Case C-409/04

The Queen, on the application of:

Teleos plc and Others

v

Commissioners of Customs & Excise

(Reference for a preliminary ruling from the

High Court of Justice of England and Wales, Queen's Bench Division)

(Sixth VAT Directive – First subparagraph of Article 28a(3) and first subparagraph of Article 28c(A)(a) – Intra-Community acquisition – Intra?Community supply – Exemption – Goods dispatched or transported to another Member State – Evidence – National measures to combat fraud)

Opinion of Advocate General Kokott delivered on 11 January 2007

Judgment of the Court (Third Chamber), 27 September 2007

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Transitional arrangements for the taxation of trade between Member States*

(Council Directive 77/388, Arts 28a(3), first subpara., and 28c(A)(a), first subpara.)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Transitional arrangements for the taxation of trade between Member States*

(Council Directive 77/388, Art. 28c(A)(a), first subpara.)

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Transitional arrangements for the taxation of trade between Member States*

(Council Directive 77/388, Art. 28c(A)(a), first subpara.)

1. The first subparagraph of Article 28a(3) and the first subparagraph of Article 28c(A)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2000/65, are, having regard to the term 'dispatched' in those two provisions, to be interpreted as meaning that the intra-Community acquisition of goods is effected and the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply.

The precondition for applying the transitional arrangements under Title XVIa of the Sixth Directive is the intra-Community nature of a transaction and, in particular, the physical movement of goods

from one Member State to another. That condition relating to the crossing of frontiers between the Member States is a necessary element of an intra-Community transaction which distinguishes it from that which occurs within a country.

Furthermore, just like other expressions which define taxable transactions for the purposes of the Sixth Directive, the meanings of ‘intra-Community supply’ and ‘intra-Community acquisition’ are objective in nature and apply without regard to the purpose or results of the transactions concerned. Consequently, it is necessary that the classification of intra-Community supplies and acquisitions be made on the basis of objective matters, such as the physical movement of the goods concerned between Member States.

(see paras 37-38, 40, 42, operative part 1)

2. The first subparagraph of Article 28c(A)(a) of the Sixth Directive 77/388, as amended by Directive 2000/65, is to be interpreted as precluding the competent authorities of the Member State of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for value added tax on those goods where that evidence is found to be false, without, however, the supplier’s involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion.

In the first place, it would be contrary to the principle of legal certainty if a Member State which has laid down the conditions for the application of the exemption of intra-Community supplies by prescribing, among other things, a list of the documents to be presented to the competent authorities, and which has accepted, initially, the documents presented by the supplier as evidence establishing entitlement to the exemption, could subsequently require that supplier to account for the VAT on that supply, where it transpires that, because of the purchaser’s fraud, of which the supplier had and could have had no knowledge, the goods concerned did not actually leave the territory of the Member State of supply.

Secondly, any sharing of the risk between the supplier and the tax authorities, following fraud committed by a third party, must be compatible with the principle of proportionality. Furthermore, rather than preventing tax evasion, a regime imposing the entire responsibility for the payment of VAT on suppliers, regardless of whether or not they were involved in the fraud, does not necessarily safeguard the harmonised VAT system from evasion and abuse by purchasers. The latter, were they exempted from all responsibility, could, in effect, be encouraged not to dispatch or not to transport the goods out of the Member State of supply and not to declare the goods for VAT purposes in the envisaged Member States of destination.

Thirdly, if suppliers were themselves required to account for the VAT after the event, that principle would be infringed, since suppliers who effect transactions within a country are never liable to pay output tax, given that it is an indirect tax on consumption. Therefore, taxable persons effecting an intra-Community transaction would be in a less advantageous position than that of taxable persons effecting an internal transaction.

Fourthly, according to case-law of the Court applicable by way of analogy, it would not be contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion. Accordingly, the fact that the supplier acted in good faith, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that supplier can be obliged to account for the VAT after the event. By contrast, once the supplier has fulfilled his obligations relating to evidence of an intra-Community

supply, where the contractual obligation to dispatch or transport the goods out of the Member State of supply has not been satisfied by the purchaser, it is the latter who should be held liable for the VAT in that Member State.

(see paras 50, 58, 60, 65-67, operative part 2)

3. The fact that the purchaser made a declaration concerning intra-Community acquisition to the tax authorities of the Member State of destination may constitute additional evidence tending to establish that the goods have actually left the territory of the Member State of supply, but it does not constitute conclusive proof for the purposes of the exemption from value added tax of an intra-Community supply.

