Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

6 September 2012*

(VAT — Directive 2006/112/EC — Article 138(1) — Conditions of exemption for intra-Community transactions characterised by the obligation on the purchaser to ensure, as from the time of their loading, the transport of the goods of which it disposes as owner — Obligation on the vendor to prove that the goods have physically left the territory of the Member State of supply — Removal from the register, with retroactive effect, of the customer's VAT identification number)

In Case C-273/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Baranya Megyei Bíróság (Hungary), made by decision of 18 May 2011, received at the Court on 3 June 2011, in the proceedings

Mecsek-Gabona Kft

v

Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus (Rapporteur), A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2012,

after considering the observations submitted on behalf of:

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

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the European Commission, by L. Lozano Palacios and V. Bottka, acting as Agents,

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

gives the following

* Language of the case: Hungarian.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 138(1) 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 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1) ('Directive 2006/112').

2 The reference has been made in proceedings between Mecsek-Gabona Kft ('Mecsek-Gabona') and the Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (Southern Transdanubia Regional Directorate-General for Tax of the National Tax and Customs Office) ('the Főigazgatóság') concerning the Főigazgatóság's refusal to grant Mecsek-Gabona an exemption from valued added tax ('VAT') in respect of a transaction which it had categorised as an intra-Community supply of goods.

Legal context

Directive 2006/112

3 In accordance with Articles 411 and 413 thereof, Directive 2006/112 replaced, with effect from 1 January 2007, the existing European Union VAT legislation and, in particular, Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

4 Article 2(1)(b)(i) of Directive 2006/112 provides:

'The following transactions shall be subject to VAT:

…

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

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such …'

5 Under Article 14(1) of that directive:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

6 Title IX of Directive 2006/112, which is entitled 'Exemptions', is composed of 10 chapters, the first of which sets out general provisions. Article 131, the sole article in Chapter 1, provides:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

7 In Chapter 4 of Title IX, which is entitled 'Exemptions for intra-Community transactions', Article 138(1) 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.'

8 Article 131 and Article 138(1) of Directive 2006/112 reproduce, in essence, the content of the first subparagraph of Article 28c(A)(a) of Sixth Council Directive 77/388, as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18).

9 Of the various chapters in Title XI of Directive 2006/112, which is entitled 'Obligations of taxable persons and certain non-taxable persons', Chapter 2 is entitled 'Identification' and Chapter 3 is entitled 'Invoicing'.

10 One of the provisions in Chapter 2 is Article 214, which is worded as follows:

'(1) Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

…

(b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT;

…'

11 In Chapter 3 of Title XI, Article 220(1) provides:

'Every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:

…

(3) supplies of goods carried out in accordance with the conditions specified in Article 138;

…'

12 Article 226, also in Chapter 3 of Title XI, provides:

'Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(4) the customer's VAT identification number, as referred to in Article 214, under which the customer received a supply of goods or services in respect of which he is liable for payment of VAT, or received a supply of goods as referred to in Article 138;

…'

Hungarian Law

13 Paragraph 89(1) of Law CXXVII of 2007 on Value Added Tax (Általános forgalmi adóról szóló 2007. évi CXXVII. Törvény, Magyar Közlöny 2007/128) is worded as follows:

'Subject to the exceptions set out in subparagraphs 2 and 3, exemption shall be granted to supplies of goods shown to have been dispatched or transported to a destination outside the territory of Hungary but within the Community, whether by the vendor or by the purchaser or by any other person acting

on their behalf, for another taxable person acting as such, not in Hungary, but in another Member State of the Community, or for a legal person who, albeit not a taxable person, is identified for VAT purposes in another Member State of the Community and is required to pay the tax.'

The dispute in the main proceedings and the questions referred

14 Mecsek-Gabona is a Hungarian company engaged in the wholesale supply of cereals, tobacco, seeds and fodder.

15 On 28 August 2009, Mecsek-Gabona concluded a contract with Agro-Trade srl ('Agro-Trade'), a company established in Italy, for the sale of 1 000 tonnes (± 10%) of rapeseed at a price of HUF 71 500/tonne for the purposes of a VAT-exempt intra-Community supply of goods.

