Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

19 December 2018 (*)

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Article 2(1)(b)(i) and (iii) — Article 3(1) — Intra-Community acquisitions of goods subject to excise duties — Article 138(1) and (2)(b) — Intra-Community supply of goods — Chain transactions with a single transport — Transaction to which the transport should be ascribed — Transport under an excise duty suspension arrangement — Impact on the classification of an intra-Community purchase)

In Case C?414/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 29 June 2017, received at the Court on 10 July 2017, in the proceedings

AREX CZ a.s.

v

Odvolací finan?ní ?editelství,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe (Rapporteur), C. Lycourgos, E. Juhász and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2018,

after considering the observations submitted on behalf of:

– the Odvolací finan?ní ?editelství, by T. Rozehnal, D. Jeroušek and D. Švancara, acting as Agents,

– the Czech Government, by J. Vlá?il, O. Serdula and M. Smolek, acting as Agents,

– the European Commission, by L. Lozano Palacios, Z. Mal?šková and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(b)(i) and (iii) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (‘the VAT Directive’).

2 The request has been made in proceedings between AREX CZ a.s. (‘Arex’) and the Odvolací finan?ní ?editelství (Appellate Tax Directorate, Czech Republic) (‘the Tax Directorate’) concerning the deduction, by Arex, of value added tax (VAT) in respect of purchases of fuel, from Czech suppliers, which was transported under an excise duty suspension arrangement from Austria to the Czech Republic.

Legal context

European Union law

The VAT Directive

3 Recital 36 of the VAT Directive states:

‘For the benefit both of the persons liable for payment of VAT and the competent administrative authorities, the methods of applying VAT to certain supplies and intra-Community acquisitions of products subject to excise duty should be aligned with the procedures and obligations concerning the duty to declare in the case of shipment of such products to another Member State laid down in Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [(OJ 1992 L 76, p. 1), as last amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30)].’

4 Article 2 of the VAT Directive provides:

‘1. The following transactions shall be subject to VAT:

...

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

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;

...

(iii) in the case of products subject to excise duty, where the excise duty on the intra-Community acquisition is chargeable, pursuant to Directive [92/12, as amended by Directive 2004/106], within the territory of the Member State, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1).

...

3. “Products subject to excise duty” shall mean energy products, alcohol and alcoholic beverages and manufactured tobacco, as defined by current [EU] legislation, but not gas supplied through the natural gas distribution system or electricity.’

5 Article 3(1) and (2) of the VAT Directive provides:

‘1. By way of derogation from Article 2(1)(b)(i), the following transactions shall not be subject to VAT:

(a) the intra-Community acquisition of goods by a taxable person or a non-taxable legal person, where the supply of such goods within the territory of the Member State of acquisition would be exempt pursuant to Articles 148 and 151;

(b) the intra-Community acquisition of goods, other than those referred to in point (a) and Article 4, and other than new means of transport or products subject to excise duty, by a taxable person for the purposes of his agricultural, forestry or fisheries business subject to the common flat-rate scheme for farmers, or by a taxable person who carries out only supplies of goods or services in respect of which VAT is not deductible, or by a non-taxable legal person.

2. Point (b) of paragraph 1 shall apply only if the following conditions are met:

(a) during the current calendar year, the total value of intra-Community acquisitions of goods does not exceed a threshold which the Member States shall determine but which may not be less than EUR 10 000 or the equivalent in national currency;

(b) during the previous calendar year, the total value of intra-Community acquisitions of goods did not exceed the threshold provided for in point (a).

The threshold which serves as the reference shall consist of the total value, exclusive of VAT due or paid in the Member State in which dispatch or transport of the goods began, of the intra-Community acquisitions of goods as referred to under point (b) of paragraph 1.’

6 The first paragraph of Article 20 of that directive reads as follows:

‘“Intra-Community acquisition of goods” shall mean the 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, in a Member State other than that in which dispatch or transport of the goods began.’

7 Article 138 of that directive provides:

‘1. Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the [European Union], by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

2. In addition to the supply of goods referred to in paragraph 1, Member States shall exempt the following transactions:

...

