduction arises and the moment it is exercised with regard to the way in which the system of VAT operates?

   To that end, it is necessary to clarify whether the right to deduct VAT may be exercised where no (valid) tax invoice has been issued for purchases of goods.

2. As regards the interpretation of Articles 167 and 178 of Directive 2006/112/EC, read in conjunction with the first alternative in Article 14(1)(a) of Directive 2008/9/EC, what is the procedural point of reference for determining the lawfulness of the exercise of the right to a refund of VAT?

   To that end, it is necessary to clarify whether an application for a refund may be made in respect of VAT which became chargeable prior to the 'refund period' but which was invoiced during the refund period.

3. As regards the interpretation of the first alternative in Article 14(1)(a) of Directive 2008/9, read in conjunction with Articles 167 and 178 of Directive 2006/112, what are the effects of the annulment of invoices and the issuing of new invoices in respect of purchases of goods made before the 'refund period' on the exercise of the right to a refund of the VAT relating to those purchases?

   To that end, it is necessary to clarify whether, in the event of annulment, by the supplier, of the invoices initially issued for the purchase of goods and the issuing of new invoices by that supplier at a later date, the exercise of the right of the recipient to apply for a refund of the VAT relating to the purchases is to be linked to the date of the new invoices, in a situation where the annulment of the initial invoices and the issuing of the new invoices is not within the recipient's control but is exclusively at the supplier's discretion.

4. May national legislation make the refund of VAT granted under Directive 2008/9 conditional upon the chargeability of the VAT in a situation where a corrected invoice is issued during the application period?'

33. The applicant, Romania and the European Commission submitted written observations in the proceedings before the Court.

V. Legal assessment

A. Admissibility of the request for a preliminary ruling

34. Romania casts doubt on the admissibility of the request for a preliminary ruling, claiming that the referring court presented the facts of the main proceedings incorrectly. Romania contends that the refund application was refused in 2012 not due to the absence of correct invoices, but due to the absence of proof of payment of the invoices; that this was still a requirement under the (national) law in force at the time; that, under a transitional rule, those applications could have been resubmitted by 30 September 2014, this time without proof of payment, which the applicant failed to do; and that, in the absence of an inaccurate invoice, all the questions raised by the referring court are obsolete and the Court cannot give any useful answer to them.

35. It is difficult for the Court to interpret EU law correctly if the facts are not presented correctly. If there are no invoicing errors, then – as Romania rightly contends – none of the questions raised by the referring court arise, and the question remains as to what, if any, specific shortcomings in the invoices caused the 2012 refund application to be refused. However, the answers to the questions raised depend upon whether the invoices were correct and had simply not been dated or whether, for example, the VAT had not been stated separately.

36. Moreover, it is settled case-law that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the latter is empowered only to give rulings on the interpretation or the validity of a provision of EU law on the basis of the facts placed before it by the referring court.[5] Therefore, as regards the alleged

[5] Judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 41); of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 27); and of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 19).

factual errors in the order for reference, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver. [6]

37. Consequently, the order for reference is admissible and the questions referred must be answered on the basis of the premiss that the 2012 refund application was refused on the basis of inaccurate invoices, the merits of which it is, however, for the referring court to check.

B. The questions referred

38. The present order for reference concerns a refund application under the Refund Directive that was refused in 2012 and resubmitted in 2015, after the initial (2012) invoices had been cancelled and reissued in 2015. By its four questions, the referring court ultimately wishes to establish the correct time for the refund of VAT charged in the price to the recipient of the supply (the applicant) for supplies in 2012.

39. Even though only Questions 2 to 4 concern the Refund Directive, while Question 1 concerns the time when the right of deduction is exercised, it too – contrary to the Commission's contention – needs to be answered as a necessary preliminary question.

40. As the Court has clarified on numerous occasions, it is not the purpose of the Refund Directive to define the conditions for exercising the right to a refund, nor the extent of that right. The second subparagraph of Article 5 of the Refund Directive provides that, without prejudice to Article 6 of that Directive, entitlement to a refund of VAT which is paid as an input tax is to be determined pursuant to the VAT Directive, as applied in the Member State of refund. [7] Thus, the VAT Directive determines the substantive claim and the Refund Directive regulates the procedure used case by case to fulfil that substantive claim in accordance with Article 170 of the VAT Directive for taxable persons not resident in the Member State of refund (within the meaning of Article 3 of the Refund Directive). [8]

41. Consequently, the right to a refund under the Refund Directive of a taxable person established in another Member State is the counterpart of that taxable person's right to deduct input VAT in his or her own Member State. [9]

42. Therefore, the moment when the right of deduction under Article 167 et seq. of the VAT Directive arose and should have been exercised by the applicant is a deciding factor, on which the answer depends to the question behind all the questions referred, that is whether the applicant exercised its right of deduction in 2015 with regard to the supply of tooling in 2012 in the correct refund period in accordance with Article 14 of the Refund Directive (and by the deadline stipulated in Article 15 of the Refund Directive).

[6] Judgments of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 19), and of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 40).

[7] Judgments of 11 June 2020, *CHEP Equipment Pooling* (C-242/19, EU:C:2020:466, paragraph 51), and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 35).

[8] See, to that effect, judgment of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 34).

[9] See, to that effect, judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 36); of 11 June 2020, *CHEP Equipment Pooling* (C-242/19, EU:C:2020:466, paragraph 52); and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 36). See, to that effect, judgment of 25 October 2012, *Daimler and Widex* (C-318/11 and C-319/11, EU:C:2012:666, paragraph 41).

