Provisional text

ORDER OF THE COURT (Tenth Chamber)

3 September 2020 (*)

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Value added tax (VAT) – Directive 2006/112/EC – Articles 168, 178, 220 and 226 – Principles of fiscal neutrality, of effectiveness and of proportionality – Right to deduct VAT – Refusal – Conditions for the existence of a supply of goods – Evasion – Proof – Penalty – Article 47 of the Charter of Fundamental Rights of the European Union – Right to an effective judicial remedy)

In Case C?610/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the F?városi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary), made by decision of 5 July 2019, received at the Court on 13 August 2019, in the proceedings

Vikingo F?vállalkozó Kft.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis (Rapporteur), President of the Chamber, E. Juhász and M. Ileši?, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the European Commission, by J. Jokubauskait? and Zs. Teleki, acting as Agents,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Articles 168(a), 178(a), 220(1) and 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), read in conjunction with the principles of fiscal neutrality, of effectiveness and of proportionality, and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between Vikingo F?vállalkozó Kft. (‘Vikingo’) and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Taxation and Customs Authority, Hungary) concerning the right to deduct input value added tax (VAT) in respect of two invoices relating to the purchase of machines.

Legal context

EU law

3 Having regard to the dates of the facts of the main proceedings, it must be noted that it is the version of Directive 2006/112, as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1), applicable as from 1 January 2013, which applies *ratione temporis* to some of those facts. However, the amendments made by that directive are not directly relevant to the present case.

4 Under Article 14(1) of Directive 2006/112:

‘“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.’

5 Article 168 of that directive provides:

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

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

…’

6 Article 178 of Directive 2006/112 states:

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

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240;

…’

7 Article 220 of that directive 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:

(1) supplies of goods or services which he has made to another taxable person or to a non-taxable legal person;

…’

8 Article 226 of Directive 2006/112 lists the only details which, without prejudice to the particular provisions laid down in that directive, are required for VAT purposes on invoices issued pursuant to Articles 220 and 221 of that directive.

9 Under the first paragraph of Article 273 of Directive 2006/112:

‘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.’

Hungarian law

10 Paragraph 27(1) of the általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax) provides:

‘Where goods are sold successively in such a way that they are dispatched or transported directly from the original supplier to the final customer mentioned as recipient, Paragraph 26 shall apply exclusively to a single supply of goods.’

11 Paragraph 26 of that law provides:

‘Where dispatch or transport is effected by the supplier, by the customer or, on behalf of either, by a third party, the place of supply of the goods shall be the place where the goods are located at the time of dispatch or of departure of transport mentioning the customer as the recipient.’

12 Under Paragraph 119(1) of Law No CXXVII of 2007 on value added tax:

‘Unless otherwise provided in this Law, a right of deduction shall arise at the time the amount due in respect of input VAT is determined (Paragraph 120).’

13 Paragraph 120(a) of that law provides:

‘In so far as the taxable person, acting as such, uses or otherwise exploits goods or services in order to carry out a taxable supply of goods or services, he or she shall be entitled to deduct from the tax that he or she is liable to pay:

(a) the amount of tax he or she was charged, in connection with the purchase of the goods or the use of the services, by another taxable person – including any person or entity subject to simplified corporation tax;

…’

14 Paragraph 127(1)(a) of Law No CXXVII of 2007 states:

‘Exercise of the right of deduction shall be subject to the substantive condition that the taxable person is himself or herself in possession:

(a) in the situation referred to in Paragraph 120(a), of an invoice issued in his or her name which attests to the performance of the transaction;

…’

15 Paragraph 1 of számvitelr?l szóló 2000. évi C. törvény (Law C of 2000 on Accounting, ‘the Law on Accounting’) is worded as follows:

‘This Law defines the accounting and reporting obligations of those persons falling within its scope,

the principles to be observed in bookkeeping and the preparation of accounts, the rules established on the basis of such principles, as well as disclosure, publication and audit requirements.'

16 Paragraph 15(3) of that law provides:

'The transactions shown in the accounts and in the annual accounts must in fact exist, be capable of proof and also be capable of being established by third parties. Their assessment must be in accordance with the valuation principles provided for in this law and the assessment procedures relating thereto ("reality principle").'

17 Paragraph 166(1) and (2) of the Law on Accounting provides:

'1. An "accounting document" means any document drawn up or prepared by an economic operator, or drawn up or prepared by a natural person or any other economic operator having a business or other relationship therewith (invoice, contract, agreement, record, certificate of credit institution, bank account extract, legislative or regulatory provision and other comparable documents), which serves as a support for the accounting (declaration) of an economic transaction.

2. The information in an accounting document must, both formally and substantively, be plausible, reliable and correct. It must be drafted in accordance with the principle of clarity.'