(see para. 72, operative part 3)

JUDGMENT OF THE COURT (Third Chamber)

27 September 2007 (*)

(Sixth VAT Directive – First subparagraph of Article 28a(3) and first subparagraph of Article 28c(A)(a) – Intra-Community acquisition – Intra?Community supply – Exemption – Goods dispatched or transported to another Member State – Evidence – National measures to combat fraud)

In Case C?409/04,

REFERENCE for a preliminary ruling under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 6 May 2004, received at the Court on 24 September 2004, in the proceedings

The Queen, on the application of:

Teleos PLC,

Unique Distribution Ltd,

Synectiv Ltd,

New Communications Ltd,

Quest Trading Company Ltd,

Phones International Ltd,

AGM Associates Ltd,

DVD Components Ltd,

Fonecomp Ltd,

Bulk GSM Ltd,

Libratech Ltd,

Rapid Marketing Services Ltd,

Earthshine Ltd,

Stardex (UK) Ltd

v

Commissioners of Customs & Excise,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 June 2006,

after considering the observations submitted on behalf of:

– Teleos PLC, Unique Distribution Ltd, Synectiv Ltd, New Communications Ltd, Quest Trading Company Ltd, Phones International Ltd, AGM Associates Ltd, DVD Components Ltd, Fonecomp Ltd, Bulk GSM Ltd, Libratech Ltd, Rapid Marketing Services Ltd, Earthshine Ltd and Stardex (UK) Ltd, by N. Pleming QC, M. Conlon QC and E. Sharpston QC, P. Hamilton, P. Moser and A. Young, Barristers, and by D. Waelbroeck, avocat,

– the United Kingdom Government, by C. Jackson, acting as Agent, and by R. Anderson QC and R. Haynes, Barrister,

– the Greek Government, by V. Kyriazopoulos, I. Bakopoulos, K. Georgiadis and M. Tassopoulou, acting as Agents,

– the French Government, by G. de Bergues and C. Jurgensen-Mercier, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, and by E. Fitzsimons SC and B. Conway BL,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. De Bellis, avvocato dello Stato,

– the Portuguese Government, by L. Fernandes and C. Lança, acting as Agents,

– the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first subparagraph of Article 28a(3) and the first subparagraph of Article 28c(A)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2000/65/EC of 17 October 2000 (OJ 2000 L 269, p. 44) ('the Sixth Directive').

2 The reference was made in the course of proceedings between Teleos PLC, Unique Distribution Ltd, Synectiv Ltd, New Communications Ltd, Quest Trading Company Ltd, Phones International Ltd, AGM Associates Ltd, DVD Components Ltd, Fonecomp Ltd, Bulk GSM Ltd, Libratech Ltd, Rapid Marketing Services Ltd, Earthshine Ltd and Stardex (UK) Ltd (hereinafter 'Teleos and Others') and the Commissioners of Customs & Excise ('the Commissioners'), who are responsible for the collection of value added tax ('VAT') in the United Kingdom, on the exemption of intra-Community supplies of goods.

Legal context

Community legislation

3 Article 2 of the Sixth Directive provides that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods are to be subject to VAT.

4 The Sixth Directive contains Title XVIa, entitled 'Transitional arrangements for the taxation of trade between Member States', which was added to it by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 (OJ 1991 L 376, p. 1) and which contains Articles 28a to 28m.

5 Article 28a of the Sixth Directive provides:

'1. The following shall also be subject to value added tax:

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B)(1).

…

3. "Intra-Community acquisition of goods" shall mean acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported.

Where goods acquired by a non-taxable legal person are dispatched or transported from a third territory and imported by that non-taxable legal person into a Member State other than the Member State of arrival of the goods dispatched or transported, the goods shall be deemed to have been dispatched or transported from the Member State of import. That Member State shall

grant the importer as defined in Article 21(2) a refund of the value added tax paid in connection with the importation of the goods in so far as the importer establishes that his acquisition was subject to value added tax in the Member State of arrival of the goods dispatched or transported.

…

5. The following shall be treated as supplies of goods effected for consideration:

(b) the transfer by a taxable person of goods from his undertaking to another Member State.

…’

6 Article 28b(A) of the Sixth Directive provides:

‘1. The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.

2 Without prejudice to paragraph 1, the place of the intra-Community acquisition of goods referred to in Article 28a(1)(a) shall, however, be deemed to be within the territory of the Member State which issued the value added tax identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that that acquisition has been subject to tax in accordance with paragraph 1.

…’

7 The first subparagraph of Article 28c(A)(a) of the Sixth Directive is worded as follows:

‘Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Article 5, dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.’

8 Article 28d(1) of the Sixth Directive provides:

‘The chargeable event shall occur when the intra-Community acquisition of goods is effected. The intra-Community acquisition of goods shall be regarded as being effected when the supply of similar goods is regarded as being effected within the territory of the country.’