43. That question is of particular importance to the court, as the initial (apparently incorrect) invoices issued in 2012 for the supplies in 2012 were cancelled and reissued in 2015. In that sense, the answer to all the questions stands and falls by the importance of an invoice to the right of deduction (see section C.). In other words, if no invoice is required, the fact that it was incorrect is immaterial, as is the fact that it was cancelled and issued again correctly.

44. Therefore, the first point to be clarified is the importance of an invoice to the right of deduction (see sections C.1. and C.2.). This will determine whether the right of deduction is conditional upon the requirement enacted in Article 178(a) of the VAT Directive, that the taxable person must *hold an invoice*, as the Court found in its judgments in *Volkswagen*[10] and *Biosafe*,[11] or whether that requirement has become obsolete in light of the judgment of the Court in *Vădan*[12] (see section C.3.). Then it has to be decided whether the fact that the invoice was incorrect and was cancelled (annulled) by the supplier and reissued in 2015 changes that (see section C.4.). However, contrary to the Commission's contention, the substantive aspects (see section C.4.a.) and the procedural aspects (see section C.4.b.) must both be considered here in order to take account of the deadline for applications stipulated in Article 15 of the Refund Directive and the enforceability of an uncontested refusal decision by the tax authorities (see Article 23 of the Refund Directive).

45. Once those points have been clarified, answering the questions concerning the correct refund period within the meaning of Article 14(1)(a) of the Refund Directive (Questions 2 to 4 in the request for a preliminary ruling) will be a straightforward matter (see section D.).

C. Time of origin of right of deduction (Question 1)

46. It is therefore necessary to clarify when the applicant's right of deduction arose. The problems involved in determining the correct period in which to exercise the right of deduction are caused by the existence and wording of two rules, namely the rule on the origin of the right of deduction in Article 167 of the VAT Directive and the rule on the exercise of the right of deduction in Article 178(a) of that Directive. That is clearly illustrated by the first question of the referring court.

47. Article 167 of the VAT Directive states that a right of deduction (on the part of the recipient of the supply) arises at the time the deductible tax becomes chargeable (and the supplier therefore becomes liable for payment of the tax, see Article 63 of the VAT Directive). Whereas in principle Article 167 of the VAT Directive brings about a simultaneous liability for payment of the tax on the part of the supplier and a right of deduction on the part of the recipient of the supply, Article 178 of the VAT Directive modifies that principle, in that successful enforcement requires not only that the supplier has become liable for payment of the tax, but also that the recipient of the supply holds an invoice. Moreover, the invoice must be drawn up in accordance with certain formal requirements (such as those specified in Article 226 of the VAT Directive).

48. Therefore, either the right of deduction arose upon the supply of the goods or services, in keeping with Article 167 and Article 63 of the VAT Directive. That would have been in 2012 and the application in 2015 would ultimately be out of time in accordance with Article 15 of the

[10] Judgment of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204).

[11] Judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249).

[12] Judgment of 21 November 2018, *Vădan* (C-664/16, EU:C:2018:933).

Refund Directive. As the Court has already found on several occasions,[13] that deadline is a mandatory time limit. Or it depends upon possession of an invoice in accordance with Article 178 of the VAT Directive, in which case the right of deduction arose either in 2012, if the invoice did not have to comply with all the formal requirements of Article 226 of the VAT Directive, or in 2015, as it was only then that an invoice was issued in this case that apparently fulfilled all the requirements of Article 226.

49. I believe that the second alternative, that it is necessary to hold an invoice, is correct, and that formal shortcomings do not preclude the right of deduction and can also be corrected retroactively. In my view, a distinction must be drawn between the origin of the right of deduction *in principle* (see section 1.) and the origin of the right of deduction *in a given amount* (see section 2.). On closer inspection, moreover, that proposition alone is consistent with the Court's case-law on the retrospective correction of formally incorrect invoices (see section 3.). That means that, although cancellation (annulment) of an invoice is possible under civil law, it has no bearing on the time of origin of the right of deduction (see section 4.).

1. Origin of right of deduction in principle

50. Closer inspection of the Court's case-law shows that it has to date ruled mainly on the origin of the right of deduction *in principle*. The Court has found that the right to deduct and, accordingly, to a refund is an integral part of the VAT scheme and in principle may not be limited. That right is exercisable immediately in respect of all taxes charged on input transactions.[14] According to the Court's settled case-law, the fundamental principle of VAT neutrality requires the deduction or refund of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements.[15] The only exception should be where non-compliance with such formal requirements has effectively prevented the production of conclusive evidence that the substantive requirements were satisfied.[16]

51. Article 168(a) of the VAT Directive refers, moreover, to deduction of the 'VAT due or paid'. That means the VAT due to the State or paid to the State by the supplier. Under that scheme, no VAT is due from the recipient of the supply, but he does owe his counterparty the agreed price.

[13] Judgment of 21 June 2012, *Elsacom* (C-294/11, EU:C:2012:382, paragraphs 33 and 34). See also judgment of 2 May 2019, *Sea Chefs Cruise Services* (C-133/18, EU:C:2019:354, paragraph 39).

[14] Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 46); of 18 November 2020, *Commission* v *Germany* (VAT refunds/invoices) (C-371/19, EU:C:2020:936, not published, paragraph 79); of 2 May 2019, *Sea Chefs Cruise Services* (C-133/18, EU:C:2019:354, paragraph 36); and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 39).

[15] Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 47); of 18 November 2020, *Commission* v *Germany* (VAT refunds/invoices) (C-371/19, EU:C:2020:936, not published, paragraph 80); of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 41); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 45); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 42); of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 58); of 30 September 2010, *Uszodaépítő* (C-392/09, EU:C:2010:569, paragraph 39); of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 42); and of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 63).

