Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 October 2019[1]

Case C-401/18

Herst, s.r.o.
v
Odvolací finanční ředitelství

(Request for a preliminary ruling from the Krajský soud v Praze (Regional Court, Prague, 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 — Transport of excise goods under a duty suspension arrangement — Primacy of EU law — Limits of an interpretation in conformity with EU law — Principle of *in dubio mitius*)

I. Introduction

1. The present case once again concerns, in essence, a question of great practical importance: which transaction in a cross-border supply chain with *multiple* transactions is to be regarded as the exempt intra-Community supply if there is only one physical movement of goods. Because the applicant in the main proceedings is claiming deduction of input tax, it does *not* wish to have received an exempt intra-Community supply.

2. Although the Court has already dealt with situations of this kind a number of times,[2] in the view of the referring court clear criteria for determining the place of supply and ascribing the exemption to one of the supplies in a supply chain still cannot be inferred from the Court's previous case-law. One crucial criterion in this connection is the transfer of the right of disposal. A particular feature of the present case in this regard is that the supplied fuel was transported under a duty suspension arrangement. The Court has, however, already ruled in its judgment in *AREX* that this is irrelevant for the purposes of the law on VAT.[3]

3. The proceedings will therefore give the Court another opportunity to clarify further the criteria for ascribing transport to a certain supply in a sales chain and to ensure greater legal certainty in this regard.

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 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027); of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84); of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592); of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786); and of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232).

3 Judgment of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027).

4. Questions also arise in connection with the principle of *in dubio mitius* in the Czech Republic. According to that principle, where objectively there are a number of possible interpretations, a rule of tax law must always be interpreted in favour of the taxable person. If interpretations more favourable to the taxable person are not consistent with interpretations in conformity with EU law, the question arises of the relationship between national constitutional law and EU law.

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]

6. 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;

…'

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

8. Article 32(1) of the VAT Directive regulates the place of supply and provides:

'Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins.'

9. In Chapter 4 of Title IX, 'Exemptions', Article 138(1) of the VAT Directive provides:

'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.'

B. Czech law

10. As far as the applicable Czech law is concerned, reference should be made in particular to Paragraph 64 of the Law on value added tax,[5] by which the Czech Republic transposed Article 138 of the VAT Directive. The right to deduct under Article 167 et seq. of the VAT Directive was transposed by Paragraph 72 et seq. of the Law on value added tax.

4 OJ 2006 L 347, p. 1.

5 Zákon č. 235/2004 Sb., o dani z přidané hodnoty (Law No 235/2004 on value added tax).

11. Furthermore, the referring court mentions a constitutional principle of *in dubio mitius* ('more leniently in case of doubt'). It aims to limit the impact of legal uncertainty on those affected by unclear legal provisions in cases where obligations are to be imposed on them by the State as the body responsible for the content and comprehensibility of the applicable rules.

12. Consequently, in Czech tax law, where a regulation in public law may be interpreted in more than one way, the interpretation that does not interfere, or interferes as little as possible, with fundamental rights and freedoms should be chosen. The referring court considers that the legislation relevant to an assessment of the present case is not clear. The deduction should be allowed for that reason under national law on the basis of the principle of *in dubio mitius*.

III. Facts and reference for a preliminary ruling

13. The applicant in the main proceedings (Herst, s. r. o) (Herst) is claiming a tax deduction before the national court. Herst carries on business inter alia in the field of road transport and owns several filling stations. Using its own vehicles, it transported fuel from other Member States (Austria, Germany, Slovakia, Slovenia) to the destination in the Czech Republic. The goods were sold on in many cases, but were transported only once (by Herst) to the final purchaser in the Czech Republic.

14. In many cases Herst acted as a final purchaser of the fuel, which it purchased from suppliers registered for VAT purposes in the Czech Republic. Here Herst was at the end of the supply chain. In other cases it sold fuel on to its own customers. In those cases it was in the middle of a supply chain. Herst did not charge its suppliers for the cost of transport, but acquired the fuel at prices that did not include transport.