(b) the supply of products subject to excise duty, dispatched or transported to a destination outside their respective territory but within the [European Union], to the customer, by or on behalf of the vendor or the customer, for taxable persons, or non-taxable legal persons, whose intra-Community acquisitions of goods other than products subject to excise duty are not subject to VAT pursuant to Article 3(1), where those products have been dispatched or transported in accordance

with Article 7(4) and (5) or Article 16 of Directive [92/12, as amended by Directive 2004/106];

...'

8 The second subparagraph of Article 139(1) of the VAT Directive provides:

'... [The] exemption [provided for in Article 138(1)] [shall not] apply to the supply of goods to taxable persons, or non-taxable legal persons, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1).'

Directives 92/12 and 2008/118/EC

9 Directive 92/12, as amended by Directive 2004/106 ('Directive 92/12'), was repealed, with effect from 1 April 2010, by Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty (OJ 2009 L 9, p. 12). Given the dates of the transactions at issue in the main proceedings, regard must be had to those two directives.

10 Pursuant to the first indent of Article 3(1) of Directive 92/12 and Article 1(1)(a) of Directive 2008/118, those directives apply, inter alia, to fuels.

11 Those directives lay down specific rules relating to the movement within the European Union of excise goods under an excise duty suspension arrangement. These rules are laid down in Articles 15 to 21 of Directive 92/12 and Articles 17 to 31 of Directive 2008/118.

12 A 'duty suspension arrangement' is defined in Article 4(7) of Directive 2008/118 as 'a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended'. Article 4(c) of Directive 92/12 which related to 'suspension arrangement[s]' defined that concept in similar terms.

13 For the purposes of Article 4(9) of Directive 2008/118, a 'registered consignee' is defined as 'a natural or legal person authorised by the competent authorities of the Member State of destination, in the course of his business and under the conditions fixed by those authorities, to receive excise goods moving under a duty suspension arrangement from another Member State'. Directive 92/12, which uses the term 'registered trader', defined it in a similar manner in Article 4(d) thereof.

Czech law

14 Article 2(1)(c) of Law No 235/2004 on value added tax, in the version in force at the material time ('the law on VAT'), provided that:

'Tax shall be chargeable on

...

(c) the acquisition of goods from another Member State of the [European Union] for consideration, effected within the national territory, by a taxable person as part of an economic activity or by a legal person not established or founded for business purposes, and the acquisition of a new means of transport from another Member State for consideration by a non-taxable person.'

15 Article 64 of that law, which transposes Article 138 of the VAT Directive into the Czech legal system, provides:

‘(1) The supply of goods to another Member State by the person liable to pay the tax to a person registered for VAT in another Member State, where those goods have been dispatched or transported from the national territory by the person liable to pay the tax or the purchaser or an authorised third person, is exempt from the tax and is tax deductible, other than where the goods are supplied to a person for whom the purchase of the goods in another Member State is not taxable.

...

(3) The supply of excise goods to another Member State by the person liable for payment to a taxable person who is not registered for VAT in another Member State or to a legal person which is not registered for VAT in another Member State, where those goods were dispatched or transported from the national territory by the person liable for payment or the acquirer or an authorised third person, is exempt from tax with the right to deduct the tax, if the dispatch or transport of the goods is carried out in accordance with the law on excise duty, and the purchaser shall become liable to pay the excise duty in the Member State in which the dispatch or transport of the goods ends.

...’

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

16 Arex is a company established in the Czech Republic, which purchased fuel originating in Austria from two Czech companies.

17 Those acquisitions took place at the end of a chain of transactions. Thus, the fuel at issue in the main proceedings was first sold by Doppler Mineralöle GmbH, a company established in Austria, to four companies registered for VAT purposes and established in the Czech Republic (‘the Czech first buyers’). They were then successively resold to several Czech companies, before eventually being sold to Arex.

18 The Czech first buyers entered into an agreement with Garantrans s. r. o., which acted as registered consignee for those buyers. Thus, Garantrans paid the excise duty on the fuel on behalf of the Czech first buyers. The latter did not pay the VAT relating to those transactions in the Czech Republic.

19 The fuel was transported from Austria to the Czech Republic under an excise duty suspension arrangement. Transport was provided by Arex by means of its own vehicles.