[16] Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 48); of 18 November 2020, *Commission* v *Germany* (VAT refunds/invoices) (C-371/19, EU:C:2020:936, not published, paragraph 81); and of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 42 and the case-law cited).

52. That rule illustrates the spirit and purpose of the right of deduction. As VAT is a tax on consumption [17] and given the indirect taxation technique applied, the right of deduction relieves recipients of supplies with a right of deduction from the burden of the VAT charged to them in the price which is due from another person (the supplier).

53. If that concept is taken at face value, then actual payment of the price by the applicant should be the criterion, as only then is it actually (indirectly) charged VAT. However, the rule enacted in Article 167a of the VAT Directive illustrates that the legislature grants a right of deduction even prior to payment. That article allows the right of deduction to be postponed until payment has been made, even though liability for payment of the tax only arises on collection of the price. That only makes sense if a right of deduction can be exercised prior to payment in other cases.

54. Thus, the legislature clearly assumes that the recipient of the supply is charged VAT prior to payment of the price, but after the supply of the goods or services. At that point, the right of deduction has already arisen *in principle*.

2. Origin of right of deduction in a given amount

55. However, it is still necessary to clarify the time of origin of the right of deduction *in a given amount*. The rule enacted in Article 178(a) of the VAT Directive is of decisive importance in that regard.

56. That is because the mere supply of the goods or services says nothing about the amount of VAT charged to the recipient of the supply and included in the price. This is obvious in the case of ongoing services, the contract for which (electricity supply contract, for example) simply sets out the subject matter of the supply, but not the quantities to be supplied. There are, furthermore, other cases in which the price owed (under civil law) depends on the amount billed by the supplier on completion of the supply (e.g. where a lawyer bills for services by the hour or on a contingency basis).

57. However, if the supply of the goods or services by the supplier still says nothing about the actual amount in VAT charged to the recipient of the supply, then it is only logical that the legislature not only links the right of deduction to the supply of the goods or services, but also demands, in Article 178(a) of the VAT Directive, that the recipient of the supply 'hold an invoice'. [18]

58. Thus, the need to hold an invoice also serves to implement the principle of neutrality enshrined in VAT law. The principle of neutrality represents a fundamental principle [19] of VAT, inherent in its nature as a tax on consumption. It requires, inter alia, that the undertaking, acting

[17] See judgments of 10 April 2019, *PSM 'K'* (C-214/18, EU:C:2019:301, paragraph 40); of 18 May 2017, *Latvijas Dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 69); of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34); and of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19).

[18] See also the Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 60).

[19] The Court refers in its judgment of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 43), to the principle of interpretation.

as tax collector on behalf of the State, should fundamentally be relieved of the final burden of VAT,[20] in so far as the economic activity carried on by the undertaking is itself geared (in principle) towards the realisation of taxable transactions.[21]

59. I should like to draw attention once again here[22] to the concept of VAT relief, from which it follows,[23] that deduction of input tax is possible only if the recipient of the supply sustains a charge to VAT. However, the recipient does not sustain a charge immediately upon the supply of the goods or services, but only upon payment of the consideration (see point 53 above). The rule enacted in Article 178(a) of the VAT Directive is clearly predicated on the concept that payment is generally made promptly once an invoice has been issued, meaning that it is possible even at that moment to presume that the recipient of the supply sustains a charge promptly.

60. This is readily apparent even from the Court's earlier case-law, in which it was still explicitly stating[24] that the immediate right to deduct is based on the assumption that, in principle, taxable persons do not make payment and therefore do not pay input VAT until they have received an invoice, or another document which may be considered to serve as an invoice, and that the VAT cannot be regarded as being chargeable on a given transaction before it has been paid.

61. After all, the extent to which the recipient of the supply sustains (or will sustain) a charge to VAT is apparent only if VAT in that amount was included in the calculation of the consideration payable by the recipient. Whether VAT was included in the consideration, however, is apparent only from the legal relationship underlying that consideration and the billing for performance under that relationship. The transaction performed is billed by issuing an invoice.

62. In the final analysis, the invoice which must be held in accordance with Article 178(a) of the VAT Directive is the verifiable means by which the charge to VAT is passed on from the supplier (which is liable for payment of the tax) to the recipient of the supply (as part of the price). Only then is the recipient of the service able to see how much the supplier believes he should be charged in VAT and can then claim relief in that amount.

63. Furthermore, as the Court has previously held,[25] the need to hold an invoice also allows the tax authorities to monitor payment of the VAT and the input tax deducted. The more details the invoice contains, the more effective the monitoring by the tax authorities, as the very comprehensive list now included in Article 226 of the VAT Directive illustrates.

64. In my opinion, the Court has already clarified the importance of possession of an invoice as the necessary means by which the charge is sustained and as the condition to relief from the charge via the right of deduction in its judgments in *Volkswagen*[26] and *Biosafe*.[27]

[20] Judgments of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25), and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

[21] Judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); and of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57). See also my Opinion in *Centralan Property* (C-63/04, EU:C:2005:185, point 25).

[22] See my Opinion in *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2017:927, point 44 et seq.).

[23] See also Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 64).

[24] Judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 35).

[25] Judgments of 15 November 2017, *Geissel and Butin* (C-374/16 and C-375/16, EU:C:2017:867, paragraph 41), and of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 27). See also my Opinion in *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:101, points 30, 32 and 46).

[26] Judgment of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204).

[27] Judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249).