15. Usually Herst placed an order with Czech suppliers which had acquired or were in the process of acquiring the fuel from a refinery in another Member State. The order stated the terminal at the refinery from which it would source the goods, the date and, as appropriate, the time of loading, the name of the driver, the registration number of the vehicle and trailer, the amount of fuel required and the place of unloading.

16. After payment of the advance invoice, Herst was able to collect the goods based on instructions from the Czech suppliers. Herst collected the fuel directly from refinery terminals in other Member States. None of the contracting partners involved in the supply chain was present at the time of collection. Herst then transported the fuel to the Czech Republic. Customs clearance was carried out there after crossing the border. The fuel was released for free circulation in relation to excise duty and the applicant continued the journey to the place of unloading, which was its own filling stations or its customers' filling stations.

17. During a tax inspection for the period from November 2010 to May 2013 and July and August 2013, the tax authority found that the applicant had claimed a tax deduction in relation to the fuel supplies as if they were national supplies. According to the tax authority, however, the supply of goods did not take place in the Czech Republic, but in other Member States where the fuel was located at the time when its dispatch or transport began. It therefore constituted an exempt intra-Community supply to Herst, in respect of which Herst was not entitled to deduct VAT.

18. Since the applicant collected the purchased goods itself in the other Member States and transported them at its own expense to the Czech Republic for the purpose of carrying out its economic activity, the tax authority considered the supply of goods between the Czech suppliers and the applicant as a supply involving the transport of goods. The tax authority therefore cancelled the incorrectly claimed tax deductions and reassessed the VAT payable by the applicant for the individual VAT periods checked by means of additional payment demands. At the same time, a penalty was imposed on Herst.

19. The applicant lodged an appeal against the additional payment demands, in which it drew particular attention to the fact that the fuel was transported between Member States under an excise duty suspension arrangement. The transport took place under customs control. The goods were released for free circulation in a single Member State only after the transport was completed and were a taxable supply only then. The possibility that the applicant had already acquired rights over the goods at the place where transport began (that is, when abroad) was therefore excluded.

20. In the contested decisions the tax authority confirmed the notices. Herst lodged an action against the contested decisions. The Krajský soud v Praze (Regional Court, Prague, Czech Republic) stayed the proceedings and referred a number of questions to the Court for a preliminary ruling pursuant to Article 267 TFEU. Following the Court's judgment in *AREX*,[6] it reduced its reference for a preliminary ruling, at the request of the Court, to the following three questions:

'(1) Is 'the right to dispose of the goods as owner' within the meaning of the VAT Directive acquired by a taxable person who buys goods from another taxable person directly for a specific customer in order to fulfil an already existing order (identifying the type of goods, the quantity, place of origin and time of delivery) where he does not physically handle the goods himself since, in the context of concluding the contract of sale, his buyer agrees to arrange transport of the goods from their point of origin, so that he will only provide access to the requested goods via his suppliers and communicate the information necessary for acceptance of the goods (on his own behalf or on behalf of his sub-suppliers in the chain), and his profit from the transaction is the difference between the buying-in price and the selling price of such goods without the cost of transporting the goods being invoiced in the chain?

(2) Does the principle of VAT neutrality or any other principle of EU law prevent application of the constitutional principle of *in dubio mitius* in national law, which obliges public authorities, where legal rules are ambiguous and objectively offer a number of possible interpretations, to choose the interpretation that benefits the person subject to the legal rule (here the taxable person for VAT)? Would the application of this principle be compatible with EU law at least if it were limited to situations where the relevant facts of the case preceded a binding interpretation of a disputed legal question by the Court of Justice of the European Union, which has determined that another interpretation less favourable to the taxable entity is correct?

(3) If it is possible to apply the principle of *in dubio mitius*: Was it possible, in terms of the limits set by EU law at the time when the taxable transactions took place in this case (November 2010 to May 2013), to consider the question whether the legal concept of supply of goods or transport of goods has (or does not have) the same content both for the purposes of the VAT Directive and for the purposes of the Excise Duty Directive objectively as legally uncertain and offering two interpretations?'