18 Paragraph 2(1) of the adózás rendjér?l szóló 2003. évi XCII. törvény (Law No XCII of 2003 on the Code of fiscal procedure, 'the Code of fiscal procedure') provides as follows:

'All rights in legal relationships for tax purposes shall be exercised in accordance with their purpose. Under the tax laws, the conclusion of contracts or the carrying out of other transactions whose purpose is to circumvent the provisions of tax laws may not be classified as exercise of rights in accordance with their purpose.'

19 Under Paragraph 97(4) and (6) of the Code of fiscal procedure:

'4. In the course of the inspection, it shall be the duty of the tax authority to establish and prove the facts unless, by virtue of legislation, the burden of proof lies with the taxpayer.

…

6. When establishing the facts, the tax authority shall have a duty also to seek facts favourable to the taxpayer. Except where estimates are made, an unproven fact or circumstance shall not be assessed to the taxpayer's disadvantage.'

20 Paragraph 170(1) of that code provides:

'If the tax payment is insufficient, this shall give rise to a tax penalty. The amount of the penalty, save as otherwise provided for in this law, shall be 50% of the unpaid amount. The amount of the penalty shall be 200% of the unpaid amount if the difference compared with the amount to be paid is connected with the concealment of income, or the falsification or destruction of evidence, accounting ledgers or registers. A tax penalty shall also be imposed by the tax authority where the taxpayer makes an application, without being entitled to do so, for a tax refund or aid, or makes a declaration relating to an asset, aid or refund, and the authority has found that the taxpayer has no such entitlement before allocation. In such a situation, the penalty shall be based on the amount wrongly claimed.'

21 Paragraph 171(1) and (2) of the Code of fiscal procedure is worded as follows:

‘1. The amount of the fine may be reduced, or even remitted, either automatically or on request, in exceptional circumstances which lead to the conclusion that the taxable person, or the taxable person’s representative, employee, member or agent responsible for the tax liability, acted with the discernment that could reasonably have been expected from him or her in those particular circumstances. The reduction of the fine should be made by weighing up all the circumstances of the case in question, in particular the size of the tax liability, the circumstances of how it arose, and the seriousness and frequency of the taxable person’s unlawful conduct (act or omission).

2. There are no grounds for reducing the fine, whether automatically or on request, where the tax liability is connected with the concealment of revenue, or the falsification or destruction of evidence, accounts or registers.

…’

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

22 On 20 March 2012, Vikingo, whose principal business is the wholesale trade in sweets and confectionery, concluded a contract with Freest Kft. for the supply of 10 packaging machines and one filling machine before 20 December 2012. That contract provided for the possibility of using subcontractors. On 21 May 2012, Vikingo concluded a new contract with Freest for the supply of six packaging machines and one bagging machine, to be delivered on 30 March 2013. Under the terms of the two contracts, the machines were purchased by Freest from another company which had itself purchased them from a further company. Vikingo exercised the right to deduct the input VAT in respect of the two invoices issued by Freest.

23 Following a subsequent inspection of the VAT returns, the first-tier tax authority made an adjustment in the amount of HUF 8 020 000 (approximately EUR 23 290) for the second and fourth quarters of 2012 and HUF 13 257 000 (approximately EUR 38 844) for the first quarter of 2013, one part of those sums corresponding to the amount of VAT unlawfully recovered and the other part to unpaid VAT. The first-tier tax authority also imposed a tax penalty on Vikingo and applied a late-payment surcharge.

24 In support of its decisions, the first-tier tax authority took the view, on the basis of findings made during related checks and of the statements of the directors of the companies involved in the supply chain, that the machines had in fact been purchased from an unknown person, with the result that those transactions had not taken place either between the persons identified on the invoices or in the manner indicated on them.

25 The second-tier tax authority upheld one of those decisions and varied the other by amending the amount of unpaid VAT as well as the amounts of the tax penalty and default interest.

26 Vikingo brought proceedings against those decisions before the referring court, which, by two judgments, varied the decisions. The referring court found, in particular, with regard to the right to deduct, that Vikingo had submitted the invoices at issue, together with the documents substantiating that they had been drawn up and paid, and it found that it was not in issue that the machines covered by the two contracts had been supplied. The referring court also considered that the tax authorities had relied on irrelevant facts such as, in particular, the lack of material and human resources of the undertakings earlier in the supply chain and the failures of recollection of the managers questioned regarding the transactions in question.

27 The Kúria (Supreme Court, Hungary) set both judgments aside and referred the cases back to the referring court. It held that, in examining the actual nature of each contract and the possible

intention to evade the tax, the tax authorities had to examine the entire chain of supply and the influence of its elements on each other. It found that the tax authorities had thus acted correctly in gathering the evidence relating to all the actors in that chain and that the first-instance court had misinterpreted Paragraph 127(1) of the Law on Accounting and the Court's case-law by focusing on the existence of a correct invoice, whereas the right to deduct presupposes that there is a genuine economic transaction.