16 Under the relevant clauses of that contract, the parties had agreed that, in terms of quantity, performance would be carried out in accordance with the weight loaded on the premises of the vendor in Szentlőrinc (Hungary), as attested in the weighing records and the invoices issued on the basis of those records. The purchaser undertook to arrange the means of transportation and to transport the goods to another Member State.

17 Prior to transportation, the purchaser provided the registration numbers of the vehicles which would come to the premises of Mecsek-Gabona to pick up the goods. After the vehicles had been weighed, the quantities of the goods purchased were entered on the CMRs (consignment notes drawn up in accordance with the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol of 5 July 1978), and the transport documents were presented by the carriers. The first copy of the completed CMRs was photocopied by the vendor, while the originals remained with the carriers. The serial numbers of the 40 CMRs, which were consecutive, were returned to the vendor by post from the purchaser's address in Italy.

18 Two invoices were issued on 4 September 2009 in relation to the VAT-exempt sale at issue in the main proceedings, the first for HUF 34 638 175 in respect of 484.45 tonnes of rapeseed and the second for HUF 34 555 235 in respect of 483.29 tonnes of rapeseed. A few days after the consignment had been delivered, the first invoice was settled by a Hungarian natural person, who paid the related amount into Mecsek-Gabona's bank account. By contrast, the second invoice, which had to be settled within eight months of delivery, has not been paid.

19 Consultation by Mecsek-Gabona of the register of taxable persons on 7 September 2009 revealed that, as at that date, Agro-Trade had a VAT identification number.

20 In the course of checking Mecsek-Gabona's tax return, the Hungarian tax authority submitted a request for information to the Italian tax authority under Article 5(1) of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of [VAT] and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1). According to the information sent by the Italian tax authority, Agro-Trade could not be found and, at the address given as that of its registered office, there was only a private home. No company of that name had ever been registered at that address. Since Agro-Trade had never paid VAT, it was also unknown to the Italian tax authority. On 14 January 2010, Agro-Trade's Italian VAT identification number was removed from the register with retroactive effect from 17 April 2009.

21 On the basis of all that information, the first-level Hungarian tax authority took the view that Mecsek-Gabona had not succeeded in proving, during the fiscal procedure, that the transaction in issue was a VAT-exempt intra-Community supply of goods and, by decision of 7 September 2010, it found that Mecsek-Gabona had a tax debt of HUF 17 298 000, representing VAT for September 2009, to which it added a fine of HUF 1 730 000 and a late-payment penalty of HUF 950 000.

22 By decision of 18 January 2011, the Főigazgatóság upheld the decision of the first-level tax authority, on the view that Mecsek-Gabona should have been in possession of a document proving that the goods had been dispatched and that they had been transported to another Member State. If Mecsek-Gabona was unable to present such a document during the inspection, or if the document presented could not be regarded as authentic, Mecsek Gabona would be liable for VAT in relation to the sale at issue in the main proceedings, unless it had acted in good faith during the transaction.

23 According to the Főigazgatóság, Mecsek-Gabona should have acted with greater caution. Accordingly, it should not merely have ensured that the goods had been dispatched, it should also have made sure that the goods had arrived at their destination.

24 Before the referring court, the Baranya Megyei Bíróság (Baranya County Court), Mecsek-Gabona is claiming that the decision of the Főigazgatóság should be annulled, together with the decision of the first-level tax authority. Mecsek-Gabona argues that it cannot be accused of failing to act with due circumspection, either at the time of concluding the contract or when that contract was in course of performance, given that, on 7 September 2009, it had checked Agro-Trade's VAT identification number; it had made sure that the number was valid; and it had made certain that the CMRs had been returned from the purchaser's address in Italy. Mecsek-Gabona adds that it could not have had any knowledge of the fact that, on 14 January 2010 the Italian tax authority had removed that identification number from the register with retroactive effect from 17 April 2009; consequently, that removal could not have any bearing on matters.