21. In the proceedings before the Court, Herst, the Czech Republic and the European Commission submitted written observations.

6 Judgment of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027).

IV. Legal assessment

A. The first question

22. The first question concerns Article 138 of the VAT Directive, which establishes the exemption of intra-Community supplies. The existence of such supplies determines whether Herst was rightly denied the right to deduct because, if the supply to Herst was exempt, it also would not be entitled to deduct VAT in this regard. On the contrary, Herst would have to initiate civil proceedings against its suppliers seeking the refund of the VAT wrongly paid.

1. Clarification of the first question

23. 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.[7] The intra-Community supply and the intra-Community acquisition are thus one and the same financial transaction.[8]

24. It becomes difficult, however, where there are multiple supplies (supply chain), but the goods are transported only once (from the first to the last link in the supply chain) (chain transaction). In that case, consideration must be given to multiple intra-Community supplies, although the exemption under Article 138 of the VAT Directive may be applied to only one supply.[9] The exempt intra-Community supply determines the place of the subsequent and preceding supplies in the supply chain.[10] That place is, pursuant to Article 32(1) 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.[11] It is thus crucial to which of the supplies in the supply chain the cross-border transport can be ascribed.

25. By the first question, the referring court asks about the criteria on which ascription can and must be based.

26. The fact that Herst transported and dispatched the goods in a special customs procedure (the duty suspension arrangement) is, in principle, irrelevant in this regard. As the Court has already ruled in *AREX*,[12] ascribing the VAT exemption to one of the supplies is purely a matter of VAT law, the constituent elements of which are not altered by the duty suspension arrangement. The question of which supply in a supply chain is to be regarded as the exempt intra-Community supply must therefore be determined on the basis of the general rules of VAT law.

7 See my Opinions in *AREX CZ* (C-414/17, EU:C:2018:624, point 28) and *EMAG Handel Eder* (C-245/04, EU:C:2005:675, points 23 to 25).

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

9 Judgments of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 34); and of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232, paragraph 45), and my Opinions in *AREX CZ* (C-414/17, EU:C:2018:624, point 55) and *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 35).

10 Judgment of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232, paragraph 50).

11 Judgment of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232, paragraph 50).

12 Judgment of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027, paragraph 66 et seq. and 73 and 74); see also my Opinion in *AREX CZ* (C-414/17, EU:C:2018:624, point 69 et seq.).

27. The referring court would also like to know whether the vendor (B) in the middle of the two-link supply chain (A — B — Herst) acquires the right of disposal even where it only provides its customer (here Herst) with access to the goods, which are still with A (its supplier), and Herst effects the subsequent transportation at its own expense.

28. The crucial factor in this situation for the purposes of the VAT deduction in respect of Herst is, however, whether the place of the supply from B to Herst is in the Czech Republic. Only in that case would the supply be taxable and liable to tax there. The statement of Czech VAT in the invoice issued to Herst would then have been made correctly and Herst would be able to make a corresponding VAT deduction.

29. Nevertheless, this presupposes that the first supply (A — B) is to be considered to be the exempt intra-Community supply. Only then is the place of the first supply under Article 32 of the VAT Directive in the Member State where transport begins, while the place of the subsequent supply (B — Herst) is in the Member State where transport ends (here the Czech Republic). [13]

2. Ascribing the cross-border transport to one of the supplies

30. It must therefore be clarified whether the cross-border transport can be ascribed to the preceding supply (A — B) despite the fact that Herst transported the goods directly from A to itself (or its customers).

31. In the light of the Court's case-law, it can also be stated 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. [14] Which of the supplies this is depends on the supply to which the cross-border transport is to be attributed. All other supplies in the sales chain which do not have this additional element of cross-border transport are thus to be regarded as domestic supplies.

