Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

3 July 2019*

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Taxable amount – Reduction – Principle of fiscal neutrality – Lease finance agreement terminated for failure to make monthly payments – Notice of adjustment – Scope – Taxable transactions – Supply of goods for consideration – Payment of 'compensation' for termination up to expiry of the agreement – Jurisdiction of the Court)

In Case C-242/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 26 March 2018, received at the Court on 5 April 2018, in the proceedings

'UniCredit Leasing' EAD

v

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (NAP),

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having considered the observations submitted on behalf of:

– 'UniCredit Leasing' EAD, by I. Dimitrova and M. Raykov, advokati,

– the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (NAP), by N. Kalistratov, acting as Agent,

– the Bulgarian Government, by E. Petranova and T. Mitova, acting as Agents,

* Language of the case: Bulgarian.

– the European Commission, by R. Lyal, Y. Marinova and P. Mihaylova, 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; 'the VAT Directive').

2 The request has been made in proceedings between 'UniCredit Leasing' EAD ('Unicredit') and the Direktor na Direktsia 'Obzhlavane i danachno-osiguritelna praktika' – Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (NAP) (Director of the Sofia 'Tax and Social Security Appeals and Practice Board' of the National Public Revenue Agency (NAP), Bulgaria; 'the Direktor') concerning the Direktor's refusal to permit regularisation of the amount of value added tax (VAT) paid in respect of instalment payments due under a lease finance agreement which were not made.

Legal background

European Union law

The Act of Accession of the Republic of Bulgaria to the European Union

3 Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203) provides:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

The VAT Directive

4 Article 2(1)(a) of the VAT Directive provides:

'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.'

5 Article 14 of that directive provides:

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

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

(a) the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;

(b) the actual handing over of goods, pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.

3. Member States may regard the handing over of certain works of construction as a supply of goods.'

6 Article 63 of that directive states:

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

7 Article 73 of that 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 the VAT Directive reads as follows:

'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 Article 273 of that directive provides:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.'

Bulgarian law

10 Under Article 6 of the Zakon za danak varhu dobavenata stoynost (Law on value added tax) (DV No 63 of 4 August 2006, in force since 1 January 2007; 'the ZDDS'):

'(1) "Supply of goods" within the meaning of this Law means the transfer of the right of ownership or another right *in rem* to the goods.'

(2) For the purposes of this Law, the following shall also be regarded as a "supply of goods":

…

(3) (amended in DV No 101 of 2013, in force since 1 January 2014) The actual supply of goods under a lease finance agreement which expressly provides for the transfer of the right of ownership of those goods; this provision shall also apply where the lease finance agreement simply contains an option to have ownership of the goods transferred, and the sum of the payments due under the agreement, excluding interest under Article 46(1)(1), equals the normal price of the goods on the date of supply …'

11 Article 115 of the ZDDS provides:

'(1) In the event of a change in the taxable amount or cancellation of a transaction for which an invoice has been issued, the supplier shall be obliged to draw up a note relating to the invoice.

(2) (supplemented in DV No 97 of 2016, in force since 1 January 2017) The note shall be issued within five days of the event referred to in paragraph 1 and, where it concerns a supply in respect of which an invoice has been issued showing the VAT invoiced on payment of a deposit, within five days of the date of reimbursement, set off, or other non-gratuitous payment of the amount of the stipulated deposit, and shall relate to the amount of the reimbursement, set off or other non-gratuitous payment.

(3) In the event of an increase in the taxable amount, a debit note shall be raised; in the event of a reduction in the taxable amount or cancellation of a transaction, a credit note shall be issued.

(4) In addition to the matters referred to in Article 114, a note relating to an invoice must state:

1. the number and date of the invoice in respect of which it is issued;

2. the reason for issuing it;

(5) Notes must be issued at least in duplicate; one copy for the supplier and one for the person to whom the supply is made.

(6) In the event of cancellation or termination of a lease finance agreement referred to in Article 6(2)(3), the supplier shall issue a credit note corresponding to the difference between the taxable amount relating to the supply under Article 6(2)(3), and the amount which he retains pursuant to the agreement, net of VAT under this Law.

(7) (introduced in DV No 94 of 2012, in force since 1 January 2013) A note relating to an invoice need not state the matters required by Article 114(1)(12), (14) and (15) unless the place of

performance of the transaction to which it relates is in the territory of a Member State, or unless it relates to an intra-Community transaction or distance sale of goods.'

12 Article 116 of the ZDDS states:

'(1) It is not permissible to make amendments or additions to invoices or notes relating to invoices. Documents which have been incorrectly drawn up or amended must be cancelled and reissued.