20 Following a tax inspection, the Finan?ní ú?ad pro Jiho?eský kraj (South Bohemia tax office, Czech Republic) (‘the tax authority’) found that, for the tax periods relating to the months of January to April, September, November and December 2010, the acquisitions by Arex constituted intra-Community acquisitions. Referring to the judgments of 6 April 2006, *EMAG Handel Eder* (C?245/04, EU:C:2006:232), and of 16 December 2010, *Euro Tyre Holding* (C?430/09, EU:C:2010:786) and noting that, in the event of chain transactions relating to a single intra-Community transport, it can be ascribed only to one transaction, that authority found that the place of acquisition by Arex was in Austria, and not the Czech Republic. Arex obtained the right to dispose of the goods as an owner in Austria, since it bore the risk relating to those goods, and transported the goods to the Czech Republic for its own purposes.

21 By seven additional recovery notices, the tax authority refused Arex the right to deduct the VAT on those acquisitions described by Arex as internal acquisitions, carried out a VAT adjustment and imposed fines upon Arex.

22 By decision of 15 July 2015, the tax directorate rejected the complaint lodged by Arex against those notices. While endorsing the findings of the tax authority, the tax directorate, first, rejected the application of Article 138(2)(b) of the VAT Directive. Next, referring to the judgment of 14 July 2005, *British American Tobacco and Newman Shipping* (C?435/03, EU:C:2005:464), it stated that the chargeability of VAT is not linked to excise duty. Finally, it rejected the arguments of Arex according to which, in view of the excise duty suspension arrangement, that company did not have the right to dispose of the fuel as an owner during transport and before its release for free circulation in the Czech Republic. It also rejected the possibility, put forward by Arex, of splitting a single intra-Community transport into partial transports for VAT purposes.

23 After the rejection of its appeal against that decision by the Krajský soud v ?eských Bud?jovicích (Regional Court, ?eské Bud?jovice, Czech Republic), Arex brought an appeal on a point of law before the referring court.

24 Arex argued, before the referring court, that Article 138(2)(b) of the VAT Directive had not been correctly transposed into the Czech legal system. Under that provision, any supply of goods transported to another Member State under an excise duty suspension arrangement, for a taxable person, is exempt as an intra-Community supply of goods. Having regard to the wording of that provision in Czech, Arex takes the view that the other conditions laid down in that provision, reflected in the subordinate clause beginning with the relative pronoun ‘whose’, apply only to non-taxable legal persons. Accordingly, Arex submits that where it has the status of a taxable person, those conditions are not applicable.

25 Where VAT is not linked to excise duty and where it is appropriate to apply Article 138(1) of the VAT Directive, Arex notes that there can be no transfer of economic ownership in the event of transport under an excise duty suspension arrangement since, even in the event of a transfer of ownership from the point of view of private law, it would be impossible to dispose of the goods in question during transport. In support of that argument, it relies on the accompanying administrative document, which circumscribes the possibility of disposing of the goods during transport under that arrangement, and submits that the judgments of 6 April 2006, *EMAG Handel Eder* (C?245/04, EU:C:2006:232), and of 16 December 2010, *Euro Tyre Holding* (C?430/09, EU:C:2010:786), did not address the issue of the transport of goods subject to excise duty.

26 Having regard to those arguments, the referring court questions whether the purchases, by Arex, of fuel transported under an excise duty suspension arrangement are to be qualified as internal acquisitions or intra-Community acquisitions.

27 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Must any taxable person be regarded as a taxable person within the meaning of Article 138(2)(b) of [the VAT Directive]? If not, to which taxable persons does that provision apply?

(2) If the [Court]’s answer is that Article 138(2)(b) of the VAT Directive applies to a situation such as that in the main proceedings (that is, the acquirer of the products is a taxable person registered for tax), must that provision be interpreted as meaning that, where the dispatch or transport of those products takes place in accordance with the relevant provisions of [Directive 2008/118], a supply connected with a procedure under [Directive 2008/118] must be regarded as a supply entitled to exemption under that provision, even though the conditions for exemption under Article 138(1) of the VAT Directive are not otherwise satisfied, having regard to the assignment of the transport of goods to another transaction?

(3) If the [Court]’s answer is that Article 138(2)(b) of the VAT Directive does not apply to a situation such as that in the main proceedings, is the fact that the goods are transported under an excise duty suspension arrangement decisive for deciding the question of which of several successive supplies the transport is to be ascribed to for the purposes of the right to exemption from VAT under Article 138(1) of the VAT Directive?’