28 The referring court states that although it is established that the machines covered by the contracts at issue were put into operation in Vikingo's establishment, the tax authorities considered that the corresponding invoices, which were not criticised as regards their form, and the other documents produced did not prove that the economic transactions mentioned on those invoices had taken place, since the content of those invoices was rebutted by statements, concerning the supply and origin of the machines, by the issuer of the invoices and the directors of the undertakings upstream of the issuer in the chain. Accordingly, the invoices were not plausible in terms of their content, notwithstanding the fact that each of the directors conceded that the machines had indeed been supplied and put into operation. Furthermore, as regards the measures which the purchaser could reasonably have been expected to take, the tax authorities did not consider it sufficient that Vikingo had examined the extract from the commercial register relating to the other party to the contract and requested a specimen signature, before concluding the contract, nor that the Freest director had visited the establishment.

29 The referring court states that the factual circumstances of the case in the main proceedings are similar to those of the cases which gave rise to the judgment of 21 June 2012, *Mahagében and Dávid* (C?80/11 and C?142/11, EU:C:2012:373) and to the orders of 16 May 2013, *Hardimpex* (C?444/12, not published, EU:C:2013:318) and of 10 November 2016, *Signum Alfa Sped* (C?446/15, not published, EU:C:2016:869). Despite the answers provided by the Court in that judgment and those orders, there are still contradictions between the way in which the law is interpreted by the tax authorities and the national courts. The tax authorities continue to refuse the right to deduct, on the ground that the content of the invoices was implausible, and inferring automatically from this that there was tax evasion of which the taxable person should necessarily have been aware.

30 The referring court also states that the Kúria (Supreme Court), in the orders referring the cases back to it, found that the order of 10 November 2016, *Signum Alfa Sped* (C?446/15, not published, EU:C:2016:869), on which the referring court had relied in the judgments set aside, did not alter the criteria of the procedure to be followed in order to assess the right to deduct and gave the referring court the instruction, in accordance with the civil procedure rules applicable, to comply with the criteria laid down by the Kúria (Supreme Court) in an opinion of 26 September 2016 as regards both the establishment of the objective facts which are relevant for recognising a right to deduct and the assessment of the evidence, requiring the referring court to comply with the rules on supply chains and the provisions of the Law on Accounting. According to the instructions given by the Kúria (Supreme Court), the tax authorities had acted correctly in gathering evidence concerning all the participants in that chain and had examined, in compliance with those rules and that law, whether Vikingo knew that it was participating in tax evasion.

31 Thus, in the referring court's view, the question again arises as to whether the tax authorities' practice and the interpretation provided by the Kúria (Supreme Court) in its opinion are contrary to the objective of the right to deduct provided for in Article 168(a) of Directive 2006/112 and whether that interpretation is consistent with Article 178(a) of that directive and the principles of fiscal neutrality and of effectiveness.

32 The referring court is unsure, in particular, whether the tax authorities' practice of making the

right to deduct conditional upon (i) the invoice's evidencing that the transaction has been carried out and (ii) the provisions of the Law on Accounting having been complied with, and of considering that a formally correct invoice is insufficient, is consistent with Articles 220 and 226 of Directive 2006/112.

33 It is also uncertain whether that practice is consistent with the principles of neutrality, effectiveness and proportionality and with the case-law of the Court as regards the requirements relating to the facts which must be established and the evidence which must be adduced. Whilst accepting that evasion may involve an examination of the relevant facts concerning the participants in the chain upstream of the taxable person, the referring court is uncertain about the tax authorities' practice of reconstructing the entire chain of transactions and, if they find that that chain is not economically rational or if a transaction is not justified or duly established, of considering that there is an irregularity which must lead to a refusal of the right to deduct, irrespective of whether the taxable person was or should have been aware of that circumstance.

34 Furthermore, the referring court is uncertain whether the principle of proportionality must be interpreted as meaning that, where the right to deduct is refused, the imposition of a tax penalty equal to 200% of the amount of the VAT difference is, in circumstances such as those in the main proceedings, proportionate.

35 Lastly, in the light of a national judicial practice which does not appear to it to comply with the objectives of Directive 2006/112, the referring court is uncertain as to the effectiveness of legal remedies, noting that it is not possible for it to make a reference to the Court for a preliminary ruling in all cases.

36 In those circumstances the F?városi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it compatible with Articles 168(a) and 178(a) of Directive 2006/112 in conjunction […] with Articles 220[1] and 226 of that directive, and with the principle of effectiveness, for a national legal interpretation and a national practice to operate (i) to the effect that the mere fact of being in possession of an invoice the content of which meets the requirements of Article 226 of that directive is not sufficient to fulfil the material conditions governing the right to deduct tax, the taxable person also being compelled, as a prerequisite of legitimately exercising the right to deduct tax on the basis of the invoice in question, to be in possession of additional documentary evidence that must not only comply with the provisions of Directive 2006/112 but also be consistent with the principles of the national legislation on accounting and the specific provisions concerning supporting documents, as well as (ii) to the effect that each member of the chain must recall and declare in the same way each detail of the economic transaction attested by those supporting documents?