(2) Issued invoices and notes relating to such invoices which ought to show VAT, but do not do so, shall also be regarded as documents which have been incorrectly drawn up.

(3) Issued invoices and notes relating to such invoices which ought not to show VAT, but do so, shall also be regarded as documents which have been incorrectly drawn up.

(4) Where documents which have been incorrectly drawn up or amended have been entered in the books of account of the supplier or the person to whom the supply is made, their cancellation requires a memorandum to be drawn up by each party, in which the following must appear:

1. the reason for cancellation;

2. the number and date of the cancelled document;

3. the number and date of issue of the new document;

4. the signatures of those who have drawn up the memorandum on behalf of each party.

(5) All the copies of the cancelled documents shall be kept by the issuer and they shall be entered in the accounts of the supplier and the person to whom the supply is made in accordance with the implementing regulation.'

13 Paragraph 9 of the transitional and final provisions of the ZDDS provides:

'(1) Where an actual supply of goods has taken place pursuant to a lease finance agreement prior to the entry into force of this Law, all subsequent payments (monthly repayments) which fall due under that agreement after the entry into force [of the ZDDS] shall be regarded as individual transactions, the chargeable event occurring on the date of the payment or, if earlier, the date on which it fell due.

(2) Paragraph 1 shall apply only if, within one month of the entry into force of [the ZDDS], the taxable person (supplier) submits a list to the regional office of the National Revenue Agency with which he is registered, containing the following mandatory particulars:

1. the person to whom the supply is made under the agreements referred to in paragraph 1;

2. the number and amount of monthly payments under all agreements in respect of which a tax document has been issued but which have not been paid;

3. the number and amount of monthly payments under all agreements in respect of which the chargeable event will occur, pursuant to paragraph 1, after the entry into force of this Law.

(3) As to contracts not appearing on a list submitted in accordance with paragraph 2, the taxable person shall be regarded as having entered into a transaction falling within Article 6(2)(3), in respect of which the taxable amount is the sum of the monthly payments due after the entry into force of [the ZDDS], excluding the VAT due on those payments.'

14 Article 128 of the Danachno-osiguritelnia protsesualen kodeks (Tax and Social Security Procedural Code;) (DV No 105 of 29 December 2005, in force since 1 January 2006; the 'DOPK') provides:

'(1) Sums unduly paid or collected in respect of taxes, compulsory social security contributions, fines or financial penalties imposed by the revenue departments, as well as sums reimbursable by the National Revenue Agency under tax or social security legislation, shall be set off by the revenue departments against the payable public debts which are collected by the National Revenue Agency. A prescribed debt can be set off where the debtor's credit became payable before his debt became prescribed. …'

15 Article 129 of the DOPK states:

'(1) Set off or reimbursement may be effected on the initiative of the tax authorities or on the written request of the person concerned. A request for set off or reimbursement shall be considered if it is submitted within five years of 1 January of the year in which the event giving rise to the reimbursement occurred, unless the law provides otherwise.

…

(3) (supplemented in DV No 108 of 2007) Notice of set off or reimbursement must be issued within 30 days of receipt of the request, if no review is ordered before expiry of that period. Liabilities comprised of tax or compulsory social security contributions are open to review even in cases of set off or reimbursement, including cases where a notice under the first sentence is the subject of an action or appeal. If the notice is the subject of an action before the courts, a notice of adjustment may be issued at any time until the judicial decision takes effect. …

(7) An appeal shall lie in respect of a notice of set off or reimbursement in accordance with the rules governing appeals against notices of adjustment.'

16 Article 133 of the DOPK provides:

'(1) A liability comprised of tax or compulsory social security contributions which has been ascertained by a notice of adjustment may, where the notice has taken effect and has not been the subject of legal proceedings, be altered on the initiative of the revenue department or at the request of the person subject to review.

(2) The grounds for alteration of the liability shall be as follows:

1. that new circumstances have come to light, or new written evidence has become available, which is essential for the purposes of ascertaining a liability comprised of tax or compulsory social security contributions, and which could not have been known to the person, or department, issuing the notice of adjustment:
   (a) before the notice of adjustment was issued (where that notice has not been the subject of an action or appeal);

(b) before the notice of adjustment took effect (where that notice has been the subject of an action or appeal).

2. that a court duly seised of the matter has found that the third party written explanations, expert conclusions, or written declarations which formed the basis on which the liability comprised of tax or compulsory social security contributions was ascertained are false, or that the person to whom the notice was addressed, his representative, or the revenue department which ascertained the taxes or compulsory social security contributions, or considered the appeal against the notice of alteration, committed a criminal offence.