(a) Significance of ownership and the right of disposal

32. On the basis of the specific question asked by the referring court regarding the right of disposal of the intermediate undertaking (B) in a supply chain, it must first be reiterated, however, that that undertaking, if it forms part of a supply chain, has naturally also acquired the right of disposal for VAT purposes and transfers it to its customers (here Herst).

33. It is absolutely clear from the Court's case-law that in a supply chain with a single transport operation there are multiple supplies whose place of delivery is to be defined differently. [15] If, therefore, a supply under Article 14(1) of the VAT Directive is defined such that the customer were granted the right of disposal by the supplier, then the intermediate undertaking must also have acquired the right of disposal (for one 'logical second' at least). Otherwise, there would not be two supplies, but at most one supply and one service. It is thus sufficient for the intermediate undertaking (B) 'only' to provide its customer (Herst) with access to the goods to be procured, which it has previously acquired itself (but has not yet collected), in order to accept a transfer of the right of disposal from A to B and then from B to Herst.

13 Judgment of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232, paragraphs 40, 42 and 50).

14 Judgments of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 34); and of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232, paragraph 45); and my Opinions in *AREX CZ* (C-414/17, EU:C:2018:624, point 55) and *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 35).

15 See judgments of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027, paragraph 70); of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraphs 34 to 36); and of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232, paragraph 50).

34. This finding (multiple supplies logically implies multiple transfers of the right of disposal) would also not be affected if national civil law were to permit direct acquisition of ownership from the first link (A) to the last link in a supply chain (here Herst). Article 14(1) of the VAT Directive specifically does not refer, as least in certain language versions,[16] to a person who has acquired the right of ownership, but states that there must be a transfer of the right to dispose of tangible property as an owner. Being able to dispose of property as an owner is not necessarily the same as having acquired ownership. First of all, there would not then be a right to dispose of property [in the German language version] '*wie ein Eigentümer*' ('like an owner') but a right to dispose '*als Eigentümer*' ('*qua* owner'). Second, the concept of supply in VAT law would otherwise be dependent on national notions of ownership. The term 'supply of goods' does not, however, refer to the transfer of ownership in accordance with the forms prescribed by the applicable national law.[17]

35. Accordingly, it is clear that it is immaterial, in principle, whether and when a *transfer of ownership in civil law* is made to the intermediate undertaking (B) or to the last undertaking in the chain (Herst). As the Commission rightly states, formal ownership is not decisive. Acquisition of ownership may be significant at most as one indicator as part of an overall assessment because, in the vast majority of the cases, acquisition of the right of disposal accompanies acquisition of ownership.

36. Based on this understanding, the meaning of the statement made by the Court regarding AREX's potential acquisition of ownership under Czech law in the *AREX* judgment becomes clear.[18] The Court considered it to be irrelevant to the decision whether ownership was acquired at the time of loading of the fuel by the recipient carrier (AREX). Acquisition of ownership by the carrier is thus a very important indicator for a supply, but is not decisive in itself.[19]

37. Accordingly, the Court has held that it is not decisive in itself who is the owner of the goods under national law during transport or who has actual physical control of the goods.[20] 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.[21] Simply selling on is thus irrelevant for the purposes of ascribing transport to one of the supplies.

38. The right of disposal for the purposes of Article 14(1) of the VAT Directive is thus broader than ownership in civil law. However, like the latter, it is not precluded by legal restrictions. Legal restrictions on disposal during customs transit arrangements have as little effect on the customer's acquisition of a right of disposal under Article 14(1) of the VAT Directive as existing rights, such as those of a lessee, have on the owner's right of disposal.

39. As an interim conclusion, it can thus be stated that the time of acquisition of ownership under national law is not decisive in ascribing the transport of one of the supplies under consideration and thus in determining the exempt intra-Community supply.

16 Thus, according to the German and French language versions, '*wie ein Eigentümer*' and '*comme un propriétaire*' respectively, whereas in the English and Estonian language versions ('as owner' and '"*Kaubatarne*" *on materiaalse vara omanikuna käsutamise õiguse üleminek*' respectively).

