Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

9 February 2023*

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 90 – Taxable amount – Reduction – Insurer paying compensation to policyholders for unpaid debts, including VAT – National legislation denying that insurer, as legal successor, the reduction of the taxable amount – Principle of fiscal neutrality – Principle of effectiveness)

In Case C-482/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 29 June 2021, received at the Court on 5 August 2021, in the proceedings

Euler Hermes SA Magyarországi Fióktelepe

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Euler Hermes SA Magyarországi Fióktelepe, by T. Fehér and P. Jalsovszky, ügyvédek,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

– the Portuguese Government, by P. Barros da Costa, R. Campos Laires, S. Jaulino and J. Ramos, acting as Agents,

* Language of the case: Hungarian.

– the European Commission, by A. Sipos and V. Uher, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) ('the VAT Directive'), read in conjunction with the principles of proportionality, fiscal neutrality and effectiveness.

2 The request has been made in the proceedings between, of the one part, Euler Hermes SA Magyarországi Fióktelepe, a company incorporated under Hungarian law, and, of the other part, the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Authority, Hungary), concerning a request for the reduction of the taxable amount of value added tax (VAT).

Legal context

European Union law

3 Article 2(1)(a) and (c) of the VAT Directive states:

'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;

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such'.

4 The first subparagraph of Article 9(1) of that directive provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.'

5 Under Article 63 of that directive:

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

6 Article 66 of that directive reads as follows:

‘By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

(c) where an invoice is not issued, or is issued late, within a specified time no later than on expiry of the time-limit for issue of invoices imposed by Member States pursuant to the second paragraph of Article 222 or where no such time-limit has been imposed by the Member State, within a specified period from the date of the chargeable event.

The derogation provided for in the first paragraph shall not, however, apply to supplies of services in respect of which VAT is payable by the customer pursuant to Article 196 and to supplies or transfers of goods referred to in Article 67.’

7 Article 73 of the VAT Directive provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

8 Article 90 of that directive states:

‘1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.’

9 As set out in Article 135(1)(a) of that directive:

‘Member States shall exempt the following transactions:

(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents’.

10 Article 250(1) of that directive provides:

‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

Hungarian law

Law No CL of 2017

11 Paragraph 196 of adózás rendjéről szóló 2017. évi CL. törvény (Law No CL of 2017 on the rules governing taxation), in the version applicable to the main proceedings, provides:

'(1) Where the Alkotmánybíróság [(Constitutional Court, Hungary)], the Kúria [(Supreme Court, Hungary)] or the Court of Justice of the European Union find, with retroactive effect from the date of publication of the decision, that a rule of law prescribing a tax obligation is contrary to the Fundamental Law or to a mandatory act of the European Union or, in the case of a municipal regulation, to any other rule of law, and that that judicial decision gives rise to a right to a refund for the taxpayer, the first-instance tax authority shall proceed with the refund at the taxpayer's request – subject to the procedures specified in the decision concerned – in accordance with the provisions of this Paragraph.

…

(3) In addition to the information which the tax authorities require to identify the taxpayer, the request must mention the tax paid as at the date of making the request, in respect of which the refund is sought, and the instrument permitting enforcement on the basis of which it was paid; it must also refer to the decision of the Alkotmánybíróság [(Constitutional Court)], of the Kúria [(Supreme Court)] or of the Court of Justice and must include a declaration that

(a) the taxpayer did not, as at the date of making the request, pass on to another person the tax for which he or she seeks a refund,

(b) no refund of tax has been made to the taxpayer or to any other person before making the request on the basis of administrative or judicial proceedings, and no such proceedings are ongoing at the time the request is made, unless the taxpayer confirms to the tax authorities, within 90 days of the request, that the proceedings have been terminated.

(4) If the other conditions laid down in subparagraph 3(a) and (b) are not met, the tax authorities shall refuse the request by means of a decision. In relation to the content of the instrument permitting enforcement, the tax authorities shall not implement any enforcement measure between the making of the request and the final conclusion of the proceedings and, in the case of a decision ordering a refund, after it has become final, until that decision is definitively declared null and void or annulled.'