25 The Főigazgatóság contends that Mecsek-Gabona's action should be dismissed, maintaining its argument that the VAT exemption could be applied to the supply at issue only if Mecsek-Gabona had satisfied itself, not only that the goods had been dispatched, but also that they had arrived.

26 The Baranya Megyei Bíróság believes that an interpretation of Article 138 of Directive 2006/112 is necessary if it is to be able to determine what constitutes satisfactory evidence that a tax-exempt supply of goods has taken place and define the extent to which the vendor, if it does not arrange the transport itself, is answerable for the conduct of the purchaser. Referring to Case C-409/04 *Teleos and Others* [2007] ECR I-7797, the referring court also asks whether the fact that Agro-Trade's VAT identification number was removed from the register after the goods had been supplied can raise doubts as to Mecsek-Gabona's good faith and serve as a basis for finding that the transaction was not a VAT-exempt supply.

27 In those circumstances, the Baranya Megyei Bíróság decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 138(1) of Directive 2006/112 to be interpreted as meaning that the supply of goods is exempt from VAT if the goods are sold to a purchaser who is registered for VAT in another Member State at the time when the contract of sale is concluded, and the purchaser has had a clause inserted in the contract of sale for the goods in question under which the right of disposal and the right of ownership are transferred to the purchaser at the time when the goods are loaded on to the means of transportation, and the purchaser assumes the obligation of transporting the goods to another Member State?

2. Is it sufficient, for the vendor to be able to apply the rules relating to VAT-exempt supplies, for the vendor to satisfy itself that the goods sold are picked up by the foreign-registered vehicles and for the vendor to be in possession of the CMRs returned by the purchaser, or must the vendor make sure that the goods sold have crossed the national border and been transported within Community territory?

3. Can the categorisation of a supply of goods as VAT-exempt be called into question solely because the tax authority of another Member State removes the purchaser's Community tax number from the register with retroactive effect from a date prior to the supply of the goods?'

The questions referred for a preliminary ruling

Questions 1 and 2

28 By Questions 1 and 2, which should be considered together, the referring court asks, in essence, whether Article 138(1) of Directive 2006/112 is to be interpreted as precluding the tax authority of a Member State from refusing to grant a vendor established in that Member State the exemption from VAT for intra-Community supplies where (i) the right to dispose of goods as owner is transferred, on the territory of that Member State, to a purchaser established in another Member State which, at the time of the transaction, has a VAT identification number in that other Member State and which assumes responsibility for the transportation of those goods to the other Member State and (ii) the vendor satisfies itself that the goods sold have been picked up by the foreign-registered vehicles, and is in possession of the CMRs returned by the purchaser from the Member State of destination, as proof that the goods have been transported to a destination outside the Member State of the vendor.

29 It should be recalled at the outset that an intra-Community supply, which is the corollary of the intra-Community acquisition, is exempt from VAT if the conditions laid down in Article 138(1) of Directive 2006/112 are satisfied (see, to that effect, *Teleos and Others*, paragraph 28, and Case C-84/09 *X* [2010] ECR I-11645, paragraph 26).

30 Under Article 138(1) of Directive 2006/112, Member States are to exempt supplies of goods dispatched or transported to a destination outside their respective territories but within the European Union, 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.

31 In accordance with settled case-law, the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the vendor establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply (see *Teleos and Others*, paragraph 42; Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 23; Case C-285/09 *R.* [2010] ECR I-12605, paragraph 41; and Case C-430/09 *Euro Tyre Holding* [2010] ECR I-13335, paragraph 29).

32 As regards, first, the transfer to the purchaser of the right to dispose of tangible property as owner, it should be noted that this is an inherent condition for any supply of goods, as defined in Article 14(1) of Directive 2006/112, and is insufficient in itself to establish the intra-Community nature of the transaction in question.