17 Judgments of 2 July 2015, *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 29); of 16 February 2012, *Eon Aset Menidjmunt* (C-118/11, EU:C:2012:97, paragraph 39); of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73, paragraph 32); and of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraphs 7 and 8).

18 See judgment of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027, paragraph 78).

19 See, to that effect, judgments of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 40), and of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 32 et seq.), where transfer of ownership played no role at all and regard was had instead to notification of the intention to sell on.

20 It is not disputed that, for example, although a carrier 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).

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

(b) Specifically ascribing the cross-border transport in a supply chain

40. According to the Court's case-law, the basis for ascribing the cross-border transport to a supply in a sales chain — in this case to one of the two supplies (A to B or B to Herst) — is an overall assessment of all the specific circumstances of the case.[22]

41. In the case of chain transactions it must be borne in mind in particular by whom or on whose behalf transport is effected.[23] In my view, the crucial factor is who bears the risk for the accidental loss of the goods during transport.[24]

42. Accordingly, in a number of cases concerning a two-link sales chain (A — B — C), 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 (C), that is, to the consignee of the 'second' supply (B — C).[25]

43. The person who already disposes of goods 'as owner' 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.[26] In its observations, the Commission also rightly refers in this regard to legal decision-making power over an object. The reverse side of this legal decision-making power, however, is that the holder bears the risk of accidental destruction of the object (of its legal decision-making power).

44. 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 within the meaning of Article 14(1) of the VAT Directive.[27]

45. It may well be, as the Czech Republic asserts, that, as a matter of law, the question of who bears the risk of accidental loss is not always easy to answer. Nevertheless, an answer is easier and leads to greater legal certainty than an overall assessment, where it is unclear what criteria are to be decisive and how they are to be weighted.

46. However, inferences can be drawn most easily from the assumption of risk for the role of the person concerned in a supply chain.[28] 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 in law as supplier (and not only as a carrier for another party). If, however, he is the supplier of the cross-border supply, then his supply must also be the exempt intra-Community supply.

47. The fact that Herst assumed the transport costs in this case can thus be regarded merely as an indicator that Herst acted on its own behalf as a supplier. Because, as a rule, the purchaser always covers the transport costs financially (either as part of the price or additionally), that indicator is not, however, compelling. If the vendor (here B) is able to add transport costs to the price, but Herst bears the risk of accidental loss during transport, the cross-border transport is nevertheless to be ascribed to Herst.

22 Judgments of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84, paragraph 32); of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 35); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 32); and of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 27); and my Opinions in *AREX CZ* (C-414/17, EU:C:2018:624, point 58 et seq.) and *EMAG Handel Eder* (C-245/04, EU:C:2005:675, point 56).

23 See also judgment of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, end of paragraph 40).

24 See my Opinion in *AREX CZ* (C-414/17, EU:C:2018:624, point 60).

25 See judgments of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 36); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 34); and of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786, paragraph 33).

26 See my Opinions in *AREX CZ* (C-414/17, EU:C:2018:624, point 62) and EMAG *Handel Eder* (C-245/04, EU:C:2005:675, point 58).

27 See also my Opinion in *AREX CZ* (C-414/17, EU:C:2018:624, point 62).

28 See also my Opinion in *AREX CZ* (C-414/17, EU:C:2018:624, point 73).

48. This holds regardless of who outwardly effects the transport in such cases (this was mostly the intermediate undertaking 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).

49. In the main proceedings this means that the crucial factor is whether Herst had already acquired the power to dispose of the fuel before its cross-border transport such that it bore the risk for its accidental loss. It cannot be ruled out that this had already taken place with a transfer of ownership at the time of loading at the refinery terminal because the owner of goods generally also bears the risk of their loss. In that case, in a two-link supply chain the second supply (B — Herst) would be the exempt supply and Herst would not be entitled to deduct.