9 Article 22 of the Sixth Directive, in the version resulting from Article 28h thereof, imposes several obligations on persons liable to payment concerning, in particular, account keeping, invoicing, VAT returns and recapitulative statements which they are required to lodge with the tax authorities. Paragraph 8 thereof is worded as follows:

‘Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for 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.’

National legislation

10 Section 30(8) of the Value Added Tax Act 1994 ('the VAT Act 1994') provides:

'Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the Member States or that the supply in question involved both –

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another Member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that Member State …

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.'

11 Article 134 of the Value Added Tax Regulations 1995 provides:

'Where the Commissioners are satisfied that–

(a) a supply of goods by a taxable person involves their removal from the United Kingdom,

(b) the supply is to a person taxable in another Member State,

(c) the goods have been removed to another Member State, and

(d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the [VAT] Act, for VAT to be charged by reference to the profit margin on the supply,

the supply, subject to such conditions as they may impose, shall be zero-rated.'

12 Other detailed rules for the exemption of intra-Community supplies are set out in Notices Nos 703 and 725 which, according to the order for reference, have, in part, the force of law.

13 Notice No 703 addressed to all economic operators engaged in intra-Community trade, provides, among other things:

'8.4 Conditions for the zero-rating of supplies of goods to other Member States

If you supply goods to a customer who is registered for VAT in another Member State [of the European Union], you may zero rate your supply in the UK, provided

– You obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the two-letter country code prefix,

– The goods are sent or transported out of the UK to a destination in another … Member State [of the Union]; and

– Within three months of the date of supply, you obtain and keep valid commercial documentary evidence that the goods have been removed from the UK.

…

If your [EU] customer collects or arranges the collection of the goods and their removal from the UK you should

– confirm how the goods are going to be removed from the UK and confirm what proof of removal will be sent to you; and

– consider taking a deposit from your customer equal to the amount of VAT you have to account for if you do not get satisfactory evidence of removal of the goods from the UK. (The deposit can be refunded when you have received evidence which proves that the goods have been removed from the UK.)'

The main proceedings and the questions referred for a preliminary ruling

14 In 2002, Teleos and Others sold mobile telephones to a Spanish company, Total Telecom España SA/Ercosys Mobil SA ('TT'). According to the sales contracts, the goods' destination was, in general, in France and, in certain cases, in Spain. In nearly every case, the contracts were concluded on the basis of one of the international commercial terms (known as 'Incoterms 2000') established by the International Chamber of Commerce, namely 'ex-works' or 'EXW', which means that Teleos and Others were required only to place the goods at TT's disposal at a warehouse in the United Kingdom, TT being responsible for arranging their transport to the specified Member State. The warehouse belonged to Euro-Cellars Ltd, a bonded warehousing and distribution company.

15 For each transaction, Teleos and Others received from TT, a few days after the sale, the stamped and signed original of the CMR consignment note (dispatch note drawn up on the basis of the Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956, as amended by the Protocol of 5 July 1978), describing the goods and stating the delivery address, the carrier's name and the vehicle's registration number. Such note, which was signed by TT, afforded evidence that the mobile telephones had reached the specified destination.

16 Initially, the Commissioners accepted those documents as evidence that the goods had been exported from the United Kingdom, so that those supplies were exempt from VAT, by virtue of the zero-rating, and Teleos and Others were entitled to be refunded the input tax paid. However, on subsequent checks, the Commissioners discovered that, in certain cases, the destination stated on the CMR notes was false, that the carriers mentioned therein did not exist or did not transport mobile telephones, or that the registration numbers given were of non-existent vehicles or of vehicles which were unsuitable for transporting such goods. The Commissioners concluded that the mobile telephones had never left the United Kingdom and therefore assessed Teleos and Others to VAT on those supplies, in an amount of several million GBP, whilst fully acknowledging that they were in no way involved in any fraud.

17 The order for reference states that there was evidence that TT had made tax returns to the competent Spanish authorities relating to the intra-Community acquisition of mobile telephones. TT had also declared the onward supply of the goods as exempt intra-Community supplies and claimed refunds of input VAT.

18 The national court considers it proven that there was no reason for Teleos and Others to doubt the information contained in the CMR consignment notes or their authenticity, and that those companies were not party to any fraud and were unaware that the mobile phones had not left the

United Kingdom. It also concluded that, after Teleos and Others had made serious and detailed inquiries as regards both TT and Euro-Cellars Ltd to establish the legitimacy of the purchaser, they had no other real means of establishing the falsity of the statements contained in those notes. Moreover, no additional evidence, other than the CMR notes, could reasonably have been obtained, having regard to the nature of the trade in question.