3. that the liability has been ascertained on the basis of a document duly recognised by judicial decision as a fabrication, as containing false information, or as having been forged;

4. that the liability has been ascertained on the basis of a document issued by a court or other State authority which has subsequently been set aside or annulled;

5. that another, contrary, notice of adjustment has been issued and has entered into force in respect of the same debts, the same period and the same taxable person. …'

17 Article 134 of the DOPK is worded as follows:

'(1) (supplemented in DV No 94 of 2015, in force since 1 January 2016) Where a revenue department identifies a ground for alteration under Article 133(2), it shall inform the regional director, supplying evidence that that ground subsists. Where the regional director has concluded that a ground for alteration subsists, he may assign or decide to delegate a review so as to enable liabilities which have already been determined, and which are comprised of tax or compulsory social security contributions, to be adjusted.

(2) An interested party may lodge a written request with the regional director, accompanied by the evidence on which he relies.

(3) Alteration is permitted if the decision ordering a review is issued, or the request for alteration is lodged, within three months of the subsistence of the ground for alteration becoming known, and before the expiry of the period prescribed by Article 109.

(4) Within 30 days of a request under paragraph 2 being lodged, the regional director shall, by reasoned decision, order or refuse to order a review. A copy of a decision refusing so to order shall be sent to the person lodging the application within seven days of being taken, and no later than 14 days after expiry of the period prescribed by the first sentence of this paragraph.

(5) (amended in DV No 30 of 2006, in force since 1 March 2007) The person concerned may bring an action against a refusal within 14 days of receipt of the decision, or, in the case of an implicit refusal, within 30 days of expiry of the period allowed for the response, before the administrative court with jurisdiction to hear an action concerning the notice of adjustment. The action shall be brought through the regional director. No appeal shall lie from the order by which the court disposes of the action.

(6) Where it is found that the liability comprised of taxes or compulsory social security contributions has been fixed in a higher or lower amount than is due, a notice of adjustment shall

be issued in respect of the difference. If there has been an overpayment, the amount overpaid shall be set off or reimbursed by the notice of adjustment.'

18 Article 87 of the Zakon za zadalzheniata i dogovorite (Law on Obligations and Contracts; the 'ZZD') provides:

'(1) Where, in the event of a synallagmatic contract, the debtor fails to perform his side of the bargain for a reason attributable to him, and the creditor gives the debtor a reasonable period in which to fulfil his duty of performance and indicates that, after expiry of that period, the contract shall be deemed to have been rescinded, he may rescind the agreement. The notice must be in writing if the agreement was entered into in writing. …'

19 Article 88 of the ZZD states:

'(1) Rescission shall operate retrospectively except where the contract provides for successive or periodic performance. The creditor is entitled to compensation for damage caused by the non-performance of the contract. …'

The main proceedings and the questions referred for a preliminary ruling

20 On 6 February 2006 'BA Kreditanstalt Bulus' EOOD ('Bulus' or 'the lessor'), a company whose rights subsequently passed to Unicredit, entered into a lease finance agreement with an option to purchase with 'Vizatel' OOD ('the lessee'), under which the lessor undertook to purchase a plot of land designated by the lessee, to erect a building on that land, and to supply the land and building to the lessee.

21 The agreement was entered into for a term of 11 years commencing at the beginning of the month following the actual handing over of the subject matter of the contract, in consideration of a monthly rent. The agreement provided for early termination by the lessor in the event of non-payment by the lessee of at least three instalments of rent, and for payment of compensation equivalent to the total sum of the unpaid rent over the entire term of the lease finance agreement.

22 On 5 December 2006 the subject matter of the contract was handed over to the lessee, and on 28 December 2006 the lessor issued an invoice, inclusive of VAT, in respect of the first payment. By a notice of adjustment of 14 February 2008, the Bulgarian tax authorities determined a VAT liability on the part of Bulus, on the basis that the taxable amount was the total sum of the rent due over the entire term of the agreement, and then deducted that tax liability from a tax credit to which Bulus was entitled as against the revenue.

23 Although the lessor continued to issue invoices inclusive of VAT up to 29 October 2010, and again between 4 August 2011 and 31 August 2012, the lessee ceased making the payments due as from April 2009. By reason of the failure of the lessee to perform its obligations, Bulus unilaterally terminated the lease finance agreement with effect from 6 June 2015.

24 In those circumstances, Bulus lodged a request with the Bulgarian tax authorities for reimbursement of the VAT calculated in the notice of adjustment of 14 February 2008. That request was, however, rejected by a decision of the competent revenue department, which was confirmed by the Direktor.