50. If, on the other hand, the goods were sold on prior to transport and there was thus a three-link supply chain (A — B — Herst — D), the conclusion must be slightly modified. The last undertaking in the supply chain would not then transport the goods, but an intermediate undertaking. In that case, if Herst bears the risk of accidental loss during transport, its supply (that is, the third supply, Herst — D) would be the cross-border and thus the exempt supply.[31] In that case too, Herst would not be able to claim deduction of VAT from the preceding supply in the Czech Republic, but only in the country where transport of the goods began.

51. It is nevertheless also conceivable that the time of the transfer of the risk (with or without concurrent acquisition of ownership under civil law) was different. The referring court thus states that, under the contracts normally used in the sector, acquisition of ownership, and thus possibly also transfer of risk to the transporting purchaser, occurs only when the goods subject to excise duty are released for free circulation.

52. If that were the case, Herst would have acted merely as a carrier during the cross-border transport (from the refinery until release for consumption in the Czech Republic).[32] Although this would be rather unusual, it is not inconceivable. It is also permitted by Article 32(1) of the VAT Directive as, under that provision, goods can be transported by the supplier (here A and B), by the customer (here B and Herst) or by a third person (that is to say, a carrier, here Herst for A or for B). In that case, the transport for the purposes of Article 32(1) of the VAT Directive would be ascribed to the supply either from A to B or from B to Herst.

53. The question whether the supply from B to Herst would then be made in the Czech Republic depends on whether the transport is to be ascribed to the first supply (A to B), which presupposes that the first undertaking (A) bore the risk of loss for the cross-border supply. That would be unusual as A allowed B to have the goods collected by a third person (here Herst), unknown to A. It is not clear prima facie why in such a situation A should also bear the risk of accidental loss after the time of collection.

54. The Court cannot, however, make the assessment of who bore the risk of loss during the cross-border transport. On the contrary, this is a task for the referring court.[33]

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

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

31 The EU legislature attempts to introduce new rules with greater legal certainty to govern this situation (transport by the intermediate undertaking) with the aid of a fiction in the new Article 36a of the VAT Directive (OJ 2018 L 311, p. 3), which is to be implemented on 1 January 2020.

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

33 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).

3. Conclusion

55. In summary, it must be stated that in ascribing the single cross-border transport to a certain supply in a supply chain, the crucial factor is who bears the risk for accidental loss during the cross-border transport of the goods. That supply is the exempt intra-Community supply, the place for which is where transport began. It is not decisive, on the other hand, who is the owner under civil law during the transport or whether the goods are transported under a special customs procedure.

B. The second and third questions

1. Admissibility and understanding of the two questions

56. The second and third questions essentially concern the relationship between a directive and national law. Specifically, the constitutional principle of *in dubio mitius* in tax law requires that the interpretation of a national law that is favourable to the taxable person is always chosen. The condition for this is that those legal rules objectively offer a number of possible interpretations.

57. It is not evident from the request for a preliminary ruling whether this actually comes into question in the present case. Curiously, the relevance of this principle was not mentioned in the request for a preliminary ruling in *AREX*,[34] although the underlying situation and the majority of the questions were almost identical. This contradicts somewhat the referring court's statement that objectively a number of possible interpretations are offered under national law.

58. Nevertheless, the view taken by the Czech Republic that the request for a preliminary ruling is inadmissible on that basis cannot be accepted. According to the settled case-law of the Court, questions referred by a national court enjoy a presumption of relevance. That court is responsible for defining the factual and legislative context in which it refers its questions on the interpretation of EU law. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[35]

59. Although, as the Commission rightly states, there are doubts whether the principle of *in dubio mitius* applies in this case, a hypothetical situation cannot be presumed. Consequently, the Court should answer the underlying legal question.

60. The Czech Republic has implemented the VAT Directive as far as possible. The concepts contained in the VAT Directive and their interpretation are sufficiently clear. However, ascribing the exemption to one of the supplies in the supply chain and, connected with this, determining the place of the other supplies are subject to a degree of legal uncertainty. This is shown by the many decisions in this regard which have now been made by the Court[36] and also by the new Article 36a of the VAT Directive, which is to be implemented on 1 January 2020.[37]

34 Judgment of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027).

35 Judgments of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230, paragraph 32); of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 26); of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 27); and of 22 January 2002, *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraph 19).