The request to have the oral procedure reopened

28 By letter lodged at the Court Registry on 31 July 2018, the lawyer representing Arex before the referring court requested the Court to order the reopening of the oral part of the procedure pursuant to Article 83 of the Rules of Procedure of the Court.

29 That request follows the transmission, by the Court Registry, of a letter dated 13 July 2018 to Arex’s representative before the referring court, informing him, inter alia, of the fact that since Arex was not validly represented at the time of the hearing in the present case, its oral submissions could not be taken into account for the purposes of the present proceedings.

30 While setting out the reasons and circumstances which, in his view, led to the lack of valid representation, Arex’s representative before the referring court took the view that it was a defect capable of being rectified and requested the reopening of the oral part of the procedure in order to allow Arex to submit its observations.

31 In that regard, it must be borne in mind that, in accordance with Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

32 In the present case, the Court takes the view, having heard the Advocate General, that the conditions for reopening the oral part of the procedure are not met. The circumstances relied on by Arex's representative before the referring court do not fulfil the criteria laid down for a reopening of the oral part of the procedure. In any event, the Court considers that it has all the information necessary to rule on the request for a preliminary ruling and that there is no need to respond to that request on the basis of an argument which was not debated before it.

33 Accordingly, there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

Preliminary observations

34 In the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgments of 14 October 2010, *Fuß*, C?243/09, EU:C:2010:609, paragraph 39 and the case-law cited, and of 19 October 2017, *Otero Ramos*, C?531/15, EU:C:2017:789, paragraph 39).

35 Consequently, even if, formally, the referring court limited its questions to the interpretation of Article 138(1) and (2)(b) of the VAT Directive, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in that regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (see, to that effect, judgments of 14 October 2010, *Fuß*, C?243/09, EU:C:2010:609, paragraph 40 and the case-law cited, and of 19 October 2017, *Otero Ramos*, C?531/15, EU:C:2017:789, paragraph 40).

36 In the present case, it should be observed that, by its questions, the referring court in essence wishes to know whether acquisitions such as those at issue in the main proceedings are subject to VAT in the Czech Republic as intra-Community acquisitions of goods dispatched or transported from another Member State.

37 Article 138(1) and (2)(b) of the VAT Directive lays down the conditions for the exemption from VAT of intra-Community supplies of goods and not the conditions for the levying of VAT on intra-Community acquisitions, which are set out in Article 2(1)(b)(i) and (iii) of that directive.

38 Accordingly, the questions referred should be reformulated inasmuch as they relate, as regards the first and second questions, to the interpretation of Article 2(1)(b)(iii) of the VAT Directive and, as regards the third question, to Article 2(1)(b)(i) of that directive.

The first question

39 By its first question, the referring court seeks, in essence, to ascertain whether Article 2(1)(b)(iii) of the VAT Directive must be interpreted as meaning that it applies to intra-Community acquisitions of excise goods, for which the excise duty is chargeable in the Member State of

destination of the dispatch or transport of those goods, carried out by any taxable person, or only to acquisitions by a taxable person whose other acquisitions are not subject to VAT pursuant to Article 3(1) of that directive.

40 According to settled case-law, when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, to that effect, judgments of 19 September 2000, *Germany* v *Commission*, C?156/98, EU:C:2000:467, paragraph 50, and of 19 April 2018, *Firma Hans Bühler*, C?580/16, EU:C:2018:261, paragraph 33).

41 Under Article 2(1)(b)(iii) of the VAT Directive, intra-Community acquisitions of goods for consideration within the territory of a Member State are subject to VAT, provided, in the case of excise goods for which excise duty has become chargeable within the territory of that Member State, that they are carried out by a taxable person or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1) of that directive.

42 First of all, it should be noted that the wording of Article 2(1)(b)(iii) of the VAT Directive does not make it possible to determine clearly if the subordinate clause ‘whose other acquisitions are not subject to VAT pursuant to Article 3(1) [of that directive]’ refers to both taxable persons and non-taxable legal persons mentioned in the first of those provisions or whether it covers only the latter persons.