25 Bulus brought an action against that decision before the Administrativen sad Sofia (Administrative Court of Sofia, Bulgaria), which dismissed the action.

26 Unicredit, having acquired the rights of Bulus, brought an appeal against that judgment before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria). It submits, inter alia, that the Administrativen sad Sofia (Administrative Court of Sofia) failed to give effect to the right, guaranteed by Article 90 of the VAT Directive, to have the amount chargeable to VAT reduced in the event of a contract being terminated.

27 The referring court considers that the right to correction of the amount chargeable to VAT does not arise where that amount is determined by a notice of adjustment which has taken effect, and not by an invoice, on the basis that such a notice is an administrative act which ascertains a tax liability. Furthermore, supposing that such a right did arise, the referring court considers that it would be necessary to draw a distinction between the period during which the monthly payments were made by the lessee, in respect of which no correction of the amount chargeable to VAT is necessary, and the period during which the monthly payments were not made, up to termination of the contract for partial non-payment, in respect of which it is impossible, under national law, to re-establish the pre-contractual position. Thus, on the assumption that this is a case of partial non-payment, and not refusal, within the meaning of Article 90 of the VAT Directive, the referring court states that Bulgarian law makes no provision as to the arrangements for reducing a taxable amount fixed by notice of adjustment in the case of partial or total non-payment.

28 Finally, the referring court raises the question of correction of the taxable amount as regards the period from termination of the contract up to expiry of the contractual term, given that it has not been established either that the subject matter of the contract was returned to the lessor before expiry of the term, or that the sums owed by the lessee have been definitively paid, bearing in mind the contractual provision for compensation to be paid to the lessor in the event of termination for failure of the lessee to perform its obligations.

29 In those circumstances, the Varhoven administrativen sad (Supreme Administrative Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In the event of termination of a financial leasing agreement, does the provision contained in Article 90(1) of [the VAT Directive] allow the taxable amount to be reduced and the VAT to be refunded where the VAT has been established by way of a definitive tax assessment notice on the basis of a taxable amount consisting of the sum of the monthly leasing instalments due throughout the term of the agreement?

(2) If the first question is answered in the affirmative: in the event of termination of a leasing agreement on account of partial non-payment of the leasing instalments owed, on which of the situations referred to in Article 90(1) of [the VAT Directive] can the lessor rely as against a Member State in order to have the taxable amount for VAT purposes reduced to the extent of the instalments that were owed but not paid in respect of the period from the cessation of payments to the time of termination of the agreement, in the case where the termination is not retroactive and this is confirmed by a clause in the agreement itself?

(3) Does the interpretation of Article 90(2) of the VAT Directive permit the conclusion that a situation such as that at issue here involves a derogation from Article 90(1) of the VAT Directive?

(4) Does the interpretation of Article 90(1) of the VAT Directive permit the assumption that the term "refusal" used in that provision includes the situation where, in the context of a financial leasing agreement without an option to purchase, the lessor may no longer demand payment of the leasing instalments from the lessee because he has terminated the leasing agreement on account of non-fulfilment of that agreement by the lessee, but is entitled, under that agreement, to compensation in the amount of all the unpaid leasing instalments that would have fallen due up to the end of the term of the lease?'

The jurisdiction of the Court

30 According to settled case-law, the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State's accession to the European Union (judgments of 15 September 2011, *Słaby and Others*, C-180/10 and C-181/10, EU:C:2011:589, paragraph 27, and of 21 November 2018, *Vădan*, C-664/16, EU:C:2018:933, paragraph 34).

31 It follows, in particular, that the Court is not competent to interpret EU Directives relating to VAT where the recovery of taxes at issue in the main proceedings pre-dates the accession of the Member State concerned to the Union (judgment of 27 June 2018, *Varna Holideis*, C-364/17, EU:C:2018:500, paragraph 18).

32 On the other hand, the Court has jurisdiction to interpret EU law where the facts of the dispute in the main proceedings occurred in part after the date of accession of the Member State to the Union (judgment of 15 April 2010, *CIBA*, C-96/08, EU:C:2010:185, paragraph 15), or where the case originates in a contract concluded before the accession of the Member State to the Union, and that situation continued to produce effects after that date (see, by analogy, in relation to a concession agreement, judgment of 15 December 2016, *Nemec*, C-256/15, EU:C:2016:954, paragraphs 22 and 23, and, in relation to the contractual creation of rights of usufruct, judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraphs 38 and 40).