65. The judgment in *Volkswagen* concerned a case in which the parties assumed that their transactions were exempt from VAT. Invoices stating VAT separately were only issued years later, once the mistake had been noticed, and a refund application was submitted under the Refund Directive. The Court held [28] that, in these circumstances, it was objectively impossible for the recipient of the supply to exercise its right to a refund before that adjustment, as, prior to that, it had neither 'been in possession of the invoices nor aware that the VAT was due. It was only following that adjustment that the substantive and formal conditions giving rise to a right to deduct VAT were met'. In the final analysis, the time limit laid down in Article 15 of the Refund Directive only started to run once an invoice had been issued with the VAT stated separately.

66. The judgment in *Biosafe* concerned the right of deduction in the case of a mutual error as to the rate of tax. It was assumed to be lower and the supplier corrected its invoice years later by increasing the separately stated amount of VAT. Here again, the Court found [29] that it was objectively impossible for the recipient of the supply to exercise its right to deduct before the VAT adjustment carried out, since beforehand it 'did not possess the documents rectifying the initial invoices and did not know that additional VAT was due. It was only following that adjustment that the substantive and formal conditions giving rise to a right to deduct VAT were met'. In the final analysis, the period of limitation under tax law in respect of that additional amount only started to run from when an invoice was held on which that amount was stated separately.

67. It is my understanding that both those judgments of the Court assumed that an enforceable right of deduction does not arise until the recipient of the supply holds an invoice showing the VAT which he has been charged. This is in line with Article 167 and Article 178(a) of the VAT Directive.

3. Correct time for exercising right of deduction

68. The origin of the right of deduction in principle is expressed in Article 167 of the VAT Directive and the origin of the right of deduction in a given amount is expressed in Article 178. The correct time for exercising the right of deduction and the time at which any time limits start to run depends upon when the requirements of both articles are fulfilled. That ultimately follows from Article 179 of the VAT Directive, which does not leave the exercise of the right of deduction to the discretion of the taxable person. On the contrary, the right of deduction can only be exercised in the tax period in which it arose, both in principle and in a given amount.

69. Otherwise, the rule enacted in Article 180 of the VAT Directive, allowing the Member States to apply a different rule, would make no sense. It follows, as the Court has previously found, [30] that the Member States may require the right to deduct to be exercised either during the period in which it arose or over a longer period, subject to compliance with certain conditions and procedures determined by their national legislation.

[28] Judgment of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraphs 49 and 50).

[29] Judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 42 and 43).

[30] Judgments of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 43), and, in particular, of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 33 et seq.).

(a) Case-law of the Court on evidence of the right of deduction in the form of an expert report

70. The judgment of the Court in *Vădan*,[31] which has caused some legal uncertainty,[32] does not suggest otherwise. The Court held in paragraph 42 of that judgment that the strict application of the substantive requirement to produce invoices would conflict with the principles of neutrality and proportionality, inasmuch as it would disproportionately prevent the taxable person from benefiting from fiscal neutrality relating to his transactions.

71. At first glance, one might assume that a right of deduction may exist even with no invoice and contrary to the wording of Article 178. On closer reading, however, the Court has not ruled thus anywhere in the judgment cited.

72. First, the 'only' question the Court had to answer in that case was whether a right of deduction can be based on an assessment resulting from an expert report on the usual right of deduction for that type of construction project. The Court correctly found that it cannot. The right of deduction is based on the *actual* VAT burden, not on the *usual* VAT burden. The expert could only have proven the latter by assessment.

73. Secondly, at no point in those proceedings did the Court answer the question of whether VAT invoices were ever issued. It simply found that the initial invoices were no longer legible and that the tax authorities had insisted that original invoices be submitted.

74. That is incompatible with the Directive. The Directive simply requires that taxable persons hold an invoice when they exercise their right of deduction, not that they must still hold and be in a position to submit the invoice during a tax audit. If the invoice is subsequently lost, the taxable person can of course use all possible evidence (usually a copy) to prove that at some point they held an invoice on which VAT was charged in a given amount.

75. Therefore, the Court's findings in *Vădan* rightly only refer to *evidence* of the right of deduction.[33] The substantive requirements (following from Article 167 and Article 178) for the deduction of VAT can be proven by all possible evidence, for which expert evidence of the usual VAT charge is per se unsuitable.[34] In my opinion, that outcome also follows quite unequivocally from the operative part of the judgment, read with reference to the questions and the facts placed before the Court.

[31] Judgment of 21 November 2018, *Vădan* (C-664/16, EU:C:2018:933).

[32] See, by way of example, the numerous German commentaries on this issue: Hartman, T., 'Vorsteuerabzug ohne Rechnung?', NWB 2019, 316; Huschens, F., 'Ist für den Vorsteuerabzug zwingend eine Rechnung erforderlich?', UVR 2019, 45; Höink, C./Hudasch, C., 'Vorsteuerabzug ohne Rechnung?!', BB 2019, 542; Heuermann, B., 'Urteil des EuGH in der Rechtssache Vădan: Rechnungserfordernis für den Vorsteuerabzug?', StBp 2019, 85; Schumann, M. F., 'Entscheidung des EuGH in der Rs. Vădan und ihre Folgen: Vorsteuerabzug ohne Rechnung?', DStR 2019, 1191; Weimann, R., 'Vorsteuerabzug auch ohne Eingangsrechnung', AStW 2019, 285; Zaumseil, P., 'Vorsteuerabzug ohne Rechnung', UR 2019, 289.

[33] Judgment of 21 November 2018, *Vădan* (C-664/16, EU:C:2018:933, paragraph 44, 'provide objective evidence'; paragraph 45, 'evidence'; paragraph 47, 'evidence'; and paragraph 48, 'provide evidence').

[34] The Court quite rightly found in its judgment of 21 November 2018, *Vădan* (C-664/16, EU:C:2018:933, paragraph 45), that an assessment cannot replace evidence.