43 Several language versions of that provision make use of an indefinite pronoun likely to reflect both the singular and the plural. Such is the case, in particular, of the versions in German (‘*deren*’), Estonian (‘*kelle*’), Spanish (‘*cuyas*’), French (‘*dont*’), Italian (‘*i cui*’) or English (‘*whose*’) of that provision. Other language versions use pronouns in the plural. This is the case of the Greek (‘*??? ??????*’), Latvian (‘*kuru*’) and Polish (‘*w przypadku których*’). Finally, the Czech version of that provision contains a word in the singular, which can only target the non-taxable legal person (‘*jejíž* ’).

44 Secondly, as regards the objectives of Article 2(1)(b)(iii) of the VAT Directive, it should be noted that that provision is part of the transitional arrangements for VAT applicable to intra-Community trade established by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1). The transitional arrangements are based on a new chargeable event for VAT purposes, namely the intra-Community acquisition of goods, enabling the transfer of the tax revenue to the Member State in which final consumption of the goods supplied takes place. The arrangements are intended to ensure a clear demarcation of the sovereignty of the Member States in matters of taxation (see, to that effect, judgments of 18 November 2010, *X*, C?84/09, EU:C:2010:693, paragraphs 22 and 23 and the case-law cited, and of 14 June 2017, *Santogal M-Comércio e Reparação de Automóveis*, C?26/16, EU:C:2017:453, paragraphs 37 and 38).

45 Thus, any intra-Community acquisition taxed in the Member State of destination of the dispatch or transport of the goods (‘the Member State of destination’) leads to an exempt intra-Community supply in the Member State in which dispatch or transport of the goods began (hereinafter ‘the Member State of origin’). Therefore, the provisions relating to the intra-Community acquisition and to the intra-Community supply of goods must be given identical meaning and scope (see, to that effect, judgments of 6 April 2006, *EMAG Handel Eder*, C?245/04, EU:C:2006:232, paragraph 29, and of 26 July 2017, *Toridas*, C?386/16, EU:C:2017:599, paragraph 31 and the case-law cited).

46 Thirdly, as regards the context of Article 2(1)(b)(iii) of the VAT Directive, it should be noted

that that provision forms part of a set of rules governing the application of VAT to intra-Community acquisitions and the exemption of the corresponding intra-Community supplies of goods. Those rules are set out, respectively, in Articles 2 and 3 and Articles 138 and 139 of that directive.

47 On the one hand, under Article 2(1)(b)(i) of the VAT Directive, intra-Community acquisitions of goods for consideration by a taxable person acting as such or by a non-taxable legal person, are, under certain conditions relating to the seller, subject to VAT in the Member State of destination, whereas, under Article 138(1) of that directive, the corresponding intra-Community supplies of goods are exempt therefrom in the Member State of origin.

48 In that regard, it should be noted that, in view of the considerations set out by the Advocate General in point 41 of her Opinion, the material scope of those provisions covers all ‘goods’, and that the concept of ‘goods’ covers excise goods. It follows that, to the extent that the other conditions relating to the seller laid down in those provisions are fulfilled, intra-Community transactions involving excise goods are exempt from VAT in the Member State of origin as an intra-Community supply of goods and are subject to VAT in the Member State of destination as an intra-Community acquisition in accordance with, respectively, Article 138(1) and Article 2(1)(b)(i) of the VAT Directive.

49 Where the intra-Community acquisition of ‘goods’ by a taxable person is already subject to VAT under Article 2(1)(b)(i) of the VAT Directive, to provide for the taxation of the acquisition by that taxable person of excise goods under Article 2(1)(b)(iii) of that directive is redundant, since such taxation is already provided for in the first provision, taking account also of the considerations set out in the preceding paragraph of the present judgment.

50 On the other hand, by way of derogation from Article 2(1)(b)(i) of the VAT Directive, Article 3(1) thereof precludes, however, certain intra-Community acquisitions carried out by a taxable person or a non-taxable legal person from being subject to VAT. At the same time, the second subparagraph of Article 139(1) of that directive provides that the exemption provided for in Article 138(1) thereof does not apply to the supply of goods corresponding to the acquisitions referred to in Article 3(1) of that directive.

51 In the light of those considerations, Article 2(1)(b)(iii) of the VAT Directive applies where intra-Community acquisitions carried out by a taxable person or non-taxable legal person are not subject to taxation under Article 3(1) of that directive.