33 In the present case, the lease finance agreement was entered into in February 2006, and VAT became chargeable upon the actual handing over of the subject matter of the contract, in December 2006. The facts of the dispute in the main proceedings and the period to which the recovery of VAT relates therefore pre-date the accession of the Republic of Bulgaria to the European Union, which took place on 1 January 2007.

34 Nonetheless, the case concerns a contract of continuing performance under which the lessee was required to pay instalments of rent attracting VAT for 11 years from 28 December 2006. Accordingly, the situation arising from the contract continued to produce effects after the date on which the Republic of Bulgaria acceded to the European Union.

35 Accordingly, in view of the particular features of that contract, and the fact that it continued to produce legal effects after the date of Bulgaria's accession to the European Union, the Court has jurisdiction to hear and determine questions referred for a preliminary ruling in relation to the tax consequences arising from the performance of that contract.

Consideration of the questions referred

The first question

36 By its first question, the referring court essentially asks whether Article 90(1) of the VAT Directive is to be interpreted, where a lease finance agreement has been terminated, as permitting reduction of a taxable amount which has been calculated globally, in a notice of adjustment, on the basis of the total rent due over the entire term of the agreement, even where that notice of adjustment has taken effect and thus constitutes a 'settled administrative act' determining a tax liability.

37 In this regard, it must be noted that Article 90(1) of the VAT Directive, which relates to cases of cancellation, refusal or total or partial non-payment, or cases where the price is reduced after the supply takes place, 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 the VAT Directive, 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 (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 29 and the case-law cited).

38 It should also be noted that, although Article 273 of the VAT Directive permits Member States to impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, those measures cannot, in principle, derogate from the rules relating to the taxable amount except within the limits strictly necessary for achieving that specific objective. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraphs 31 and 33).

39 Consequently, 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 for VAT, must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received. It is for the national courts to ascertain whether that is true of the formalities required by the Member State concerned (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 34).

40 The issuing of a notice of adjustment, such as that at issue in the main proceedings, cannot constitute a formality intended to ensure the correct collection of VAT and to prevent evasion, within the meaning of Article 273 of the VAT Directive.

41 Accordingly, the issuing of a notice of adjustment, such as that at issue in the main proceedings, cannot in itself justify a situation in which the taxable person is, subsequently, no longer able to exercise his right to a reduction of the taxable amount in the event of termination of the contract.

42 Having regard to the principles set out above, that remains so even if, as the referring court states, the notice of adjustment has become 'settled' pursuant to the national rules, which is to say that it is no longer open to challenge.

43 It follows that the answer to the first question is that Article 90(1) of the VAT Directive must be interpreted as permitting, in the event of termination of a lease finance agreement, a reduction of the taxable amount which has been calculated globally in a notice of adjustment, on the basis of the total rent due over the entire term of the agreement, even where that notice of adjustment has taken effect and thus constitutes a 'settled administrative act' determining a tax liability under national law.

The second, third and fourth questions

Admissibility of the fourth question

44 The Bulgarian Government maintains that the fourth question is inadmissible. It argues that the provision for compensation in the event of termination of the agreement for failure of the lessee to perform its obligations is a nullity, on the ground that it is contrary to public policy under national law. It also argues that this question relates to a lease finance agreement with no option of purchase, whereas the agreement at issue in the main proceedings specifically provides for an option to purchase.

45 In that regard, it must be borne in mind that, in the context of the cooperation between the Court and the national courts established in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need of a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 47).

46 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. 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 is unrelated to the actual facts of the main action or its object, 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 (judgment of 23 January 2019, *M.A. and Others*, C-661/17, EU:C:2019:53, paragraph 50).

47 Furthermore, the Court has repeatedly held that it is not for it, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of such provisions is correct, as such an interpretation falls within the exclusive jurisdiction of the national courts (judgments of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraph 21, and of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 45).

48 Last, it is common ground that, in the context of Article 267 TFEU, the Court has no jurisdiction to apply the rules of EU law to a particular case. It is therefore for the national court to carry out the legal classifications necessary for the resolution of the dispute in the main proceedings. On the other hand, it is for the Court of Justice to provide the national court with all necessary information with a view to offering guidance in that determination, if necessary by reformulating the question before it (judgment of 2 July 2015, *NLB Leasing*, C-209/14, EU:C:2015:440, paragraph 25 and the case-law cited).

49 In the present case, the Bulgarian Government maintains that the clause providing for compensation in the event of termination of the contract for failure of the lessee to perform its obligations is a nullity, on the basis that it is contrary to public policy under national law. It is not for the Court either to rule on the interpretation of national law, or to satisfy itself that the legislative and factual context has been accurately defined by the referring court.