The Law on VAT

12 Paragraph 5(1) of általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax), in the version applicable to the main proceedings ('the Law on VAT'), provides:

'For the purposes of VAT, "taxable person" shall mean any person or body having legal capacity which, in its own name, carries on in any place any economic activity, whatever the purpose or results of that activity. …'

13 Under Paragraph 55 of that law:

‘(1) The tax shall become chargeable on the occurrence of the event by which the taxable transaction is actually effected (“performance”).

(2) The legal consequence provided for in subparagraph 1 above also applies where, despite the lack of performance, an invoice is issued. It applies to the taxable person who is listed on the invoice as the supplier of goods or services, unless that person proves conclusively that:

(a) despite the invoice being issued, there has been no performance, or

(b) there has been performance, but it was carried out by a third party,

and that, at the same time, that person immediately took the necessary steps to annul the invoice issued or that – where the invoice has been drawn up in its name, but by a third party – that person immediately informed the person or body listed on the invoice as the purchaser of goods or services of the existence of a situation referred to in points (a) or (b).’

14 Paragraph 56 of that law is worded as follows:

‘Unless otherwise provided in this Law, the tax due shall be determined at the time of performance.’

15 Paragraph 77(7) of that law provides:

‘Taking into account, in particular, the principle that rights are to be exercised in accordance with their intended purpose, the taxable amount may be subsequently reduced by the amount, exclusive of tax, of all or part of the consideration recognised as irrecoverable debt if the following conditions are cumulatively met:

(a) the taxable person and the purchaser of the goods or services are independent parties;

(b) the taxable person gives prior written notice to the purchaser of the goods or services in accordance with the provisions of subparagraph 8, unless the purchaser of the goods or services has ceased to exist and has no successor in title;

(c) the taxable person is not subject to bankruptcy, winding-up or compulsory liquidation proceedings at the time of filing the declaration to which the irrecoverable debt relates;

(d) the purchaser of the goods or services is not subject to bankruptcy, winding-up or compulsory liquidation proceedings at the time of the supply of goods or services on the basis of which the debt is recognised as an irrecoverable debt;

(e) the purchaser of the goods or services does not appear in the database of persons who have a significant tax difference or a significant tax liability, which may be consulted on the tax authorities’ website, at the time of the supply of goods or services on the basis of which the debt is recognised as an irrecoverable debt or in the previous year;

(f) the tax identification number of the purchaser of the goods or services had not been removed at the time of the supply of goods or services on the basis of which the debt is recognised as an irrecoverable debt;

(g) no information had been provided to the taxpayer by the tax and customs authorities of the State concerning tax avoidance by the purchaser of the goods or services at the time of the supply of goods or services on the basis of which the debt is recognised as an irrecoverable debt;

(h) at least one year has elapsed since the payment of the consideration for the supply of goods or services on the basis of which the debt is recognised as an irrecoverable debt has become due; and

(i) the consideration for the supply of goods or services on the basis of which the debt is recognised as an irrecoverable debt has not been paid or otherwise provided.'

Law No CLI of 2017

16 Paragraph 12 of adóigazgatási rendtartásról szóló 2017. évi CLI. törvény (Law No CLI of 2017 regulating the administration of tax), in the version applicable to the main proceedings, provides:

'(1) Unless otherwise provided for in this Law, all rights which belonged to the predecessor in title revert to the successor in title of the taxable person, within the meaning of the rules of civil law, as shall all of the unperformed obligations of the predecessor in title, in proportion to the assets obtained by virtue of the succession in title. If there are several successors in title, they shall discharge the obligations of the predecessor in title in proportion to the assets. In the event of non-performance, they shall be jointly and severally liable for the debt of the predecessor in title. In the absence of any agreement to the contrary, they are entitled to subsidies in proportion to the assets.

(2) The tax authorities shall verify whether the successor in title satisfies the legal conditions relating to the periods preceding the succession, including the tax history of the predecessor in title, also assessing the conduct of the predecessor in title.

(3) The provisions of subparagraphs 1 and 2 shall also apply where the activity of a sole trader is continued in the form of a one-person company.'