19 Teleos and Others brought proceedings before the referring court against the Commissioners' decisions assessing them to the VAT, on the ground that there was no basis for them under the Sixth Directive.

20 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. In the relevant circumstances [of the main proceedings], is the term "dispatched" in Article 28a(3) [of the Sixth Directive] (intra-Community acquisition of goods) to be understood as meaning that intra-Community acquisition takes place when:

(a) the right to dispose of the goods as owner passes to the purchaser and the goods are supplied by the supplier by placing them at the disposal of the purchaser (who is registered for VAT in another Member State), on an ex works contract of sale whereby the purchaser assumes responsibility for removing the goods to a different Member State from that of supply, at a secure warehouse located in the supplier's Member State, and where the contractual documents and/or other documentary evidence state that the intention is that the goods should then be transported onwards towards a destination in another Member State, but the goods have not yet physically left the territory of the Member State of supply; or

(b) the right to dispose of the goods as owner passes to the purchaser and the goods commence, but do not necessarily complete, their journey towards a different Member State (in particular, if the goods have not yet physically left the territory of the Member State of supply); or

(c) the right to dispose of the goods as owner has passed to the purchaser and the goods have physically left the territory of the Member State of supply on their journey towards a different Member State?

2. Is Article 28c(A)(a) [of the Sixth Directive] to be interpreted as meaning that supplies of goods are exempt from VAT where:

– the goods are supplied to a purchaser who is registered for VAT in another Member State; and

– the purchaser contracts to purchase the goods on the basis that, after he has acquired the right to dispose of the goods as owner in the supplier's Member State, he will be responsible for transporting the goods from the supplier's Member State to a second Member State; and:

(a) the right to dispose of the goods as owner has passed to the purchaser and the goods have been supplied by the supplier by placing them at the disposal of the purchaser, on an ex works contract of sale whereby the purchaser assumes responsibility for removing the goods to a different Member State from that of supply, at a secure warehouse located in the supplier's Member State, where the contractual documents and/or other documentary evidence state that the intention is that the goods should then be transported onwards towards a destination in another Member State, but the goods have not yet physically left the territory of the Member State of supply; or

(b) the right to dispose of the goods as owner has passed to the purchaser and the goods have commenced, but not necessarily completed, their journey towards a different Member State (in particular, the goods have not yet physically left the territory of the Member State of supply); or

(c) the right to dispose of the goods as owner has passed to the purchaser and the goods have left the territory of the Member State of supply on their journey towards a second Member State; or

(d) the right to dispose of the goods as owner has passed to the purchaser and the goods can also be shown to have actually arrived in the Member State of destination?

3. In the relevant circumstances [of the main proceedings], where a supplier acting in good faith has tendered to the competent authorities in his Member State, after submission of a repayment claim, objective evidence which at the time of its receipt apparently supported his right to exempt goods under Article 28c(A)(a) [of the Sixth Directive] and the competent authorities initially accepted that evidence for the purpose of exemption, in what circumstances (if any) may the competent authorities in the Member State of supply nevertheless subsequently require the supplier to account for VAT on those goods where further evidence comes to their attention that either (a) casts doubt upon the validity of the earlier evidence or (b) demonstrates that the evidence submitted was materially false, but without the knowledge or the involvement of the supplier?

4. Is the answer to question 3 above affected by the fact that there was evidence that the purchaser made returns to the tax authorities in the Member State of destination, where those returns included as intra-Community acquisitions the purchases the subject matter of these claims, the purchaser entered an amount purporting to represent acquisition tax and also claimed the same amount as input tax in accordance with Article 17(2)(d) of the Sixth Directive?'

The questions referred for a preliminary ruling

Preliminary observations

21 At the outset, it is appropriate to note that the questions referred by the national court arise in the context of the transitional arrangements for VAT applicable to intra-Community trade established, for the purpose of the abolition of internal frontiers on 1 January 1993, by Directive 91/680. Since that date, the imposition of tax on imports and the remission of tax on exports in trade between Member States were definitively abolished (second and third recitals in the preamble to that directive).

22 The Community legislature, after stating that conditions could not yet be brought about that would permit the principle of the taxation in the Member State of origin of goods supplied to be implemented without prejudicing the principle that tax revenue from the imposition of tax at the final consumption stage should accrue to the benefit of the Member State in which the final consumption takes place, introduced, under Title XVIa of the Sixth Directive, transitional

arrangements for the taxation of trade between Member States, based on a new chargeable event, namely the intra-Community acquisition of goods (7th to 10th recitals in the preamble to Directive 91/680).