50 Moreover, it is apparent from the file before the Court, as the Bulgarian Government points out, that the lease finance agreement at issue in the main proceedings incorporates an option to purchase. However, the fact that one passage of the question referred makes reference to there being no such option – which appears at first sight to be a mistake – does not mean that the question referred is purely hypothetical. Furthermore, in the context of a reference for a preliminary ruling, it is incumbent on the Court to provide a useful answer to the referring court, if necessary by reformulating the question before it.

51 In those circumstances, the fourth question, which the Court will take to refer, as the referring court indicates in paragraph 4 of the order for reference, to a lease finance agreement with an option to purchase, is admissible.

Substance

52 By its second, third and fourth questions, which it is appropriate to examine together, the referring court asks whether Article 90 of the VAT Directive is to be interpreted as meaning that a situation such as that at issue in the main proceedings is a case of 'refusal' or of 'non-payment' capable of falling within the derogation from the obligation to reduce the taxable amount permitted by paragraph 2 of that article, first, in the absence of payment of some of the instalments of rent due under a lease finance agreement, relating to the period from cessation of payment to termination of the agreement, where such termination does not operate retrospectively, and secondly, in the absence of payment of compensation which is due in the event of early termination of the agreement, and which corresponds to the sum total of the unpaid rent over the whole term of the contract.

53 Article 90(2) of the VAT Directive allows Member States, in the event of total or partial non-payment of the price, to derogate from the rule referred to in paragraph 37 of this judgment, under which they are required to reduce the taxable amount accordingly whenever, after a transaction has been concluded, some or all of the consideration is not received by the taxable person.

54 However, as the Court has already held, the power to derogate, which is strictly limited to situations of total or partial non-payment, is based on the notion that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary (judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 17).

55 Non-payment of the purchase price does not restore the parties to their pre-contractual position. On the one hand, the purchaser remains, at the very least, liable for the whole of the price initially agreed, in a case of total non-payment, or that part of the price which remains due, in the case of partial non-payment. On the other hand, the seller continues, in principle, to have the right to receive payment, which he can rely on in court proceedings (see, to that effect, judgment of 12 October 2017, *Lombard Ingatlan Lízing*, C-404/16, EU:C:2017:759, paragraph 29).

56 In those circumstances, whereas the terms 'cancellation' and 'refusal' in Article 90(1) of the VAT Directive refer to situations in which the debtor's obligation to discharge his or her debt is either fully extinguished or set at a definitive level, non-payment is characterised by the inherent uncertainty that stems from its non-definitive nature (see, to that effect, judgment of 12 October 2017, *Lombard Ingatlan Lízing*, C-404/16, EU:C:2017:759, paragraphs 30 and 31).

57 With regard, first, to the rent due for the period from cessation of payments to termination of the lease finance agreement at issue, it must be noted that, in the present case, the lessor terminated the agreement with effect from 6 June 2015. However, since the termination operated only prospectively, pursuant to Article 88 of the ZZD, the instalments due under the lease finance agreement but not paid by the lessee prior to the date of termination remain due, and, in principle, the lessor retains his claim to payment, with the possibility of bringing that claim before the courts.

58 On that basis, the obligation to reduce the taxable amount accordingly, laid down by Article 90(1) of the VAT Directive, cannot apply to such a claim, which is not affected by termination of the lease finance agreement.

59 It follows that the failure to pay some of the instalments due in respect of the period prior to termination of the agreement is a case of partial non-payment within the meaning of Article 90(1) of the VAT Directive, in respect of which the Member State concerned may, as is apparent from paragraphs 53 and 54 of the present judgment, exercise its power to derogate from the obligation to reduce the taxable amount laid down in paragraph 2 of that article.

60 In that regard, the Court has already held that a national provision which, in setting out the situations in which the taxable amount is reduced, does not refer to the situation of non-payment of the transaction price must be regarded as the result of the exercise by the Member State of the power of derogation granted it under Article 90(2) of the VAT Directive (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 24).

61 The referring court states that Bulgarian law does not provide for a reduction of the taxable amount in the case of non-payment, Article 115 of the ZDDS providing for such a correction only in the event of cancellation or termination. Accordingly, the Republic of Bulgaria must be regarded as having exercised its power to derogate from the obligation to reduce the taxable amount in the event of non-payment, with the result that the lessor cannot rely on such a right.