(2) Is it compatible with the provisions of Directive 2006/112 on the deduction of VAT and with the principles of fiscal neutrality and of effectiveness for a national legal interpretation and a national practice to operate (i) to the effect that, in the case of a chain transaction, the mere fact that the transaction forms part of a chain has the consequence, irrespective of any other circumstance, of imposing on each of the members of that chain an obligation to scrutinise the components of the economic transaction carried out by them and a duty to draw inferences from that scrutiny for the taxable person situated at the other end of the chain, as well as (ii) to the effect that the taxable person is refused the right to deduct VAT on the ground that the constitution of the chain, although not prohibited by national law, was not reasonably justified from an economic point of view? In that context, when it comes to examining the objective circumstances capable of justifying a refusal to grant the right to deduct VAT in the case of a chain transaction, is

it possible, when determining and assessing the relevance and probative force of the evidential material on which the refusal of the right to deduct VAT is based, to apply only the provisions of Directive 2006/112 and national law relating to the deduction of tax, as material provisions specifying the facts relevant to the determination of the factual framework, or is there also a duty to apply, as special provisions, the accounting legislation of the Member State in question?

(3) Is it compatible with the provisions of Directive 2006/112 on the deduction of VAT and with the principles of fiscal neutrality and of effectiveness for a national legal interpretation and a national practice to operate (i) to the effect that a taxable person who uses goods for the purposes of his or her taxed transactions in the Member State in which he or she carries out those transactions and who is in possession of an invoice consistent with Directive 2006/112 is denied the right to deduct VAT on the ground that he or she is not aware of all the components of the transaction carried out by the members of the chain or on the basis of circumstances associated with the members of the chain upstream of the issuer of the invoice and over which the taxable person was unable to bring to bear any influence for reasons beyond his or her control, as well as (ii) to the effect that the right to deduct VAT is made subject to the condition that, so far as concerns the measures reasonably incumbent upon him or her, the taxable person must comply with a general obligation of scrutiny that must be discharged not only before the contract is concluded but also during and even after its performance? In that context, is the taxable person obliged to refrain from exercising the right to deduct VAT in the case where, in connection with any component of the economic transaction indicated on the invoice and at any point subsequent to the conclusion of the contract or during or after its performance, he or she notices an irregularity or becomes aware of a circumstance the consequence of which would be the refusal of the right to deduct VAT pursuant to the practice of the tax authorities?

(4) Having regard to the provisions of Directive 2006/112 on the deduction of VAT and the principle of effectiveness, do the tax authorities have an obligation to specify how tax evasion has been committed? Is it appropriate for the tax authorities to proceed in such a way that omissions and irregularities on the part of members of the chain that exhibit no reasonable causal link with the right to deduct tax are regarded as proof of tax evasion on the ground that, since those omissions and irregularities rendered the content of the invoice implausible, the taxable person knew or should have known about the tax evasion? If tax evasion has been committed, does this justify the fact that the scrutiny required of the taxable person must exhibit the breadth, depth and scope indicated above or does that duty exceed the requirements of the principle of effectiveness?

(5) Is a penalty involving refusal of the right to deduct VAT and consisting in the obligation to pay a tax penalty equal to 200% of the tax difference proportionate in the case where the public purse has incurred no loss of revenue directly linked to the taxable person’s right to deduct VAT? May account be taken of the presence of any of the circumstances referred to in the third sentence of Article 170(1) of [the Code of fiscal procedure] in the case where the taxable person has made available to the tax authorities all the documents that were in his or her possession and has included in his or her tax return the invoices issued?

(6) In the event that it is apparent from the answers given to the questions referred for a preliminary ruling that the interpretation of the rule of national law which has been followed since the case that gave rise to the order of 10 November 2016, *Signum Alfa Sped* (C?446/15, not published, EU:C:2016:869) and the practice adopted on the basis of that interpretation are not consistent with the provisions of Directive 2006/112 on the deduction of VAT, and having regard to the fact that the first-instance court cannot make a request for a preliminary ruling to the Court of Justice in all cases, may the view be taken, on the basis of Article 47 of the Charter, that the right of taxable persons to bring a judicial action for damages guarantees them the right to an effective remedy and an impartial tribunal provided for in that article? Is it possible, in that context, to adopt

an interpretation to the effect that the form of the decision given in *Signum Alfa Sped* [order of 10 November 2016, C?446/15, not published, EU:C:2016:869] means that the question had already been regulated by EU law and had been clarified by the case-law of the Court of Justice and that, consequently, the answer to it was obvious, or does it mean that, since new proceedings were instituted, the question had not been fully clarified and, consequently, there was still a need to seek a preliminary ruling from the Court of Justice?'