23 In that regard, the intra-Community supply of goods and their intra-Community acquisition are, in fact, one and the same financial transaction, even though the latter creates different rights and obligations both for the parties to the transaction and for the tax authorities of the Member States concerned.

24 Thus, any intra-Community acquisition that is taxed in the Member State where the dispatch or intra-Community transport of goods ends under the first subparagraph of Article 28a(1)(a) of the Sixth Directive has, as a corollary, an exempted supply in the Member State in which that dispatch or transport began under the first subparagraph of Article 28c(A)(a) of that directive (Case C?245/04 *EMAG Handel Eder* [2006] ECR I?3227, paragraph 29).

25 It follows that the exemption of an intra-Community supply corresponding to an intra-Community acquisition enables double taxation and, therefore, infringement of the principle of fiscal neutrality inherent in the common system of VAT, to be avoided.

The first and second questions

26 By its first two questions, which it is appropriate to consider together, the national court is asking, in essence, whether the first subparagraph of Article 28a(3) and the first subparagraph of Article 28c(A)(a) of the Sixth Directive are, having regard to the term ‘dispatched’ in those two provisions, to be interpreted as meaning that the intra-Community acquisition of goods takes place and the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply.

27 The conditions which must be fulfilled for a transaction to be capable of description as an intra-Community acquisition and subject to VAT are laid down in Article 28a of the Sixth Directive. As well as the conditions as to the capacities of the vendor and purchaser, laid down in paragraph 1(a) of that article, the first subparagraph of paragraph 3 thereof makes intra-Community acquisition subject to two requirements; first, the transfer to the purchaser of the right to dispose as owner of movable tangible property and, second, the dispatch or transport of those goods to the person acquiring them by or on behalf of the vendor or person acquiring them ‘to a Member State other than that from which the goods are dispatched or transported’.

28 The transaction constituting the corollary of the intra-Community acquisition, that is to say the intra-Community supply, is exempt from VAT if it satisfies the conditions laid down in Article 28c(A)(a) of the Sixth Directive. By contrast to the conditions required for intra-Community acquisitions, that provision requires that, to be entitled to exemption as an intra-Community supply, the goods must be dispatched or transported ‘out of the territory referred to in Article 3 but within the Community’, that is to say that the dispatch or transport must be effected from a Member State forming part of the territory of the Community where the common system of VAT is in force to another Member State thereof.

29 It is apparent from the contents of the file submitted to the Court that the first condition relating to intra-Community acquisition, that is the transfer of the right to dispose of the goods as owner, is considered by the national court to have been fulfilled. The parties to the main proceedings disagree, however, as to the second condition to which such an acquisition is subject.

The disagreement concerns, in particular, the interpretation to be given to the term ‘dispatch’ in the first subparagraph of Article 28a(3) and the first subparagraph of Article 28c(A)(a) of the Sixth Directive.

30 Teleos and Others submit that the term ‘dispatched’ means that the goods concerned are sent to a particular destination or a particular consignee. They rely on a literal interpretation of that term and argue that a comparison of all the language versions shows that the term respectively used in them focuses on the start of the process of dispatch and does not necessitate the complete physical transport of the goods outside the supplier’s Member State.

31 Teleos and Others submit, therefore, that an intra-Community supply of goods is effected where the supplier places the goods at the purchaser’s disposal, in accordance with the ‘ex-works’ clause, by which the latter undertakes to transport them to another Member State, and where the evidence shows that the parties’ intention is that the goods should then be transported towards a destination in another Member State, even if they have not yet physically left the territory of the Member State of supply.

32 The Member States which have submitted observations to the Court and the Commission of the European Communities submit, on the other hand, that use of the term ‘dispatched’ means that the goods must have physically left the territory of the Member State of dispatch or have arrived in the Member State of destination.

33 Admittedly, whilst it is true that, on a literal interpretation, the expression ‘dispatched or transported … to a Member State’ in the first subparagraph of Article 28a(3) of the Sixth Directive seems to focus on the start of the process of dispatch or transport, as Teleos and Others submit, the fact remains that, as most of the Member States which submitted observations to the Court argue, the expression ‘dispatched or transported … out of the territory [of the Member State]’, in the first subparagraph of Article 28c(A)(a) of that directive, necessitates the goods actually leaving the Member State of supply.

34 In those circumstances, in view of the necessary correlation between intra-Community supply and acquisition, the two provisions mentioned in the preceding paragraph must be interpreted in such a way as to confer on them identical meaning and scope.

35 If there are several possible literal interpretations of an expression it is necessary, in order to determine its scope, to have recourse to the context in which it is used, taking account of the aims and scheme of the Sixth Directive (see, to that effect, Case C?185/89 *Velker International Oil Company* [1990] ECR I?2561, paragraphs 16 and 17; Case C?2/95 *SDC* [1997] ECR I?3017, paragraph 22; and Case C?455/05 *Velvet & Steel Immobilien* [2007] ECR I?0000, paragraph 20).