33 In that regard, it is apparent from the order for reference that it is not disputed that the condition relating to transfer of the right to dispose of goods as owner is satisfied in the case before the referring court, given that, under the contract between the parties, the transfer took place at the time when the goods were loaded on to the means of transportation provided by the purchaser and the Hungarian tax authority did not dispute the fact that the goods had been loaded.

34 So far as concerns, secondly, the vendor's obligation to establish that the goods have been dispatched or transported to a destination outside the Member State of supply, it should be borne in mind that that obligation must be considered in the specific context of the transitional tax arrangements applicable to intra-Community trade, established for the purpose of the abolition of internal frontiers on 1 January 1993 by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) (*Teleos and Others*, paragraph 21).

35 In that regard, the Court observed that, even if the intra-Community supply of goods is subject to the objective requirement that the goods must have physically left the territory of the Member State of supply, it has been difficult since the abolition of border controls between the Member States for the tax authorities to check whether or not the goods have physically left the territory of that Member State. As a result, it is principally on the basis of the evidence provided by taxable persons and of their statements that the national tax authorities are to carry out the necessary checks (*Teleos and Others*, paragraph 44, and *R.*, paragraph 42).

36 It is also apparent from the case-law that, in the absence of any specific provision in Directive 2006/112 as to the evidence that taxable persons are required to provide in order to be granted the exemption from VAT, it is for the Member States to lay down, in accordance with Article 131 of Directive 2006/112, the conditions in which intra-Community supplies of goods will be exempt, with a view to ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse. However, when they exercise their powers, Member States must observe the general principles of law which form part of the European Union legal order, which include, in particular, the principles of legal certainty and proportionality (see, to that effect, Case C-146/05 *Collée* [2007] ECR I-7861, paragraph 24; *Twoh International*, paragraph 25; *X*, paragraph 35; and *R.*, paragraphs 43 and 45).

37 It should be noted in that regard that the order for reference does not mention any specific obligations laid down by Hungarian law, such as a list of the documents to be presented to the competent authorities, for the purposes of applying the exemption for intra-Community supplies. According to the explanations given by the Hungarian Government at the hearing before the Court, Hungarian legislation provides only that the supply must be certified and that the level of evidence required will depend on the specific characteristics of the transaction in question.

38 In those circumstances, the obligations imposed upon taxable persons with regard to evidence must be determined in the light of the conditions laid down in that regard by national law and in accordance with the general practice established in respect of similar transactions.

39 According to the case-law of the Court, the principle of legal certainty requires that taxable persons be aware, before concluding a transaction, of their tax obligations (*Teleos and Others*, paragraph 48 and the case-law cited).

40 The referring court asks, in particular, whether, for the application of the exemption for intra-Community supplies, a Member State may require taxable persons to ensure that the goods have physically left the territory of that Member State.

41 On that point, the Court has observed that, where there appears to be no tangible evidence to substantiate the conclusion that the goods concerned have been transferred out of the territory of the Member State of supply, to oblige taxable persons to provide conclusive proof of this does not ensure the correct and straightforward application of the exemptions. On the contrary, that obligation places taxable persons in an uncertain situation as regards the possibility of applying the exemption to their intra-Community supplies or as regards the need to include VAT in the sale price (see, to that effect, *Teleos and Others*, paragraphs 49 and 51).

42 Furthermore, it should be pointed out that, where the purchaser has the right to dispose of the goods as owner in the Member State of supply and where that person assumes the obligation of transportation of those goods to the destination Member State, account must be taken of the fact that the evidence that the vendor might submit to the tax authorities depends essentially on information that it receives for those purposes from the purchaser (see, to that effect, *Euro Tyre Holding*, paragraph 37).

43 The Court accordingly found that, once the vendor has fulfilled his obligations relating to evidence of an intra-Community supply, where the contractual obligation to dispatch or to transport the goods out of the Member State of supply has not been satisfied by the purchaser, it is the latter which must be held liable for the VAT in that Member State (see, to that effect, *Teleos and Others*, paragraphs 66 and 67, and *Euro Tyre Holding*, paragraph 38).