62 That said, the fact that recovery of the sums due is uncertain may be taken into account, in accordance with the principle of fiscal neutrality, by depriving the taxable person of the right to a reduction of the taxable amount for as long as the debt is not definitively irrecoverable. However, it may equally be taken into account by granting the reduction when the taxable person demonstrates a reasonable probability that the debt will not be honoured, without prejudice to the possibility of the taxable amount being re-evaluated upwards in the event that payment nonetheless occurs. It would thus be for the national authorities to determine, with due regard to

the principle of proportionality and subject to review by the courts, the evidence for a probable extended period of non-payment to be provided by the taxable person, according to the specific features of the applicable national law. Such a rule would be an equally effective means of attaining the objective pursued, while being less onerous for the taxable person, who pre-finances the VAT by collecting it on behalf of the State (see, to that effect, judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 27).

63 In that regard, it has been held that that observation applies a fortiori in the context of national legislation under which certainty that the debt is definitively irrecoverable can be obtained, in practice, only around ten years later. Such a period is, in any event, such as to inflict on traders subject to that legislation, when they are confronted with non-payment of an invoice, a cash-flow disadvantage compared to their competitors in other Member States, which would clearly undermine the objective of fiscal harmonisation pursued by the Sixth Directive (judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 28).

64 In the present case, it is apparent from the order for reference that the lessee ceased to make the payments due in April 2009, that is, almost nine years before the date of that order. It follows from the considerations set out above that, where a taxable person has not recovered sums owed to him for an extended period, he is to be regarded as having demonstrated a reasonable probability that the debt will not be honoured, the onus being on the national authorities, subject to review by the courts, to satisfy themselves that that is indeed the case, in the light of the evidence supplied for that purpose.

65 In those circumstances, bearing in mind that the power to derogate in Article 90(2) of the VAT Directive is solely intended to address uncertainty as regards recovery of sums due, it cannot extend to a situation such as that at issue in the main proceedings, without prejudice to the possibility of the taxable amount being re-evaluated upwards in the event that payment nonetheless occurs.

66 With regard, secondly, to the compensation due in the event of early termination of the contract, it is apparent from the order for reference that the lease finance agreement provided that the lessor might require the lessee, in the event of termination for failure of the lessee to perform its obligations, to pay compensation equivalent to the sum of all the unpaid rent over the entire term of the agreement, after deduction of the residual value of the asset and the annual fee based on the rate of interest applicable to the financing of the transaction. It follows that the lease finance payments can be regarded as falling due after the date of termination of the agreement, subject to any contrary national provisions.

67 In that regard, the Direktor, the Bulgarian Government and the European Commission submit that the contractual payment described as compensation is not genuinely compensation, but is remuneration for the transaction which formed the subject matter of the contract, and subject as such to VAT.

68 With that in mind it should be noted that, under Article 2(1)(a) and (c) of the VAT Directive, the supply of goods and services for consideration within the territory of a Member State by a taxable person acting as such is taxable.

69 In that regard, the Court has held that classification as a ‘transaction for consideration’ requires only 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. Such a direct link is established if there is a

legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (judgment of 10 January 2019, *A*, C-410/17, EU:C:2019:12, paragraph 31).

70 More specifically, it has been held that a predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its customer, or for a reason attributable to the customer, which corresponds to the amount that the operator would have received during that period in the absence of such termination, must be regarded as the remuneration for a supply of services for consideration and subject as such to VAT, even where such termination entails the deactivation of the goods and services to which the contract related, before the expiry of the agreed minimum commitment period (see, to that effect, judgment of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia*, C-295/17, EU:C:2018:942, paragraphs 12, 45 and 57).

71 In the present case, as regards, first, the requirement for reciprocal performance establishing a direct link between the service provided and the consideration received, it should be noted that the payment, by way of compensation for termination, of the instalments at issue is a constituent part of the contract in so far as the legal link between the parties depends for its existence on the payment of those instalments.

72 It is apparent from the material available to the Court that, under the lease finance agreement in question, the lessor agreed to purchase a plot of land designated by the lessee, to erect a building on that land and to supply the land and building to the lessee. By way of consideration, the lessee was to pay rent of EUR 833.78 per month for 132 months, or 11 years, so as to finance the transaction in accordance with the schedule annexed to the agreement. By an agreed memorandum of 29 October 2010, the parties recorded that the construction of the leased property had been completed.

73 Furthermore, the amount due in the event of termination of the contract before expiry of the agreed term corresponds solely, as stated in paragraph 66 of the present judgment, to the sum of all the unpaid rent over the entire term of the agreement. It thus excludes both the annual charge based on the rate of interest applicable to the financing of the transaction and the residual value of the asset, which would have been payable only if the option had been exercised. Accordingly, upon payment of the amount due in the event of early termination of the agreement, the lessor receives the same income as would have been received in the absence of such termination. It follows that, in the context of an agreement of the kind at issue in the main proceedings, termination does not alter the economic reality of the contractual relationship.