36 It follows from the purpose of the transitional arrangements under Title XVIa of the Sixth Directive, namely the transfer of the tax revenue to the Member State in which final consumption of the goods supplied takes place (see *EMAG Handel Eder*, paragraph 40), that those arrangements were established to govern, in particular, the movement of goods within the Community.

37 Since, as noted in paragraph 21 of the present judgment, they replaced the system of imports and exports between the Member States, those arrangements clearly differ from those which govern transactions effected within a country. The condition precedent to the application of such arrangements is the intra-Community nature of a transaction and, in particular, the physical movement of goods from one Member State to another. That condition relating to the crossing of frontiers between the Member States is a necessary element of an intra-Community transaction which distinguishes it from that which occurs within a country.

38 Furthermore, just like other expressions which define taxable transactions for the purposes of the Sixth Directive (see Joined Cases C?354/03, C-355/03 and C?484/03 *Optigen and Others* [2006] ECR I?483, paragraph 44, and Joined Cases C?439/04 and C?440/04 *Kittel and Recolta Recycling* [2006] ECR I?6161, paragraph 41), the meanings of ‘intra-Community supply’ and ‘intra-Community acquisition’ are objective in nature and apply without regard to the purpose or results of the transactions concerned.

39 Contrary to Teleos and Others’ argument that the supplier’s and purchaser’s intention to effect an intra-Community transaction is sufficient for its classification as such, it is clear from the Court’s case-law that requiring the tax authorities to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating the measures necessary for the application of VAT by having regard, save in exceptional cases, to the objective character of the transaction concerned (see Case C?4/94 *BLP Group* [1995] ECR I-983, paragraph 24; *Optigen and Others*, paragraph 45; and *Kittel and Recolta Recycling*, paragraph 42).

40 Consequently, it is necessary that the classification of intra-Community supplies and acquisitions be made on the basis of objective matters, such as the physical movement of the goods concerned between Member States.

41 That interpretation is also supported by the context of the intra-Community supply and acquisition of goods. Indeed, it is already clear from the wording of Title XVIa of the Sixth Directive that the transitional arrangements apply to trade between the Member States. In addition, the provisions relating to those arrangements employ several expressions showing that there are at least two Member States involved in a transaction consisting of an intra-Community supply and acquisition and that there must be a transfer of the goods between those States. Those particular expressions, such as ‘to a Member State other than that from which the goods are dispatched or transported’, ‘into a Member State other than the Member State of arrival of the goods dispatched or transported’ and ‘the transfer by a taxable person of goods from his undertaking to another Member State’, appear, in particular, in Article 28a(3) and (5) of the Sixth Directive.

42 In the light of the foregoing considerations, the reply to the first and second questions referred must be that the first subparagraph of Article 28a(3) and the first subparagraph of Article 28c(A)(a) of the Sixth Directive are, having regard to the term ‘dispatched’ in those two provisions, to be interpreted as meaning that the intra-Community acquisition of goods is effected and the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply.

The third question

43 By its third question, the national court is asking, in essence, whether the first subparagraph

of Article 28c(A)(a) of the Sixth Directive is to be interpreted as precluding the competent authorities of the Member State of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for VAT on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established.

44 First of all, even if the intra-Community supply and acquisition of goods are subject to the objective condition of physical transfer of the goods out of the Member State of supply, as is clear from the reply given to the first two questions, it is difficult for the tax authorities, because of the abolition of frontier checks between the Member States, to satisfy themselves that the goods have or have not physically left the territory of that Member State. As a result, it is principally on the basis of the evidence provided by taxable persons and of their statements that the tax authorities so satisfy themselves.

45 As is clear from the first part of the sentence in Article 28c(A) of the Sixth Directive, it is for the Member States to lay down the conditions for the application of the exemption of intra-Community supplies of goods. It is important to note, however, that when they exercise their powers, Member States must comply with the general principles of law which form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality (see, to that effect, Joined Cases C?286/94, C?340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I?7281, paragraph 48, and Case C?384/04 *Federation of Technological Industries and Others* [2006] ECR I?4191, paragraphs 29 and 30).

46 It is also clear from the Court's case-law on the recovery of VAT after the event that the measures which the Member States may adopt in order to ensure the correct levying and collection of the tax and for the prevention of fraud may not be used in such a way as to undermine the neutrality of VAT (see, to that effect, Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Others* [2000] ECR I?1577, paragraph 52; Case C?454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I?6973, paragraph 59; and Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraph 92).