Consideration of the questions referred

37 Under Article 99 of its Rules of Procedure, the Court may, in particular, where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, decide at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to rule by reasoned order.

38 It is appropriate to apply that provision in the present case.

The first four questions

39 By its first four questions, the referring court asks, in essence, whether Directive 2006/112, read in conjunction with the principles of fiscal neutrality, of effectiveness and of proportionality, must be interpreted as precluding a national practice by which the tax authorities refuse a taxable person the right to deduct the VAT paid on purchases of goods which were supplied to him or her, on the ground that credence cannot be given to the invoices relating to those purchases because, first, the manufacture of those goods and their supply could not, as the necessary material and human resources were lacking, have been effected by the issuer of those invoices and the goods were therefore, in fact, purchased from an unidentified person, secondly, the national accounting rules were not complied with, thirdly, the supply chain which led to those purchases was not economically justified and, fourthly, irregularities vitiated certain earlier transactions forming part of that supply chain.

40 It must be borne in mind that, in accordance with the settled case-law of the Court, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT. As the Court has repeatedly held, the right to deduct provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited if the material and formal requirements or conditions to which this right is subject are respected by taxable persons wishing to exercise it (see, to that effect, judgments of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraphs 37 and 38; of 3 October 2019, *Altic*, C?329/18, EU:C:2019:831, paragraph 27, and of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 33).

41 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his or her economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject in principle to VAT (judgments of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 39, and of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 37).

42 The question whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT. VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (judgments of 6 July

2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraph 49, and of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 40, and order of 10 November 2016, *Signum Alfa Sped*, C?446/15, not published, EU:C:2016:869, paragraph 32).

43 The right to deduct VAT is, however, subject to compliance with both substantive requirements or conditions and formal requirements or conditions. With regard to the substantive requirements or conditions, it is apparent from the wording of Article 168(a) of Directive 2006/112 that, in order to have the right to deduct, it is necessary, first, that the interested party be a 'taxable person' within the meaning of that directive and, secondly, that the goods or services relied on to confer entitlement to the right to deduct VAT be used by the taxable person for the purposes of his or her own taxed output transactions, and that, as inputs, those goods or services be supplied by another taxable person. As to the detailed rules governing the exercise of the right to deduct VAT, which may be considered formal requirements or conditions, Article 178(a) of Directive 2006/112 provides that the taxable person must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238 to 240 of that directive (judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraphs 30 to 32 and the case-law cited).

44 In addition, in accordance with the first paragraph of Article 273 of Directive 2006/112, Member States may impose obligations, other than those provided for by that directive, if they consider such obligations necessary to ensure the correct collection of VAT and to prevent evasion. However, the measures adopted by the Member States must not go beyond what is necessary to achieve the objectives pursued. Therefore, they cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraphs 49 and 50 and the case-law cited).

45 In the present case, the referring court states that, although those conditions are met in the main proceedings, Vikingo was refused the right to deduct pursuant, inter alia, to the rules of the Law on Accounting, from which it follows that the invoice must establish that the transaction has in fact been carried out and, therefore, relate to a genuine economic transaction. The tax authorities considered that the goods at issue were neither manufactured nor supplied by Freest, the issuer of the invoices, or by its subcontractor, since those undertakings did not have the necessary human or material resources, and that those goods had, therefore, in fact been purchased from an unidentified person. Accordingly, the referring court is uncertain whether that right may be made subject to evidential requirements that go beyond the formalities imposed by Directive 2006/112.

46 In that regard, it must be noted that the substantive conditions to which the right to deduct is subject are fulfilled only if the supply of goods or services to which the invoice relates has actually been carried out. The Court has held that verifying whether there is a taxable transaction must be done in accordance with the rules of evidence under national law, carrying out an overall assessment of all the facts and circumstances of the case (see, to that effect, judgments of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraphs 31 and 32, and of 31 January 2013, *Stroy trans*, C?642/11, EU:C:2013:54, paragraph 45). The application of rules such as that laid down in Paragraph 15(3) of the Law on Accounting in order to verify, in the main proceedings, whether the invoices do in fact relate to genuine economic transactions is, therefore, consistent with Directive 2006/112.

47 However, the fact that in the main proceedings the goods concerned were neither manufactured nor supplied by the issuer of the invoices or its sub-contractor, inter alia because they did not have the human and material resources necessary, is not sufficient to conclude that the supplies of goods at issue did not exist and to exclude the right to deduct relied on by Vikingo,

since that fact may be the result both of a fraudulent pretence by the suppliers and simply of recourse to subcontractors (see, to that effect, judgments of 6 September 2012, *Tóth*, C?324/11, EU:C:2012:549, paragraph 49, and of 13 February 2014, *Maks Pen*, C?18/13, EU:C:2014:69, paragraph 31).