74 It must therefore be held that, in an agreement such as that at issue in the main proceedings, the consideration for the amount paid by the lessee to the lessor is constituted by the right of the lessee to benefit from the performance, by that operator, of his specific obligations under the contract, even where the lessee does not wish to exercise that right, or is unable to exercise it, for a reason that is attributable to him. In fact, it is immaterial whether the property did or did not remain available to the lessee after the date of termination of the agreement; if the lessor has put the lessee in a position to benefit from the services provided pursuant to the agreement, the cessation of those services not being attributable to him.

75 Next, as regards the requirement for the sums paid to constitute actual consideration for an identifiable particular service, it must be borne in mind that, in a situation such as that at issue in the main proceedings, the obligations of the lessor and the amount to be invoiced to the lessee, in the event of early termination of the agreement, were determined at the time of conclusion of the contract. Furthermore, the amount due in the event of early termination corresponds to the total amount of the monthly payments yet to fall due, which become immediately payable, although this does not alter the economic reality of the contractual relationship.

76 It follows that the amount due in the event of early termination must be regarded as forming an integral part of the total amount which the lessee had agreed to pay in respect of the lessor's performance of his contractual obligations.

77 The fact that the Bulgarian tax authority calculated the VAT on the basis of a taxable amount corresponding to the sum of the entire rent payable over the full term of the agreement, which Bulus does not seem to have contested, confirms moreover that the sums at issue constituted consideration for an independent and identifiable particular service.

78 Consequently, compensation for termination such as that at issue in the main proceedings must be regarded as constituting the remuneration for the transaction which formed the subject matter of the lease finance agreement, and subject as such to VAT.

79 It is therefore necessary to determine whether a situation in which the payments corresponding to the sum total of the unpaid rent, from termination until the expiry of the agreement, have not been made, is a case of 'refusal' or 'non-payment', within the meaning of Article 90(1) of the VAT Directive.

80 As is apparent from paragraph 66 of the present judgment, those sums can be regarded as being due, so that, in principle, the lessor retains his claim to payment, and the possibility of bringing that claim before the courts. In fact, recovery of the payments due in respect of the period after termination of the agreement is, prima facie, uncertain.

81 Moreover, on the basis that the taxable person has demonstrated a reasonable probability that the debt corresponding to the payments due prior to termination of the contract will not be honoured, having regard to the fact that the sums due have not been recovered in almost nine years – this being a matter for the referring court to verify – it must be held, in a dispute such as that at issue in the main proceedings, that the same is true of the payments due after termination of the contract.

82 In those circumstances, the power to derogate in Article 90(2) of the VAT Directive is equally inapplicable to the period after termination of the agreement, without prejudice to the possibility of the taxable amount being re-evaluated upwards in the event that payment nonetheless occurs.

83 It follows that the answer to the second, third and fourth questions is that Article 90 of the VAT Directive must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, both the absence of payment of some of the instalments of rent due under a lease finance agreement, relating to the period from cessation of payments to non-retrospective termination of the agreement, and the absence of payment of compensation which is due in the event of early termination of the agreement, and which corresponds to the sum total of the unpaid rent up to expiry of the agreement, constitute cases of non-payment capable of falling

within the derogation from the obligation to reduce the taxable amount, unless the taxable person demonstrates a reasonable probability that the debt will not be honoured, which is a matter for the referring court to verify.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

1. **Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as permitting, in the event of termination of a lease finance agreement, a reduction of a taxable amount for value added tax which has been calculated globally in a notice of adjustment, on the basis of the total rent due over the entire term of the agreement, even where that notice of adjustment has taken effect and thus constitutes a 'settled administrative act' determining a tax liability under national law.**

2. **Article 90 of Directive 2006/112 is to be interpreted as meaning that, in a situation such as that at issue in the main proceedings, both the absence of payment of some of the instalments of rent due under a lease finance agreement, relating to the period from cessation of payments to non-retrospective termination of the agreement, and the absence of payment of compensation which is due in the event of early termination of the agreement, and which corresponds to the sum total of the unpaid rent up to expiry of the agreement, constitute cases of non-payment capable of falling within the derogation from the obligation to reduce the taxable amount, unless the taxable person demonstrates a reasonable probability that the debt will not be honoured, which is a matter for the referring court to verify.**

[Signatures]