52 It follows that, where an acquisition is carried out by a taxable person, it is not any taxable person, but only taxable persons whose other intra-Community acquisitions are not subject to VAT pursuant to the latter provision which fall within the scope of Article 2(1)(b)(iii) of that directive for the purposes of VAT becoming chargeable on their intra-Community acquisitions of excise goods for which the excise duty is chargeable in the Member State of destination.

53 In that regard, as the Advocate General observed in points 42 and 43 of her Opinion, that interpretation is borne out by the wording of Article 138(2)(b) of the VAT Directive from which it is apparent, in essence, that, 'in addition to the supply of goods referred to in paragraph 1' of Article 138, the intra-Community supply of goods corresponding to the acquisitions referred to in Article 2(1)(b)(iii) of that directive are exempted where they are carried out, in the circumstances set out therein, for taxable persons or non-taxable legal persons, whose intra-Community acquisitions of goods other than excise goods are not subject to VAT pursuant to Article 3(1) of that directive. As noted by the Advocate General in point 43 of her Opinion, it is apparent from the choice of words introducing the exemptions listed in Article 138(2) of the VAT Directive that that set out in point (b) of that provision has a prescriptive content which goes beyond the exemption provided for in Article 138(1) of that directive.

54 The interpretation set out in paragraph 52 of the present judgment is also consistent with the objective, set out in recital 36 of the VAT Directive, of achieving some alignment of the rules for the levying of VAT on certain intra-Community acquisitions of excise goods with the procedures and obligations concerning the duty to declare in the case of shipment of such products to another Member State, laid down in Directives 92/12 and 2008/118. Since Article 2(1)(b)(iii) of the VAT Directive is applicable to the intra-Community acquisitions of excise goods for which excise duty is chargeable in the Member State of destination, that interpretation entails that those acquisitions are subject to VAT in that Member State, even where the purchaser's other acquisitions are not subject to VAT pursuant to Article 3(1) of the directive.

55 In the present case, subject to verification by the referring court, which alone has jurisdiction to find and assess the facts pertaining to the dispute in the main proceedings, it is not apparent from the file before the Court that Arex's other intra-Community acquisitions are covered by the derogations laid down in Article 3(1) of the VAT Directive. In the event that the referring court, on the basis of its own assessment of all of the circumstances of the dispute in the main proceedings, reaches such a conclusion, it would be appropriate to apply Article 2(1)(b)(i) of the VAT Directive rather than Article 2(1)(b)(iii) of that directive in order to determine whether the acquisitions by Arex of the fuel at issue in the main proceedings must be subject to VAT in the Member State of destination as intra-Community acquisitions.

56 In the light of the foregoing, the answer to the first question is that Article 2(1)(b)(iii) of the VAT Directive must be interpreted as meaning that it applies to intra-Community acquisitions of excise goods, in respect of which the excise duty is chargeable in the Member State of destination, carried out by a taxable person whose other acquisitions are not subject to VAT pursuant to Article 3(1) of that directive.

The second question

57 By its second question, the referring court seeks, in essence, to ascertain whether Article 2(1)(b)(iii) of the VAT Directive must be interpreted as meaning that, where there is a chain of successive acquisitions concerning the same excise goods which gave rise only to a single intra-Community transport of those goods under an excise duty suspension arrangement, the acquisition carried out by the trader liable for payment of those duties in the Member State of destination must be classified as an intra-Community acquisition subject to VAT under that provision, even where that transport cannot be ascribed to that acquisition.

58 According to the information contained in the order for reference, it appears that it is the Czech first buyers, rather than Arex, which are the persons liable for payment of the excise duty on the fuel at issue in the main proceedings. In those circumstances, the second question seeks to determine whether the intra-Community transport at issue in the main proceedings must

necessarily be ascribed to the acquisition by those purchasers, since they are liable for payment of the excise duty, and may not be ascribed to another acquisition, in this case by Arex.

59 In that regard, it follows from the wording of Article 2(1)(b)(iii) of the VAT Directive, as set out in paragraph 41 of the present judgment, that the liability to pay VAT, pursuant to that provision, for intra-Community acquisitions of excise goods in the Member State of destination, is subject to three cumulative conditions.

60 It presupposes, first, that the transaction constitutes an intra-Community acquisition within the meaning of Article 20 of the VAT Directive; secondly, that the transaction concerns excise goods for which the excise duty is due in the Member State of destination; and, thirdly, that the transaction is carried out by a taxable person or a non-taxable legal person whose other acquisitions are not subject to VAT pursuant to Article 3(1) of that directive.