48 In addition, according to settled case-law of the Court, the concept of ‘supply of goods’, referred to in Article 14(1) of Directive 2006/112, does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party to dispose of it as if he or she were its owner. The Court has likewise held that that concept is objective in nature and that it applies without regard to the purpose or results of the transactions concerned. It follows that the transactions at issue in the main proceedings constitute supplies of goods within the meaning of Article 14 of Directive 2006/112, even though the goods in question were neither manufactured nor supplied by the issuer of the invoices and the person from whom those goods were actually purchased has not been identified, if they satisfy the objective criteria on which that concept is based and are not vitiated by VAT fraud (see, to that effect, judgment of 21 November 2013, *Dixons Retail*, C?494/12, EU:C:2013:758, paragraphs 20 to 22, and, by analogy, judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraphs 22 and 23).

49 It follows that, if, as the referring court states, the supplies of goods at issue in the main proceedings have actually been carried out and those goods were used by Vikingo for the purposes of its own taxed output transactions, Vikingo cannot, in principle, be refused the right of deduction (see, to that effect, judgment of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraph 33, and order of 16 May 2013, *Hardimpex*, C?444/12, not published, EU:C:2013:318, paragraph 22).

50 That being so, it must be borne in mind that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 and that the Court has repeatedly held that EU law cannot be relied on for abusive or fraudulent ends. It is, therefore, for the national courts and authorities to refuse the right of deduction, if it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends (see, to that effect, judgments of 6 July 2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraphs 54 and 55, and of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 34 and the case-law cited).

51 If that is the case where a fraud is committed by the taxable person himself or herself, it is also the case where a taxable person knew, or should have known, that, by his or her purchase, he or she was taking part in a transaction connected with VAT fraud (see, to that effect, judgments of 6 July 2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraph 56; of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 46; and of 6 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 35).

52 On the other hand, it is incompatible with the rules governing the right of deduction under Directive 2006/112 to impose a penalty, in the form of refusal of that right, on a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier or that another transaction forming part of the chain of supply, downstream or upstream of the transaction carried out by the taxable person, was vitiated by VAT fraud. The establishment of a system of strict liability would go beyond what is necessary to preserve the public exchequer’s rights (see, inter alia, judgments of 12 January 2006, *Optigen and Others*, C?354/03, C?355/03 and C?484/03, EU:C:2006:16, paragraphs 52 and 55; of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraphs 47 and 48;

and of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraphs 41 and 42).

53 Where the VAT fraud is not committed by the taxable person himself or herself, he or she cannot be refused the right of deduction unless it is established on the basis of objective factors that he or she knew or should have known that, through the purchase of those goods or services, on the basis of which the right of deduction is claimed, he or she was participating in a transaction connected with VAT fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services (see, to that effect, judgment of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 35 and the case-law cited).

54 In that connection, as regards the level of diligence required of a taxable person wishing to exercise his or her right to deduct, the Court has held on a number of occasions that it is not contrary to EU law to require a trader to take every step which could reasonably be required of him or her to satisfy himself or herself that the transaction which he or she is effecting does not result in his or her participation in tax evasion. Determination of the measures which may, in a particular case, reasonably be required of a taxable person wishing to exercise the right to deduct VAT in order to satisfy himself or herself that his or her transactions are not connected with fraud committed by a trader at an earlier stage of a transaction depends essentially on the circumstances of that particular case (see, to that effect, judgments of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraphs 54 and 59, and of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 52).

55 It is true that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he or she intends to purchase goods or services in order to ascertain the latter’s trustworthiness (judgment of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 60).

56 However, the tax authorities may not oblige a taxable person to undertake complex and far-reaching checks as to that person’s supplier, thereby de facto transferring their own investigative tasks to that person (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 51). In particular, the Court has held that the tax authorities cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct is sought has the capacity of a taxable person, that he or she was in possession of the goods at issue and was in a position to supply them and that he or she has satisfied his or her obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, secondly, to be in possession of documents in that regard (judgment of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 61).

57 In addition, according to the settled case-law of the Court, since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent on the tax authorities to establish, to the requisite legal standard, the objective evidence from which it may be concluded that the taxable person committed fraud or knew or should have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence (see, to that effect, judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraph 39, and of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 36 and the case-law cited).

58 If the tax authorities conclude that, in view of fraud or irregularities committed by the issuer of the invoice or other operators upstream in the supply chain that the transactions which were invoiced and relied on as the basis for the right of deduction did not actually take place, they must, in order to be able to refuse that right, establish on the basis of objective evidence, without requiring the recipient of the invoices to perform checks for which it is not responsible, that the recipient knew or should have known that those transactions were connected with VAT fraud, a matter which it is for the referring court to determine (see, to that effect, order of 10 November 2016, *Signum Alfa Sped*, C?446/15, not published, EU:C:2016:869, paragraph 39 and the case-law cited).

59 Since EU law lays down no rules relating to the procedures for taking evidence in connection with VAT fraud, that objective evidence must be established by the tax authorities in accordance with the rules of evidence laid down in national law. However, those rules must not undermine the effectiveness of EU law (see, to that effect, judgments of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 65, and of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 37).