The dispute in the main proceedings and the question referred for a preliminary ruling

17 The applicant in the main proceedings is an insurance company which, in the course of its business, undertakes, on the basis of an insurance contract, to pay compensation to its policyholders, in the event of non-payment, by their customers, of a given debt. The amount of the compensation is, in principle, 90% of the value of the unpaid debt including VAT. Under that insurance contract, in parallel with that compensation, the relevant portion of the value of the debt and all related rights originally attributed to the policyholder are attributed to the applicant in the main proceedings. In practice, the burden of VAT previously paid to the Treasury by the policyholders, but passed on by them to their customers and not paid by the latter, is borne by the applicant in the main proceedings as regards the portion of the VAT attributed.

18 On 31 December 2019, the applicant in the main proceedings submitted to the tax authorities a request for a refund of VAT relating to irrecoverable debts in the total amount of 225 855 154 forint (HUF) (approximately EUR 680 631) and EUR 128 240.44, together with interest for late pay-

ment equal to $^{1}/_{365}$ of the value, plus five percentage points above the base rate of the Hungarian Central Bank applicable on the date due, or interest for late payment at the Hungarian Central Bank's simple base rate.

19 In support of that request, the applicant in the main proceedings argued that the amount of the compensation which it paid after 1 January 2014 in respect of definitively irrecoverable debts that it had insured also included VAT. It stated, referring to the order of the Court of 24 October 2019, *Porr Építési Kft.* (C-292/19, not published, EU:C:2019:901), that, in breach of Article 90 of the VAT Directive, the provisions of the Law on VAT did not permit, before 1 January 2020, the subsequent reduction of the taxable amount of VAT in the case of total or partial non-payment of the consideration for the services or goods supplied, even where a debt had become definitively irrecoverable.

20 By decision of 29 January 2020, the Nemzeti Adó- és Vámhivatal Észak-budapesti Adó- és Vámigazgatósága (Budapest North Tax and Customs Directorate of the National Tax and Customs Administration, Hungary) (the first-tier tax authority) refused that request on the ground that the applicant in the main proceedings had not carried out the transactions on which the irrecoverable debts at issue were based.

21 By decision of 15 April 2020, the defendant in the main proceedings rejected the complaint filed by the applicant in the main proceedings against that decision of 29 January 2020 and upheld that decision. In that regard, it maintained that a change of taxable person resulting from an insurance contract did not constitute a succession for the purposes of tax law, since the substantive material conditions laid down for granting an application for a refund of VAT were not met, given that the applicant in the main proceedings was not a taxable person as regards the transactions in respect of which it intended to exercise its right to a reduction of the taxable amount and to a refund of the VAT resulting therefrom.

22 The applicant in the main proceedings brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary), the referring court, against that decision of 15 April 2020, requesting, principally, that that decision be reviewed and altered with retroactive effect. In its submission, under the insurance contract referred to in paragraph 17 above, as the successor in title to its policyholders, it is entitled to a refund of the VAT relating to the irrecoverable debts at issue. It is similarly entitled under EU law, by virtue of the principle of fiscal neutrality.

23 The defendant in the main proceedings contends that the action should be dismissed. It argues that, under both EU law and Hungarian law, an insurer such as the applicant in the main proceedings is not entitled, under Article 90 of the VAT Directive, to a reduction of the taxable amount applicable in the event of definitive non-payment. According to the defendant in the main proceedings, the right to apply for a refund of VAT is vested in the taxable person whose debt has become definitively irrecoverable and who has paid that tax. It maintains that, in the present case, the taxable entity is not the applicant in the main proceedings, but its policyholders. Furthermore, the defendant in the main proceedings states that the applicant in the main proceedings did not pay the VAT, but rather the amount insured under that insurance contract, such that, if the defendant were to grant the applicant's claim for a refund of VAT, that would result in the latter's unjust enrichment.

24 As regards the debts concerned, the referring court states that, at the time of their transfer to the applicant in the main proceedings, those debts were not yet considered irrecoverable and that they became definitive only after that transfer. That court also states that, until 1 January 2020, the Law on VAT was contrary to EU law, since that law did not permit the subsequent reduction of the taxable amount of VAT in respect of such debts.

25 That court is uncertain whether the provisions of Hungarian law applicable to the dispute before it and the tax authorities' practice based on those provisions are compatible with EU law, the case-law of the Court and the principles of proportionality, fiscal neutrality and effectiveness.