47 Teleos and Others submit that in cases where it is shown after the acquisition that the purchaser committed fraud and the goods did not actually leave the territory of the Member State of supply, the imposition by the tax authorities of a Member State of the entire burden of proof, as well as the liability to account for the VAT, on the supplier of goods sold under the system of intra-Community supplies, is incompatible with the principles of legal certainty, proportionality and fiscal neutrality. They submit also that the measures adopted in their regard adversely affect the proper functioning of the single market and interfere with the free movement of goods.

48 As regards, first, the principle of legal certainty, it must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which such rules impose on them (see Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24, and *Halifax and Others*, paragraph 72). It follows that it is necessary, as Teleos and Others and the Commission correctly observe, that taxable persons be aware, before concluding a transaction, of their tax obligations.

49 In the main proceedings, it is clear both from the contents of the Court's file and from the observations submitted to the Court that there appears to be no tangible evidence either to support the conclusion that the goods concerned were transferred out of the territory of the Member State of supply or to exclude the possibility of manipulation and fraud. It is nevertheless necessary, in order to ensure the correct and straightforward application of the exemptions, that the national authorities lay down the conditions under which they exempt intra-Community supplies of goods.

50 Accordingly, it would be contrary to the principle of legal certainty if a Member State which has laid down the conditions for the application of the exemption of intra-Community supplies by prescribing, among other things, a list of the documents to be presented to the competent authorities, and which has accepted, initially, the documents presented by the supplier as evidence establishing entitlement to the exemption, could subsequently require that supplier to account for the VAT on that supply, where it transpires that, because of the purchaser's fraud, of which the supplier had and could have had no knowledge, the goods concerned did not actually leave the territory of the Member State of supply.

51 To oblige taxable persons to provide conclusive proof that the goods have physically left the Member State of supply does not ensure the correct and straightforward application of the exemptions. On the contrary, that obligation places them in an uncertain situation as regards the possibility of applying the exemption to their intra-Community supplies or as regards the need to include VAT in the sale price.

52 Secondly, as regards the principle of proportionality, it must be recalled that the Court held, in paragraph 46 of its judgment in *Molenheide and Others*, that, in accordance with that principle, the Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant Community legislation.

53 Accordingly, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, such measures must go no further than necessary for that purpose (see *Molenheide and Others*, paragraph 47, and *Federation of Technological Industries and Others*, paragraph 30).

54 The United Kingdom and Italian Governments submit in that regard that, in the main proceedings, the case-law according to which it is neither disproportionate nor contrary to the general principles of law which the Court is required to uphold to require an importer who has acted in good faith to pay customs duties payable on the importation of goods in respect of which the exporter has committed a customs offence, where the importer has played no part in that offence, is applicable to this case (see Joined Cases C?153/94 and C?204/94 *Faroe Seafood and Others* [1996] ECR I?2465, paragraph 114, and Case C?97/95 *Pascoal & Filhos* [1997] ECR I?4209, paragraph 61).

55 That argument cannot be accepted.

56 As Teleos and Others and the Commission correctly maintain and as the Advocate General observed in points 78 to 82 of her Opinion, the application of customs duties to imports from outside the European Union and the imposition of VAT on intra-Community acquisitions are not comparable transactions.

57 The regime applying to intra-Community trade lays down the division of powers in tax matters in the internal market and permits the tax authorities to resort to both the supplier and the purchaser to obtain payment of the VAT, whereas, under the common customs regime, duties are recoverable only from the importer. It follows that the case-law cited in paragraph 54 of the present judgment is not applicable to the case which is before the national court.

58 Admittedly, the objective of preventing tax evasion sometimes justifies stringent requirements as regards suppliers' obligations. However, any sharing of the risk between the supplier and the tax authorities, following fraud committed by a third party, must be compatible with the principle of proportionality. Furthermore, rather than preventing tax evasion, a regime

imposing the entire responsibility for the payment of VAT on suppliers, regardless of whether or not they were involved in the fraud, does not necessarily safeguard the harmonised VAT system from evasion and abuse by purchasers. The latter, were they exempted from all responsibility, could, in effect, be encouraged not to dispatch or not to transport the goods out of the Member State of supply and not to declare the goods for VAT purposes in the envisaged Member States of destination.

59 As regards, thirdly, the principle of fiscal neutrality, it must be recalled that that principle precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see Case C?240/05 *Eurodental* [2006] ECR I-11479, paragraph 46).