(b) Case-law of the Court on the correct period for exercising the right of deduction

76. Therefore, nor does any contradiction exist with the case-law of the Court in which it addressed the specific period [35] in which the right of deduction is to be exercised. By those judgments, it always in fact relied on the need for the taxable recipient of the supply to hold an invoice. [36]

77. For example, in its judgment in *Terra Baubedarf-Handel*, it explicitly argued as follows: 'As regards the principle of proportionality, it is not infringed by requiring the taxable person to effect the deduction of input VAT in respect of the tax period in which the condition of possession of the invoice or of a document considered to serve as an invoice and that of the origin of the right to deduct are satisfied. First, that requirement is consistent with one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected (evidence), and secondly …, payment for delivery of goods or performance of services, and therefore payment of input VAT, is not normally made until the invoice has been received.' [37] By its judgment in *Senatex*, it established the principle that the right of deduction must be exercised in respect of the tax period, first, in which the right of deduction arose and, secondly, in which the taxable person 'is in possession of the invoice'.

78. However, if the period in which the right of deduction is to be exercised depends upon possession of an invoice, then that possession is a substantive, not simply formal criterion. Consequently, the right of deduction depends upon possession of a corresponding invoice.

(c) Case-law of the Court on the retroactive correction of incomplete/incorrect invoices

79. Ultimately, this also follows from the Court's more recent case-law on the retrospective correction of invoices, [38] by which the Court distinguishes between the substantive and formal requirements for the right of deduction. The formal requirements include the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns. [39] At the same time, the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some formal requirements. [40] Consequently, where the tax authorities have the information necessary

[35] For example, judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691), and of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268).

[36] See also the Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 58) and my Opinion in *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2017:927, point 65 et seq.).

[37] Judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 37).

[38] It includes, for example, judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690); and of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297).

[39] Judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 47). See, to that effect, judgment of 11 December 2014, *Idexx Laboratories Italia* (C-590/13, EU:C:2014:2429, paragraphs 41 and 42 and the case-law cited).

[40] Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 47); of 18 November 2020, *Commission* v *Germany* (VAT refunds/invoices) (C-371/19, EU:C:2020:936, not published, paragraph 80); of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 41); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 45); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 42); of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 58); of 30 September 2010, *Uszodaépítő* (C-392/09, EU:C:2010:569, paragraph 39); of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 42); and of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 63).

to establish that the substantive requirements have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes. [41]

80. However, it is clear on closer reading that the case-law of the Court on the formal shortcomings which do not preclude the right of deduction always concerns the details of the content of an invoice, never possession of an invoice as such (or the existence of an invoice). [42]

81. Thus, that case-law only refers to the absence of *certain* formal requirements, not to the absence of *all* formal requirements. It cannot therefore be concluded from that case-law that a right of deduction can arise if no invoice is held. The Court itself only notes that 'holding an invoice showing the details mentioned in Article 226 of Directive 2006/112 is a formal condition, not a substantive condition, of the right to deduct VAT'. [43] That observation is correct. The provision of *all* the information specified in Article 226 of the VAT Directive is a formal requirement. Provided it is not essential (as explained in point 93 et seq.), that information may also be added or amended at a later date (for example in accordance with Article 219 of the VAT Directive). *Possession* of an invoice in accordance with Article 178 of the VAT Directive is of itself a situation in fact, not a formal requirement. [44]

82. Furthermore, the Court also 'only' concludes from that finding that the tax authority cannot refuse the right to deduct VAT on the sole ground, for example, that an invoice does not satisfy the conditions required by Article 226(6) and (7) of the VAT Directive (precise description of the quantity and nature of supply and date of the supply) if they have available all the information to ascertain whether the substantive conditions for that right are satisfied. [45] The same applies to the information mentioned in Article 226(3) (supplier's VAT identification number) [46] or Article 226(2) (invoice number). [47] Consequently, the Court ascribed retroactive effect to the correction of a (formally incorrect) invoice already held by the recipient of the supply. [48]

[41] Judgments of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 42), and of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraphs 58 and 59). See also, to that effect, judgments of 1 March 2012, *Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz* (C-280/10, EU:C:2012:107, paragraph 43), but with reference to the reverse charge procedure, and of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 42), including in the context of the reverse charge procedure.

[42] As explicitly clarified in judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 39 et seq.). Judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraphs 35 and 49) also concerned an invoice, the possession of which was uncontested, but some of the details of which were imprecise. Judgment of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 45), also refers to possession of an initial invoice.

[43] Judgments of 15 November 2017, *Geissel and Butin* (C-374/16 and C-375/16, EU:C:2017:867, paragraph 40), and of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 38, and, similarly, paragraph 29 'holding an invoice drawn up in accordance with Article 226 of that directive'). Similarly, judgments of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 42), and of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 47).

[44] The Court also appears to assume as much (judgment of 30 September 2010, *Uszodaépítő*, C-392/09, EU:C:2010:569, paragraph 45) in noting that Article 178 of the VAT Directive precludes the imposition of additional formal requirements, as Article 178 of the VAT Directive cannot of itself constitute a merely formal requirement. Also, the judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 43), and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 50), clarify that all the substantive and formal requirements for exercising the right of deduction are fulfilled only once an invoice is held showing the VAT charged.

[45] Judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 43).

[46] Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 40 et seq.).

[47] Judgment of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 45). Similarly, judgment of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraphs 53 and 57).

[48] See judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690); and of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297).