26 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the principles of proportionality, fiscal neutrality and effectiveness – having regard, in particular, to the fact that a Member State may not charge an amount of VAT exceeding that actually received by the supplier of goods or services in respect of that supply of goods or services – and the exemption laid down in Article 135(1)(a) of the VAT Directive – particularly as regards the requirement that that activity is to be treated as a single exempt transaction, by reference to the principles laid down in points 35, 37 and 53 of the [Opinion of Advocate General Mengozzi in *Swiss Re Germany Holding* (C-242/08, EU:C:2009:300)] – and the obligation to guarantee the free movement of capital and services in the internal market preclude a practice of a Member State pursuant to which the reduction applicable to the taxable amount in the event of definitive non-payment, as provided for in Article 90(1) of the VAT Directive, is not applicable where an insurer, in the course of its commercial credit insurance business, paid an indemnity to the insured person in respect of the taxable amount and also in respect of the VAT due when the risk materialised (non-payment by the insured's client), meaning that, under the insurance contract, the debt, together with all associated rights of enforcement, was assigned to the insurer, in the following circumstances:

(a) at the time when the debts in question became irrecoverable, national law did not allow any reduction of the taxable amount in respect of an irrecoverable debt;

(b) since the incompatibility of that prohibition with [EU] law was made clear, national positive law has consistently excluded outright the refund of VAT on an irrecoverable debt to the original supplier of the goods or services (the insured person) on the grounds that the insurer has reimbursed that amount of VAT to the supplier; and

(c) the insurer is able to show that its claim against the debtor has become definitively irrecoverable?'

Consideration of the question referred

27 As a preliminary point, it should be noted, first, that, in its question, the referring court refers to Article 135(1)(a) of the VAT Directive, which provides for an exemption for insurance transactions. In the present case, the applicant in the main proceedings seeks a refund of the VAT paid by taxable persons in the context not of insurance transactions exempted under that provision, but of taxable transactions. Therefore, that provision is irrelevant for the purposes of resolving the dispute in the main proceedings.

28 Secondly, the referring court refers to the provisions of the FEU Treaty on the free movement of services and capital. In the present case, it should be noted that the dispute in the main proceedings is characterised by factors that are all confined to one and the same Member State, since it is between a Hungarian company established in Hungary and the Hungarian tax authorities, namely the Appeals Directorate of the National Tax and Customs Authority.

29 It is settled case-law that the provisions of the FEU Treaty on the freedom of establishment, the freedom to provide services and the free movement of capital do not apply to a situation which is confined in all respects within a single Member State (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited).

30 Consequently, the provisions of the FEU Treaty on the free movement of services and capital are not applicable to the dispute in the main proceedings.

31 In those circumstances, it must be held that, by its question, the referring court asks, in essence, whether Article 90(1) of the VAT Directive and the principles of proportionality, fiscal neutrality and effectiveness must be interpreted as precluding legislation of a Member State under which the reduction of the taxable amount in the event of non-payment, provided for in that provision, is not applied to an insurer who, under a contract for the insurance of trade debts, paid one of its policyholders, by way of compensation following non-payment of a debt, part of the taxable amount of the taxable transaction at issue including VAT, even though, pursuant to that contract, that part of the debt together with all associated rights have been assigned to that insurer.

32 It should be recalled, first, that Article 90(1) of the VAT Directive refers to cases of cancellation, termination, rescission, total or partial non-payment or price reduction after the time when the transaction which gave rise to the payment of the VAT is carried out. That provision requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of that directive, the principle of fiscal neutrality, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (order of 3 March 2021, *FGSZ*, C-507/20, EU:C:2021:157, paragraph 18 and the case-law cited).

33 Having regard to the wording of Article 90(1) of the VAT Directive, and the principle of fiscal neutrality, the formalities to be complied with by taxable persons in order to exercise, vis-à-vis the tax authorities, the right to reduce the taxable amount of VAT must be limited to those which make it possible to provide proof that, after a transaction has been concluded, part or all of the consideration will definitively not be received (see, to that effect, order of 3 March 2021, *FGSZ*, C-507/20, EU:C:2021:157, paragraph 19 and the case-law cited).