44 It is apparent from the order for reference that, in the case before the referring court, Mecsek-Gabona claims to be entitled to exemption from VAT on the basis of (i) the VAT identification number assigned to the purchaser by the Italian tax authority, (ii) the fact that the goods sold had been picked up by foreign-registered vehicles and (iii) the CMRs returned by the purchaser from its address, indicating that the goods had been transported to Italy.

45 The question whether, by acting in that manner, Mecsek-Gabona fulfilled its obligations relating to evidence and diligence is a matter for the referring court to assess in the light of the conditions specified in paragraph 38 above.

46 However, where the supply of goods concerned is part of a tax fraud committed by the purchaser and where the tax authority is not certain that the goods have actually left the territory of the Member State of supply, it is necessary to consider, thirdly, whether that authority may subsequently require the vendor to account for the VAT on that supply.

47 According to settled case-law, the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76; *R.*, paragraph 36; and Joined Cases C-80/11 and C-142/11 *Mahagében and Dávid* [2012] ECR, paragraph 41 and the case-law cited) which can, in certain circumstances, justify stringent requirements as regards vendors' obligations (*Teleos and Others*, paragraphs 58 and 61).

48 Accordingly, it is not contrary to European Union law to require an operator to act in good faith and to take every step which could reasonably be asked of it to satisfy itself that the transaction which it is carrying out does not result in its participation in tax fraud (*Teleos and Others*, paragraph 65, and *Mahagében and Dávid*, paragraph 54).

49 The Court found those factors to be important for the purposes of deciding whether the vendor can be obliged to account for the VAT after the event (see, to that effect, *Teleos and Others*, paragraph 66).

50 Consequently, in the event that the purchaser in the case before the referring court has committed tax fraud, it is justifiable to make the vendor's right to exemption from VAT conditional upon its good faith.

51 It is not immediately clear from the order for reference that Mecsek-Gabona knew or should have known that the purchaser had committed tax fraud.

52 However, in its written and oral submissions before the Court, the Hungarian Government claims that several factors not mentioned in the order for reference prove, in its opinion, that Mecsek-Gabona acted in bad faith. To that effect, the Hungarian Government argues that, even though Mecsek-Gabona was not familiar with the purchaser of the goods at issue in the main proceedings, it had not requested any guarantees from the purchaser; it did not check the purchaser's VAT identification number until after the transaction; it did not collect any additional information on the purchaser; it had transferred the right to dispose of the goods as owner to the purchaser, while accepting that payment of the original sale price could be deferred; and it had presented the CMRs returned by the purchaser even though they were incomplete.

53 In that regard, it should be borne in mind that, in proceedings brought under Article 267 TFEU, the Court has no jurisdiction to check or to assess the factual circumstances of the case before the referring court. It is therefore for the national court to carry out an overall assessment of all the facts and circumstances of the case in order to establish whether Mecsek-Gabona had acted in good faith and taken every step which could reasonably be asked of it to satisfy itself that the transaction which it had carried out had not resulted in its participation in tax fraud.

54 If the referring court were to reach the conclusion that the taxable person concerned knew or should have known that the transaction which it had carried out was part of a tax fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, there would be no entitlement to exemption from VAT.

55 In the light of all the foregoing considerations, the answer to Questions 1 and 2 is that Article 138(1) of Directive 2006/112 is to be interpreted as not precluding, in circumstances such as those of the case before the referring court, refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence, or that it knew or should have known that the transaction which it carried out was part of a tax fraud committed by the purchaser, and that it had not taken every reasonable step within its power to prevent its own participation in that fraud.

Question 3

56 By Question 3, the referring court asks, in essence, whether a vendor may be refused the VAT exemption for an intra-Community supply, in accordance with Article 138(1) of Directive 2006/112, on the ground that the tax authority of another Member State has removed the purchaser's VAT identification number from the register, with retroactive effect from a date prior to the sale of the goods even though the number was removed after the goods had been supplied.