83. In the case-law cited, moreover, the Court expressly lays down as a further condition the correction of an existing invoice held by the recipient of the supply.[49] Consequently, in the normal case of a transaction for consideration, the origin of the right of deduction is completed only once both conditions have been fulfilled (arising of a tax debt following the supply of the goods or services and possession of an invoice documenting the supply).

84. The importance of holding an invoice also explains why Article 66(a) of the VAT Directive allows the Member States to provide that the tax becomes chargeable no later than the time the invoice is issued. This refers to exceptions for prepayment where the invoice is issued before the goods or services are supplied. In that case, the right of deduction arises in principle and in a given amount as and when the invoice is issued to the recipient of the supply. However, a right of deduction never arises in principle unless the recipient of the supply holds an invoice.

85. A comparison between Article 178(a) and (f) clearly illustrates that the legislature has imposed an additional condition (possession of an invoice) for standard cases of indirect collection (subparagraph (a)). That requirement is not necessary in exceptional cases of direct collection (subparagraph (f), reverse charge procedure)[50] and is not therefore provided for. However, that legislative decision would be circumvented were possession of an invoice declared to be a mere and insignificant formality.

(d) Case-law of the Court on the Refund Directive

86. Last but not least, the need to hold an invoice is confirmed by the rules enacted in the Refund Directive, which expressly relies at numerous points on the existence of an invoice. For example, Article 8(2) of the Refund Directive explicitly requires certain details to be set out in the refund application 'for each invoice'. According to Article 10 of the Refund Directive, the Member State of refund may require the applicant to submit a 'copy of the invoice'. Article 14(1)(a) of the Refund Directive refers to the purchase 'invoiced'. It follows from this that a right of deduction for which a refund application is submitted requires the recipient of the supply to have held an invoice at some point.

87. It is for that reason that the Court[51] has previously found that the tax authorities can refuse the refund application where the invoice or a copy of the invoice is not available to them and the taxable person fails to supply them, on request, with the sequential number of the invoice by the deadline stipulated in the Refund Directive. That would make no sense if an invoice were superfluous to requirements.

[49] In its judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 39), the Court expressly draws a distinction between that case and the judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 38), by noting that no invoice existed in that case whereas, in *Senatex*, an invoice existed and was paid inclusive of VAT. The judgment of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297, paragraph 34 et seq.), also concerned the correction of an initial invoice.

[50] Expressly confirmed by judgment of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraphs 47 and 51). That is because, in that case, the invoice does not function as the means by which the tax burden is passed on (as explained in point 61 et seq. above), as the supplier is never liable for it and therefore has no need to charge it.

[51] Judgment of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 57).

(e) Conclusion

88. Thus, it follows both from the wording of the VAT Directive and the Refund Directive and from the case-law of the Court that a right of deduction for which a refund application is submitted requires the recipient of the supply to have held an invoice at some point. The time at which the invoice was held determines the correct period for exercising the right of deduction.

4. Legal consequences of the 'cancellation' of an invoice in terms of the correct tax period for the deduction of input VAT

(a) Implications of the cancellation of an invoice under substantive law

89. If the requirements governing the right of deduction in principle (Article 167 of the VAT Directive) and in a given amount (Article 178(a) of the VAT Directive) are substantive requirements, it also follows that the cancellation of an invoice is irrelevant when determining the correct period for exercising the right of deduction under Article 179 of the VAT Directive.

90. Either the substantive requirements (supply of goods or services and possession of an invoice) are fulfilled, in which case the right of deduction also arose at that time and has to be exercised in the corresponding tax period. That does not change if the invoice is cancelled and reissued. At most, any formal shortcomings can be eliminated with retroactive effect from that period, as the Court has previously found in the case of a corrected invoice in which the old invoice was cancelled by issuing a credit note (meaning that the invoice was cancelled/annulled). [52]

91. Or the substantive requirements (supply of goods or services or possession of an invoice) are not fulfilled, in which case the new (corrected) invoice issued after the invoice is cancelled is the first invoice that gives rise to the right of deduction and it determines the correct period for exercising the right of deduction.

92. Thus, the decisive factor in this case is whether the invoices issued to the applicant in 2012 are to be regarded as 'invoices' within the meaning of Article 178(a) of the VAT Directive. That in turn depends on the type of shortcoming that apparently vitiated them, which has not, however, been disclosed to the Court.

93. In my opinion, a document is in fact an invoice within the meaning of Article 178(a) of the VAT Directive if it enables both the recipient of the supply and the tax authorities to establish which supplier has charged which recipient of the supply which amount in VAT and for which transaction. That means it needs to state the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT, which must be stated separately. [53] If those five essential items of information are provided, the spirit and purpose of the invoice are fulfilled and the right of deduction ultimately arises. [54]

[52] Judgment of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 45). Also, judgment of the Bundesfinanzhof (Federal Finance Court, Germany) of 22 January 2020 (XI R 10/17, Federal Finance Gazette (BStBl.) II 2020, 601, paragraph 18) follows that case-law of the Court.

[53] See, to that effect, Bundesfinanzhof (Federal Finance Court) judgments of 12 March 2020 (V R 48/17, BStBl. II 2020, 604, paragraph 23); of 22 January 2020 (XI R 10/17, BStBl. II 2020, 601, paragraph 17); and of 20 October 2016 (V R 26/15, BStBl. 2020, 593, paragraph 19).

[54] The criterion requiring the VAT to be 'stated separately' follows from the judgments of the Court in *Volkswagen* and *Biosafe*, in which invoices were issued, but the VAT was not stated so that the right of deduction could be exercised in that amount. See judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 42 and 43), and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraphs 49 and 50).