34 Secondly, Article 90(2) of the VAT Directive allows Member States to derogate from the rule referred to in Article 90(1) of that directive in situations of total or partial non-payment of the transaction price. In that regard, the Court has held that the exercise of that power to derogate cannot allow Member States to exclude altogether reduction of the taxable amount of VAT in the event of non-payment. That power is only intended to enable the Member States to counteract the uncertainty as to the non-payment of an invoice or the definitive nature of that

non-payment, and does not resolve the issue of whether a reduction of the taxable amount might not be carried out in the case of non-payment (see, to that effect, order of 3 March 2021, *FGSZ*, C-507/20, EU:C:2021:157, paragraph 20 and the case-law cited).

35 Moreover, to accept that it is possible for Member States to exclude, in the event of total or partial non-payment of the transaction price, any reduction of the taxable amount of VAT would run counter to the principle of the neutrality of VAT, which means, inter alia, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of his or her economic activities, themselves subject to VAT (see, to that effect, judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 23 and the case-law cited).

36 In the present case, it is necessary to determine whether, in circumstances such as those at issue in the main proceedings, the non-payment of debts falls within the scope of Article 90(1) of the VAT Directive.

37 In that regard, it should be noted that, in accordance with Article 2(1)(a) and (c) of that directive, the supply of goods and services for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT.

38 In that regard, the Court has held that classification of a transaction as effected 'for consideration' requires that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person (see, to that effect, judgment of 3 July 2019, *UniCredit Leasing*, C-242/18, EU:C:2019:558, paragraph 69 and the case-law cited). The Court has also held that it is not a requirement that, for a supply of goods or services to be effected 'for consideration', the consideration for that supply must be obtained directly from the person to whom those goods or services are supplied, since it may be obtained from a third party (see, to that effect, judgment of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraph 34 and the case-law cited). It is apparent from that case-law that, for the purposes of that classification, the decisive factor is the fact that consideration has actually been paid.

39 In the present case, the applicant in the main proceedings paid to the taxable customers compensation corresponding to 90% of the amount of the debts at issue, including VAT.

40 In that context, it appears that the part of the debts for which the applicant in the main proceedings received compensation was indeed received by the taxable customers as consideration for the taxable transactions at issue, with the result that it cannot be regarded as being the subject of a 'non-payment' within the meaning of Article 90(1) of the VAT Directive.

41 It follows that that part of the debts, even if it was received by way of compensation, cannot give rise to any right to a reduction of the taxable amount of VAT for the taxable customers.

42 Furthermore, it cannot be held that, in the light of EU VAT law and irrespective of the national rules that may govern assignments of debts under civil law, an insurer such as the applicant in the main proceedings may be identified as being the taxable person entitled, as regards the part of the debts that have been the subject of compensation and assignment, to a reduction of the taxable amount for VAT purposes under Article 90(1) of the VAT Directive.

43 To recognise such an insurer as having that status would be tantamount to disregarding the principle of fiscal neutrality, since the VAT paid to the tax authorities would not be exactly proportional to the price actually received by the taxable customers who carried out the taxable transactions in question.

44 In the light of all of the foregoing considerations, the answer to the question referred is that Article 90(1) of the VAT Directive and the principle of fiscal neutrality must be interpreted as not precluding legislation of a Member State under which the reduction of the taxable amount in the event of non-payment, provided for in that provision, is not applied to an insurer who, under a contract for the insurance of trade debts, pays the insured person, by way of compensation following non-payment of a debt, part of the taxable amount of the taxable transaction at issue including VAT, even though, pursuant to that contract, that part of the debt together with all associated rights have been assigned to that insurer.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, and the principle of fiscal neutrality

must be interpreted as not precluding legislation of a Member State under which the reduction of the taxable amount in the event of non-payment, provided for in that provision, is not applied to an insurer who, under a contract for the insurance of trade debts, pays the insured person, by way of compensation following non-payment of a debt, part of the taxable amount of the taxable transaction at issue including value added tax, even though, pursuant to that contract, that part of the debt together with all associated rights have been assigned to that insurer.

[Signatures]