60 As regards the main proceedings, it is apparent from the order for reference that, in order to refuse Vikingo the right to deduct, the tax authorities, in addition to the facts referred to in paragraph 45 above, also found that the purpose of the transactions in question was to provide an origin for the machines of unknown origin purchased and recorded on the invoices, to allow the sub-contractor of the issuer of the invoices to avoid payment of VAT and to generate a right to deduct in favour of Vikingo, while the VAT was not paid by that sub-contractor.

61 The referring court states that, in the case of chain transactions, it is necessary, according to the case-law of the Kúria (Supreme Court), to carry out an examination of that chain as a whole and of the legal acts performed between the participants in that chain, and to determine whether the constitution of that chain is reasonably justified. The right to deduct may be refused where the creation of the chain is economically irrational or not reasonably justified, or if any element of the economic transaction between the participants is not justified by the taxable person or is not verifiable. Moreover, the practice of the tax authorities, based on an opinion and the case-law of the Kúria (Supreme Court), consists, in particular, in distinguishing between the transactions in question according to whether or not they have been carried out between the parties mentioned on the invoice, by taking into consideration principally the manner in which the economic transaction is carried out. The economic transaction must be considered not to have been carried out between those parties where it is vitiated by any irregularity or defect, in particular where the taxable person was not aware or has no evidence of the economic activity of the operators upstream in the chain. In such a case, examination of whether the recipient of the invoice was aware or should have been aware of the fraud is a possibility, but not an obligation.

62 However, the Court of Justice points out, in the first place, that, as has been noted in paragraphs 41 and 42 above, the right to deduct VAT applies whatever the purpose and result of the economic activity in question, and whether the VAT payable on prior transactions relating to the goods concerned has or has not been paid to the public purse is irrelevant to that right. In addition, according to the case-law of the Court, taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purpose of limiting their tax burdens (judgment of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 42 and the case-law cited). The principle that abusive practices are prohibited, which applies to the field of VAT, bars only wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage the grant of which would be contrary to the purposes of

Directive 2006/112 (see, to that effect, judgment of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraphs 35 and 36 and the case-law cited).

63 It follows that, if, as the referring court states, the existence of the supplies of goods in the main proceedings is established, the fact that the chain of transactions which led to those supplies appears to be economically irrational or not reasonably justified and that one of the participants in that chain has not fulfilled his or her tax obligations cannot be regarded as constituting fraud in themselves.

64 In the second place, a system of evidence such as that described in paragraph 61 above, which leads to a taxable person being refused the right to deduct where, in particular, that person does not provide evidence substantiating all the transactions carried out by all the participants in that chain and the economic activity of those participants, by attributing to him or her, where relevant, the fact that that evidence is not verifiable, is contrary to the case-law referred to in paragraphs 50 to 58 above, according to which it is for the tax authorities to establish to the requisite legal standard, in each individual case, in the light of objective evidence, proof of the existence of fraud committed by the taxable person or proof that the taxable person knew or should have known that the transaction concerned was connected with fraud committed by the issuer of the invoice or another operator acting upstream in the supply chain.

65 While it is true that the facts described in paragraphs 45 and 60 above may contain evidence that the taxable person actively participated in fraud or that he or she knew or should have known that the transactions concerned were connected with fraud committed by the issuer of the invoices, it is for the referring court to ascertain whether such proof has been adduced, by carrying out, in accordance with the rules of evidence under national law, an overall assessment of all the evidence and factual circumstances of the main proceedings (see, to that effect, judgment of 13 February 2014, *Maks Pen*, C?18/13, EU:C:2014:69, paragraph 30, and order of 10 November 2016, *Signum Alfa Sped*, C?446/15, not published, EU:C:2016:869, paragraph 36).

66 In the light of the foregoing, the answer to the first four questions is that Directive 2006/112, read in conjunction with the principles of fiscal neutrality, of effectiveness and of proportionality, must be interpreted as precluding a national practice by which the tax authorities refuse a taxable person the right to deduct the VAT paid on purchases of goods which were supplied to him or her, on the ground that credence cannot be given to the invoices relating to those purchases because, first, the manufacture of those goods and their supply could not, as the necessary material and human resources were lacking, have been effected by the issuer of those invoices and the goods were therefore, in fact, purchased from an unidentified person, secondly, the national accounting rules were not complied with, thirdly, the chain of supply which led to those purchases was not economically justified and, fourthly, irregularities vitiated certain earlier transactions forming part of that chain of supply. In order to provide a basis for such a refusal, it must be established to the requisite legal standard that the taxable person actively participated in fraud or that that taxable person knew or should have known that those transactions were connected with fraud committed by the issuer of the invoices or any other trader acting upstream in that supply chain, which it is for the referring court to ascertain.