94. Failure to comply with the other requirements specified in Article 226 of the VAT Directive does not preclude a right of deduction, provided they are corrected in the administrative or court proceedings. That legal consequence ultimately also follows from the Court's case-law on the retrospective correction of an invoice. [55]

95. If, therefore, the shortcoming concerned essential information on an invoice, no right of deduction arose in 2012, as no invoice existed within the meaning of the VAT Directive, and the right of deduction would only have arisen in full when an invoice was first held in 2015.

96. If, however, the shortcoming in the invoice simply concerned individual formalities (e.g. no date, no invoice number, incorrect address, vague description of the goods/services supplied and period of supply or missing tax number, etc.), [56] then the right of deduction arose in 2012, when the goods/services were supplied and the invoices were held. Such shortcomings do not mean that the recipient does not 'hold an invoice' within the meaning of Article 178(a) of the VAT Directive.

97. I am unconvinced by the view to the contrary expressed by the Commission and the applicant, namely that the legal consequences of the old invoice were eliminated when it was cancelled and the 2015 invoices alone are relevant. On the contrary, I consider the misgivings raised by the referring court concerning unilateral cancellation to be justified, even if, in this case, the invoices were probably cancelled and reissued by mutual agreement.

98. The right of deduction of the recipient of the supply is a right against the tax creditor which, once it has arisen, cannot be eliminated unilaterally by a third party. [57] Nor does any provision of the VAT Directive make the right of deduction of the recipient of the supply contingent upon the supplier's abiding by and not cancelling a previous invoice. It is sufficient that the recipient of the supply held an invoice at some point.

99. As the fact of the supply of the goods or services and the possession of an invoice is not affected by cancellation of the invoice, cancellation by the supplier cannot affect the right of deduction of the recipient of the supply. The European Court of Human Rights having found that the right to claim a deduction of input VAT is a fundamental property right, [58] it would be hard from the point of view of a State bound by constitutional law to argue that a property right already vested in a private individual can be freely disposed of by another private individual, who might destroy that right at will.

[55] It includes, for example, judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690); and of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297).

[56] See, with regard to Article 226(6) and (7) of the VAT Directive, judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690); with regard to Article 226(1), judgment of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441); and, with regard to Article 226(3), judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691).

[57] Judgment of 21 September 2017, *SMS group* (C-441/16, EU:C:2017:712, paragraph 55), explicitly found that, in the absence of fraud or abuse, the right of refund, once it has arisen, is retained.

[58] Judgment of the European Court of Human Rights of 22 January 2009, *'Bulves' AD v. Bulgaria* (no 3991/03, paragraph 53 et seq.).

(b) Implications of the cancellation of an invoice under procedural law

100. Moreover, certain implications under procedural law must be taken into account, a fact which the Commission has overlooked. The right of deduction is subject to limitation periods under national law which, of themselves, are acceptable in principle under EU law. [59] Decisions by the tax authorities are subject to time limits for appeal under national law, which are likewise acceptable under EU law. [60] Refund applications under Article 15 of the Refund Directive are also subject to a deadline imposed by EU law which, of itself, is acceptable a fortiori under EU law. [61] However, if they are to fulfil their purpose (legal certainty), those time limits laid down by public law cannot be overturned by the parties.

101. That is precisely what would happen, however, if expiry of a time limit (in this case the deadline stipulated in Article 15 of the Refund Directive) could be circumvented by cancelling (annulling) and reissuing an invoice. In this case, the uncontested – and thus enforceable – refusal decision of the Romanian tax authorities would be overturned de facto by the subsequent cancellation and reissuing of the invoices. That would reduce the significance of the aforementioned time limits (limitation periods, appeal deadlines, application deadlines) to an absurdity.

102. As the Court has previously found, Articles 180 and 182 of the VAT Directive allow a taxable person to be authorised to make a VAT deduction even if he did not exercise his right during the period in which the right arose, subject, however, to compliance with certain of the conditions and procedures determined by national legislation. [62] However, that was not the case here.

103. Furthermore, the possibility of exercising the right to deduct without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely. [63] That applies a fortiori to refund applications, which must be submitted by no later than the deadline stipulated in Article 15(1) of the Refund Directive.

104. It is for those reasons that the Court has always noted in its case-law on corrected invoices that the Member State may deny their retroactive effect if the correction (or completion of the documents) was made 'after a refusal decision was adopted'. [64] That also applies where an invoice is not only corrected, but is cancelled in its entirety and reissued after the refusal decision was adopted, as in this case.

[59] See, to that effect, judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 37); of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 47); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraphs 34 and 35); of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, EU:C:2012:458, paragraph 64); of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32, paragraph 17); and of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraphs 45 and 46).

[60] For example, the Court automatically assumes in its judgment of 14 February 2019, *Nestrade* (C-562/17, EU:C:2019:115, paragraph 43 and 44), that it suffices that an appeal can be brought against a decision within reasonable time limits. As stated explicitly in its judgment of 14 June 2017, *Compass Contract Services* (C-38/16, EU:C:2017:454, paragraph 42 and the case-law cited).

[61] Judgment of 21 June 2012, *Elsacom* (C-294/11, EU:C:2012:382, paragraphs 33 and 34). See also judgment of 2 May 2019, *Sea Chefs Cruise Services* (C-133/18, EU:C:2019:354, paragraph 39).

[62] Judgments of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 45); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 32); and of 6 February 2014, *Fatorie* (C-424/12, EU:C:2014:50, paragraph 46).

[63] Judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 36); of 14 February 2019, *Nestrade* (C-562/17, EU:C:2019:115, paragraph 41); of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 46); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 33); of 21 June 2012, *Elsacom* (C-294/11, EU:C:2012:382, paragraph 29); of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, EU:C:2012:458, paragraph 48); of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32, paragraph 16); and of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 44).