36 Judgments of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027); of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84); of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592); of 16 December 2010, *Euro Tyre Holding* (C-430/09, EU:C:2010:786); and of 6 April 2006, *EMAG Handel Eder* (C-245/04, EU:C:2006:232).

37 Council Directive (EU) 2018/1910 of 4 December 2018 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States (OJ 2018 L 311, p. 3).

61. In the event that the national rules objectively permit a different way of ascribing the exemption to another supply by way of interpretation and this means that the place of performance in this case would objectively be in the Czech Republic, the question arises as to the relationship between the constitutional principle of *in dubio mitius* and the VAT Directive. It will then have to be determined whether the more favourable interpretation of national law provided for under national constitutional law can prevent an interpretation of national law which is less favourable to the taxable person, but is in conformity with EU law.

2. No question of the primacy of EU law

62. At first sight, one might be inclined to answer this question in the negative on the basis of the primacy of EU law.[38] However, this would overlook the fact that the question raised by the referring court — in so far as it actually arises — does not concern the primacy of EU law. This is because the primacy of EU law constitutes a conflict rule[39] which concerns the relationship between two provisions which are in themselves applicable. That is not the case here.

63. The VAT Directive is not a regulation, but a directive, which, under Article 288 TFEU, is addressed only to the Member State. In principle, it is not therefore directly applicable. An EU directive is directly applicable, according to the Court's case-law,[40] only if it appears, so far as its subject matter is concerned, to be unconditional and sufficiently precise.

64. However, as the Court has expressly stated, such a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against such a person before a national court.[41] Thus, obligations arising from a directive must be transposed into national law in order to be capable of being relied on directly against an individual.

65. The Court has created an effective instrument for the enforcement of EU law in favour of the individual. Accordingly, the Member State is not able to rely on failure to transpose EU law or incorrect transposition against an individual. The State is prevented from taking advantage of its own failure to comply with EU law.[42] If the interpretation of national law in conformity with EU law is the interpretation more favourable to the taxable person, both the national principle of *in dubio mitius* and a possible direct application of the directive achieve the same result.

66. The principle of *in dubio mitius* can thus have autonomous effect in the field of VAT law only if the interpretation possible at national level leads to a more favourable result for the taxable person than is prescribed by the directive. In such cases, however, the direct applicability of the VAT Directive is precluded. Consequently, there is no conflict between two rules that are applicable in themselves, such that the question of the primacy of one of the rules does not arise.

38 Judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 17/18); of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 3); and of 15 July 1964, *Costa* (6/64, EU:C:1964:66, p. 1270).

39 Primacy is thus rightly characterised as a conflict resolution rule in Marc Desens, *Auslegungskonkurrenzen im europäischen Mehrebenensystem*, EuGRZ 2011, p. 211 (212), Harald Schaumburg in Schaumburg/Englisch, *Europäisches Steuerrecht*, Cologne 2015, paragraph 4.19 et seq., Claus Dieter Classen/Martin Nettesheim in Oppermann/Classen/Nettesheim, *Europarecht*, Munich, 8th edition 2018, § 10, paragraph 33.

40 Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 26); of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496 paragraphs 48 and 49); of 12 December 2013, *Portgás* (C-425/12, EU:C:2013:829, paragraph 18); of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 33); and of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 25).

41 Judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 26); of 12 December 2013, *Portgás* (C-425/12, EU:C:2013:829, paragraph 22); of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraphs 37 and 38); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 20); and of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 48).

42 See expressly, to that effect, judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 38); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraphs 22 and 23); and of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 49).

3. Divergence between the directive and national law

67. On the contrary, there is a classic case of a divergence between a directive and national law. This divergence is to be resolved in principle by the requirement for national law to be interpreted in conformity with EU law.[43] It permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them.