60 If the suppliers involved in the main proceedings were themselves required to account for the VAT after the event, that principle would be infringed, since suppliers who effect transactions within a country are never liable to pay output tax, given that it is an indirect tax on consumption. Therefore, taxable persons effecting an intra-Community transaction, in circumstances such as those of the main proceedings, would be in a less advantageous position than that of taxable persons effecting an internal transaction (see, to that effect, as regards the right to deduct, *Eurodental*, paragraph 47).

61 As regards, fourthly, Teleos and Others' argument that the measures adopted by the United Kingdom authorities interfere with the free movement of goods, first, it is clear from the Court's case-law that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C?487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I?5337, paragraph 76, and *Kittel and Recolta Recycling*, paragraph 54), which can, in certain circumstances, justify restrictions on the free movement of goods.

62 Secondly, it is also important to ensure, as the Commission correctly submits, that the position of economic operators should not be less favourable than it was prior to the abolition of frontier checks between the Member States, because such a result would run counter to the purposes of the internal market which is intended to facilitate trade between them.

63 Since it is no longer possible for taxable persons to rely on documents issued by the customs authorities, evidence of intra-Community supplies and acquisitions must be provided by other means. Whilst it is true that the regime governing intra-Community trade has become more open to fraud, the fact remains that the requirements for proof established by the Member States must comply with the fundamental freedoms established by the EC Treaty, such as, in particular, the free movement of goods.

64 In that regard, it is also important to point out that, under Article 22(8) of the Sixth Directive, the Member States may impose the obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

65 Moreover, according to the Court's settled case-law, which is applicable to the main proceedings by way of analogy, it would not be contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see, as regards 'carousel' type fraud, *Federation of Technological Industries and Others*, paragraph 33, and *Kittel and Recolta Recycling*, paragraph 51).

66 Accordingly, the fact that the supplier acted in good faith, that he took every reasonable

measure in his power and that his participation in fraud is excluded are important points in deciding whether that supplier can be obliged to account for the VAT after the event.

67 By contrast, as the Commission observes, once the supplier has fulfilled his obligations relating to evidence of an intra-Community supply, where the contractual obligation to dispatch or transport the goods out of the Member State of supply has not been satisfied by the purchaser, it is the latter who should be held liable for the VAT in that Member State.

68 The reply to the third question referred must therefore be that the first subparagraph of Article 28c(A)(a) of the Sixth Directive is to be interpreted as precluding the competent authorities of the Member State of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for VAT on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion.

The fourth question

69 By its fourth question, the national court is asking, in essence, whether the fact that the purchaser made a declaration concerning intra-Community acquisition, such as that in question in the main proceedings, to the tax authorities in the Member State of destination can be regarded as conclusive proof for the purposes of the exemption from VAT of an intra-Community supply.

70 Having regard to the reply given to the first two questions, it must be held that, apart from the requirements relating to the capacities of the taxable persons, to the transfer of the right to dispose of goods as owner and to the physical movement of the goods from one Member State to another, no other conditions can be placed on the classification of a transaction as an intra-Community supply or acquisition of goods.

71 In the context of the transitional arrangements for intra-Community supplies and acquisitions, it is necessary, in order to ensure the proper collection of VAT, that the competent tax authorities check, independently of each other, whether the conditions for intra-Community acquisition and for the exemption of the corresponding supply are satisfied. Therefore, even if presentation by the purchaser of a tax return relating to an intra-Community acquisition may be evidence of the actual transfer of the goods out of the Member State of supply, such a return does not however constitute conclusive evidence for the purpose of proof of an exempt intra-Community supply of goods.

72 It follows that the reply to the fourth question referred must be that the fact that the purchaser made a declaration concerning intra-Community acquisition, such as that in question in the main proceedings, to the tax authorities of the Member State of destination may constitute additional evidence tending to establish that the goods have actually left the territory of the Member State of supply, but it does not constitute conclusive proof for the purposes of the exemption from VAT of an intra-Community supply.

Costs

73 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 (Third Chamber) hereby rules:

1. **The first subparagraph of Article 28a(3) and the first subparagraph of Article 28c(A)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2000/65/EC of 17 October 2000, are, having regard to the term 'dispatched' in those two provisions, to be interpreted as meaning that the intra-Community acquisition of goods is effected and the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply.**

2. **The first subparagraph of Article 28c(A)(a) of Sixth Directive 77/388, as amended by Directive 2000/65, is to be interpreted as precluding the competent authorities of the Member State of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for value added tax on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion.**

3. **The fact that the purchaser made a declaration concerning intra-Community acquisition, such as that in question in the main proceedings, to the tax authorities of the Member State of destination may constitute additional evidence tending to establish that the goods have actually left the territory of the Member State of supply, but it does not constitute conclusive proof for the purposes of the exemption from value added tax of an intra-Community supply.**

[Signatures]

* Language of the case: English.