The fifth question

67 By its fifth question, the referring court asks, in essence, whether the principle of proportionality must be interpreted as precluding a tax penalty twice the amount of the VAT deduction unlawfully made being imposed on the taxable person, where the public purse has incurred no loss of tax revenue. It also asks whether it may be considered that any of the factual conditions for the application of the third sentence of Paragraph 170(1) of the Code of fiscal procedure is met where the taxable person has made available to the tax authorities all the

documents in his or her possession and included in his or her VAT return the invoices which he or she has drawn up.

68 In that regard, it must be borne in mind that, under the procedure laid down in Article 267 TFEU, the Court has no jurisdiction to interpret national law, that being exclusively for the referring court (judgment of 30 January 2020, *Generics (UK) and Others*, C?307/18, EU:C:2020:52, paragraph 25 and the case-law cited). The second part of the fifth question referred, which seeks an interpretation of national law is, therefore, inadmissible.

69 As regards the first part of the fifth question, it must be noted that, according to settled case-law of the Court, 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, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (judgment of 26 March 2020, *Miasto ?owicz and Prokurator Generalny zast?powany przez Prokuratur? Krajow? (Disciplinary regime for judges)*, C?558/18 and C?563/18, EU:C:2020:234, paragraph 43 and the case-law cited). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 December 2018, *Wightman and Others*, C?621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

70 The procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. The justification for a reference for a preliminary ruling is not, however, that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgment of 26 March 2020, *Miasto ?owicz and Prokurator Generalny zast?powany przez Prokuratur? Krajow? (Disciplinary regime for judges)*, C?558/18 and C?563/18, EU:C:2020:234, paragraph 44 and the case-law cited).

71 In the present case, as is apparent from the order for reference, the third sentence of Paragraph 170(1) of the Code of fiscal procedure, which the tax authorities applied in the main proceedings, provides for a fine of 200% of the unpaid amount if the difference compared with the amount to be paid is connected with the concealment of income, or the falsification or destruction of evidence, accounting ledgers or registers. The issue of the proportionality of that penalty can arise only if the constituent elements of that provision have been made out and the situation under consideration falls within its scope. However, it is not apparent from the description of the situation presented by the referring court that that is the case.

72 In those circumstances, the first part of the fifth question appears to be hypothetical and the answer to it is not necessary for the resolution of the dispute in the main proceedings. It follows that it is also inadmissible.

The sixth question

73 By its sixth question, the referring court asks, in essence, whether the right of taxable persons to bring an action for damages must be regarded as ensuring the right to an effective remedy enshrined in Article 47 of the Charter, where the case-law of the national court ruling at final instance is, persistently, contrary to Directive 2006/112 as interpreted by the Court, given that the lower courts cannot make a request for a preliminary ruling to the Court of Justice in all the cases before them.

74 In that regard, it must be noted, first of all, that the issue of the right to compensation for damage caused by a failure to observe EU law is unrelated to the subject matter of the dispute in the main proceedings. Next, the referring court does not refer to any obstacle to the right of litigants to bring an action before the national courts against the decisions of tax authorities. Lastly, it does not state that it is precluded under national law from referring a question to the Court for a preliminary ruling if it considers that the case-law of the higher court is contrary to EU law or if it is uncertain in that regard, or that it is bound, in accordance with national procedural law, by legal rulings or directions from that higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings or instructions are inconsistent with EU law.

75 In that regard, it must be borne in mind that a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it. However, it must be pointed out that the possibility thus given to the national court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before, if necessary, disapplying directions from a higher court which prove to be contrary to EU law cannot be transformed into an obligation (judgment of 5 October 2010, *Elchinov*, C?173/09, EU:C:2010:581, paragraphs 27 and 28).

76 It follows that the sixth question, which clearly bears no relation to the actual facts of the main action or its purpose, is inadmissible in the light of the case-law referred to in paragraph 69 above.

Costs

77 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 (Tenth Chamber) hereby orders:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principles of fiscal neutrality, of effectiveness and of proportionality, must be interpreted as precluding a national practice by which the tax authorities refuse a taxable person the right to deduct the value added tax paid on purchases of goods which were supplied to him or her, on the ground that credence cannot be given to the invoices relating to those purchases because, first, the manufacture of those goods and their supply could not, as the necessary material and human resources were lacking, have been effected by the issuer of those invoices and the goods were therefore, in fact, purchased from an unidentified person, secondly, the national accounting rules were not complied with, thirdly, the supply chain which led to those purchases was not economically justified and, fourthly, irregularities vitiated certain earlier transactions forming part of that supply chain. In order to provide a basis for such a refusal, it must be established to the requisite legal standard that the taxable person actively participated in fraud or that that taxable person knew or should have known that those transactions were connected with fraud committed by the issuer of the invoices or any other trader acting upstream in that supply chain, which it is for the referring court to ascertain.

[Signatures]

* Language of the case: Hungarian.