68. The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.[44]

4. Limits of an interpretation in conformity with EU law

69. However, the requirement of an interpretation in conformity with EU law is not unlimited. On the contrary, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.[45]

70. According to the referring court, the general legal principle of *in dubio mitius* fosters legal certainty in the Czech Republic because it regulates the impact of legal uncertainty arising from an unclear law clearly and to the detriment of the party causing the uncertainty. As a principle of Czech law, it thus constitutes a limit on interpretation in conformity with EU law in the same way as the limits of the wording of a rule.

71. It is evident from the abovementioned case-law that not all national law can be interpreted in conformity with EU law. Furthermore, EU law requires the Member States, under certain circumstances, to make good damage caused if the result prescribed by a directive cannot be achieved by way of interpretation.[46]

72. If, therefore, it is not possible to interpret national law in conformity with EU law, national law is contrary to EU law but applicable in favour of the taxable person. This situation can arise not only if the wording of national legislation is clearly conflicting, but also where legal principles — in this case the constitutional principle of *in dubio mitius* — reduce the possibilities for interpretation to just one possible interpretation. It is, however, for the referring court to make this determination.

43 Judgments of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraphs 109 and 110); of 16 June 2005, *Pupino* (C-105/03, EU:C:2005:386, paragraphs 44 and 47); of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 114); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 26); and of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395, paragraph 8).

44 Judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 24); of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 111); and of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 115, 116, 118 and 119).

45 Judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 25); of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 110); and of 16 June 2005, *Pupino* (C-105/03, EU:C:2005:386, paragraphs 44 and 47).

46 See, to that effect, judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraphs 42 and 43); of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 112); and of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 27).

73. Such consequences of a directive not being directly applicable, which are regrettable from the point of view of EU law, also arise in other areas of law.[47] It is then for the Member State to comply with its implementation obligations and to organise its national law (clearly) in conformity with EU law if it wishes to avoid infringement proceedings being brought by the Commission.

5. Conclusion

74. Neither the principle of VAT neutrality nor any other principle of EU law preclude the application of conflicting national law, provided that the individual does not or cannot himself rely directly on the VAT Directive and it is also not possible to interpret national law in conformity with EU law (here based on the principle of *in dubio mitius*).

C. The third question

75. By the third question, the referring court would like to know whether — if it is 'possible to apply' the principle of *in dubio mitius* — the legal concept of supply of goods or transport of goods, which both have (or do not have) the same content for the purposes of the VAT Directive and for the purposes of the Excise Duty Directive, can be considered as objectively uncertain and offering two interpretations.

76. As has already been stated above, in determining the place of supply under Article 32 of the VAT Directive, the concepts of VAT law alone are decisive, and they cannot be regarded as objectively uncertain. A degree of legal uncertainty applies 'only' in ascribing the exemption to one of the supplies in the supply chain and, connected with this, in determining the place of the other supplies.

77. However, this does not preclude a different interpretation of the formulations of national law in their own context (scheme, drafting history, spirit and purpose) notwithstanding an identical wording. The principle of *in dubio mitius* relates only to national law, with the result that the only decisive factor in this connection is whether the national rules objectively offer a number of possible interpretations.

78. This remains a question of national law which can be answered only by the referring court.

V. Conclusion

79. I therefore propose that the Court answer the questions referred by the Krajský soud v Praze (Regional Court, Prague, Czech Republic) as follows:

(1) In ascribing the single cross-border transport to a certain supply in a supply chain, the crucial factor is who bears the risk for accidental loss during the cross-border transport of the goods. That supply is the exempt intra-Community supply, the place for which is where transport began.

(2) Neither the principle of VAT neutrality nor any other principle of EU law preclude the application of the constitutional principle of *in dubio mitius* in national law, which obliges public authorities, where legal rules are ambiguous and objectively offer a number of possible interpretations, to choose the interpretation that benefits the person subject to the legal rule (here the taxable person for VAT).

47 See, for example, judgments of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 52); of 12 December 2013, *Portgás* (C-425/12, EU:C:2013:829, paragraph 31, in so far as the body was not sufficiently closely related to the State); and of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 30).