57 Under the transitional arrangements for tax applicable to trade within the European Union, the purpose of which is the transfer of the tax revenue to the Member State in which final consumption of the goods supplied takes place (see *Teleos and Others*, paragraph 36, and Joined Cases C-536/08 and C-539/08 X *and fiscale eenheid Facet-Facet Trading* [2010] ECR I-3581, paragraph 30), the identification of taxable persons subject to VAT by means of an individual number facilitates the determination of the Member State in which that final consumption takes place.

58 Under Article 214(1)(b) of Directive 2006/112, Member States are to take the measures necessary to ensure that every taxable person who makes intra-Community acquisitions is identified by means of an individual number. Under Article 226(4) of Directive 2006/112, on the other hand, the customer's VAT identification number, under which the customer has received a supply of goods as referred to in Article 138 of that directive, must be indicated on the invoice, which itself must always be issued in respect of an intra-Community supply.

59 However, neither the wording of Article 138(1) of Directive 2006/112 nor the case-law cited in paragraph 31 above mentions – as one of the substantive conditions, listed exhaustively, for an intra-Community supply – the obligation to have a VAT identification number.

60 Admittedly, a VAT identification number provides proof of the tax status of the taxable person for the purposes of the application of VAT and facilitates the tax audit of intra-Community transactions. However, it constitutes a formal requirement which cannot undermine the right of exemption from VAT where the substantive conditions for an intra-Community supply are satisfied (see, by analogy, in relation to the right of deduction, Case C-385/09 *Nidera Handelscompagnie* [2010] ECR I-10385, paragraph 50, and Case C-438/09 *Dankowski* [2010] ECR I-14009, paragraphs 33 and 47).

61 According to the case-law, a national measure which, in essence, makes the right of exemption for an intra-Community supply conditional upon compliance with formal obligations, without any account being taken of the substantive requirements, goes further than is necessary to ensure the correct levying and collection of the tax (*Collée*, paragraph 29). The only exception is if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied (see, to that effect, *Collée*, paragraph 31).

62 In the present case, it is common ground that the purchaser's identification number was valid at the time of the transaction but that, several months later, that number was removed from the register of taxable persons by the Italian tax authority, with retroactive effect.

63 However, given that the obligation to check the status of the taxable person must be discharged by the competent national authority before it assigns that person a VAT identification number, possible irregularities affecting the register cannot deprive a trader who has relied on the information entered in that register of the right of exemption from VAT to which it is entitled.

64 As the European Commission rightly observes, it is contrary to the principle of proportionality that the vendor be held liable for the VAT solely on the ground that the purchaser's VAT identification number was removed from the register with retroactive effect.

65 Accordingly, the answer to Question 3 is that a vendor may not be refused the VAT exemption for an intra-Community supply, in accordance with Article 138(1) of Directive 2006/112, solely on the ground that the tax authority of another Member State has removed the purchaser's VAT identification number from the register, with retroactive effect from a date prior to the sale of the goods even though the number was removed after the goods had been supplied.

Costs

66 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 (Second Chamber) hereby rules:

1. **Article 138(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/88/EU of 7 December 2010, is to be interpreted as not precluding, in circumstances such as those of the case before the referring court, refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, on the basis of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence, or that it knew or should have known that the transaction which it carried out was part of a tax fraud committed by the purchaser, and that it had not taken every reasonable step within its power to prevent its own participation in that fraud.**

2. **A vendor may not be refused the VAT exemption for an intra-Community supply, in accordance with Article 138(1) of Directive 2006/112, as amended by Directive 2010/88, solely on the ground that the tax authority of another Member State has removed the purchaser's VAT identification number from the register, with retroactive effect from a date prior to the sale of the goods even though the number was removed after the goods had been supplied.**

[Signatures]