[64] Judgments of 14 February 2019, *Nestrade* (C-562/17, EU:C:2019:115, paragraph 33); of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297, paragraph 36); and of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 45).

5. Conclusion

105. To conclude, I find, in answer to Question 1, that the origin of the right of deduction based on the rules in the VAT Directive lies in two acts. It arises in principle when the tax becomes chargeable by the supplier (Article 167 of the VAT Directive), as a rule, therefore, when the goods or services are supplied, and it arises in a given amount when an invoice is held (Article 178(a) of the VAT Directive) documenting that the VAT has been charged. Only when both conditions have been fulfilled is the origin of the right of deduction completed.

106. Those two conditions also determine the period in which the right of deduction has to be exercised and the time when any time limits start to run. An invoice within the meaning of Article 178(a) of the VAT Directive exists when it includes information on the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT, which must be charged separately. The formalities specified in Article 226 of the VAT Directive need not all be complied with for that purpose and may be provided at a later date.

D. Correct refund period within the meaning of Article 14(1)(a) of the Refund Directive (Questions 2, 3 and 4)

1. Question 2 (relevant refund period)

107. In light of my findings with regard to Question 1, it is for the referring court to clarify whether the invoices issued in 2012 complied with requirements or whether they had so many shortcomings that they cannot be regarded as invoices within the meaning of Article 178(a) of the VAT Directive. That will determine the correct refund period within the meaning of Article 14(1)(a) of the Refund Directive.

108. If the applicant first held invoices within the above meaning in 2015 (see point 93), then it is irrelevant that the goods or services had already been supplied in 2012. That follows from Article 167 and Article 178(a) of the VAT Directive, read in combination, and is explicitly confirmed in Article 14(1)(a) of the Refund Directive, which refers to the purchase of goods or services (i.e. a supply) 'which was invoiced during the refund period'. In this case, that happened in 2015.

109. If the applicant already held invoices within the above meaning in 2012 (see point 93), then the correct refund period was 2012, which is also when it submitted its first refund application. That application was refused pursuant to Article 23 of the Refund Directive. As the applicant (or its predecessor in title) failed to appeal against that refusal decision, it became enforceable. If that refusal decision conflicted with EU law, that should have been clarified in an appeal procedure. Therefore, the question raised by the Commission, as to whether the tax authorities complied with the other procedural requirements of Articles 20 and 21 of the Refund Directive, does not arise.

2. Question 3 (effect of cancellation)

110. The cancellation of an invoice (whether by mutual agreement or unilaterally) has no effect on that enforceable decision or on a right of deduction that has already arisen. That follows directly from the simple fact that, in principle, other persons' vested rights cannot be undermined and time limits laid down by public law cannot be overturned with retroactive effect by actions taken by private individuals (see points 98 et seq.).

111. In the final analysis, the opposite would only apply where an invoice was not cancelled (annulled), because the invoices issued in 2015 are to be regarded as initial invoices.

3. Question 4 (invoice needed for refund)

112. The fourth question referred is somewhat harder to understand.

113. If it means that national law links the refund period solely to the time when the tax becomes chargeable in accordance with Article 167 of the VAT Directive (as a rule upon the supply of the goods or services, see Article 63), that is precluded by EU law. As stated previously, Article 178(a) of the VAT Directive also requires possession of an invoice showing the VAT charge to be neutralised by exercising the right of deduction.

114. If it means that the refund period has already been determined under national law based on the possession of invoices issued in 2012 which did not fulfil all the requirements of Article 226 of the VAT Directive, the question would appear to be based on the premiss that a correct invoice that gives rise to the right of deduction in a given amount means an invoice that contains all the information specified in Article 226 of the VAT Directive.

115. However, as stated above (points 89 et seq.), that is precluded by the case-law of the Court on the retroactive correction of invoices. It therefore suffices if the invoice enables both the recipient of the supply and the tax authorities to establish which supplier has charged which recipient of the supply which amount in VAT and for which transaction. The right of deduction in a given amount arises as and when the recipient of the service holds such an invoice. Any missing formalities can then be corrected with retroactive effect in the procedure under way, if they were not already known to the tax authorities. [65]

VI. Conclusion

116. I therefore propose that the Court answer the questions referred for a preliminary ruling by the Tribunalul București (Regional Court, Bucharest, Romania), as follows:

1. The VAT Directive is to be interpreted as meaning that the right of deduction under Article 168(a) of the VAT Directive arises in principle once the tax has become chargeable (Article 167 of the VAT Directive) and in a given amount once an invoice is held (Article 178(a) of the VAT Directive). The correct period for exercising the right of deduction

[65] See explicitly, to that effect, judgment of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraphs 53 and 57).

is determined based on when those two conditions are fulfilled. Although the invoice required for that purpose need not fulfil all the formalities specified in Article 226 of the VAT Directive, the VAT Directive does not provide for a right of deduction if no invoice is held.

2. The correct refund period within the meaning of Article 14(1)(a) of the Refund Directive is the period in which the taxable person held such an invoice. The referring court must clarify when that was in the applicant's case.

3. The (mutually agreed or unilateral) cancellation (annulment) of an invoice has no effect on a right of deduction that has already arisen or on the period in which it is to be exercised.

4. EU law precludes national regulations which link the refund period within the meaning of Article 14(1)(a) of the Refund Directive solely to the time when the tax becomes chargeable in accordance with Article 167 of the VAT Directive. It is also necessary to hold an invoice showing the amount charged in VAT, even if the invoice does not fulfil all the formalities specified in Article 226 of the VAT Directive.