61 As regards the first of those conditions, it should be recalled that the intra-Community acquisition of goods, within the meaning of Article 20 of the VAT Directive, is effected when the right to dispose of the goods as an owner has been transferred to the purchaser, when the supplier establishes that those goods have been dispatched or transported to another Member State and when, as a result of that dispatch or that transport, they have physically left the territory of the Member State of origin (see, to that effect, judgments of 27 September 2007, *Teleos and Others*, C?409/04, EU:C:2007:548, paragraphs 27 and 42, and of 18 November 2010, *X*, C?84/09, EU:C:2010:693, paragraph 27). The condition relating to the crossing of borders between Member States is a constituent element of intra-Community acquisitions (see, to that effect, judgment of 27 September 2007, *Teleos and Others*, C?409/04, EU:C:2007:548, paragraph 37).

62 Only an acquisition that satisfies all those conditions may be classified as an intra-Community acquisition.

63 Therefore, where several acquisitions for consideration give rise to a single intra-Community dispatch or intra-Community transport of goods, that dispatch or transport can only be ascribed to one of those acquisitions, which will alone be subject to VAT in the Member State of destination as an intra-Community acquisition provided that the other conditions laid down in Article 2(1) of the VAT Directive are met (see, by analogy, judgment of 6 April 2006, *EMAG Handel Eder*, C?245/04, EU:C:2006:232, paragraph 45).

64 Such an interpretation is necessary in order to achieve in a simple way the objective, pursued by the transitional arrangements for intra-Community transactions, of transferring, as is apparent from paragraph 44 of the present judgment, the tax revenue to the Member State in which final consumption of the goods supplied took place. That transfer occurs upon the single transaction giving rise to an intra-Community movement (see, by analogy, judgment of 6 April 2006, *EMAG Handel Eder*, C?245/04, EU:C:2006:232, paragraph 40).

65 As regards the second condition referred to in paragraph 60 of the present judgment, it should be clarified that the chargeability of excise duty in the Member State of destination presupposes the dispatch or transport of excise goods under an excise duty suspension arrangement in accordance with the provisions of Directive 92/12 or Directive 2008/118. That condition reflects the objective set out in recital 36 of the VAT Directive to make excise goods subject to excise duty and VAT in the same Member State.

66 However, that condition in no way suggests that the acquisition by the taxable person or the non-taxable legal person referred to in Article 2(1)(b)(iii) of the VAT Directive, which are liable to pay the excise duty, must be subject to VAT under that provision in the Member State of destination, even if the intra-Community transport cannot be ascribed to that acquisition.

67 An interpretation according to which the acquisition should be subject to VAT under that provision even if the intra-Community transport cannot be ascribed to it would, moreover, be contrary to the cumulative nature of the conditions referred to in paragraph 60 of the present judgment. It would make it possible to apply VAT in the Member State of destination to an acquisition which is not linked to an intra-Community transport and which thus does not fulfil all the conditions required in order to be classified as an intra-Community acquisition.

68 In the light of the foregoing, the answer to the second question is that Article 2(1)(b)(iii) of the VAT Directive must be interpreted as meaning that, in a chain of successive transactions which gave rise only to a single intra-Community transport of excise goods under an excise duty suspension arrangement, the acquisition carried out by the trader liable for payment of the excise duty in the Member State of destination may not be classified as an intra-Community acquisition subject to VAT under that provision, where that transport cannot be ascribed to that acquisition.

The third question

69 By its third question, the referring court seeks, in essence, to ascertain whether Article 2(1)(b)(i) of the VAT Directive must be interpreted as meaning that, where there is a chain of successive acquisitions concerning the same excise goods and which gave rise only to a single intra-Community transport of those goods under an excise duty suspension arrangement, the fact that those goods are transported under that arrangement constitutes a decisive factor in determining to which acquisition the transport is to be ascribed for the purposes of applying VAT under that provision.

70 In that regard, it follows from the case-law on the interpretation of Article 138(1) of the VAT Directive that, as regards transactions which form a chain of two successive supplies which gave rise to only a single intra-Community transport, the intra-Community transport can be ascribed to only one of the two supplies, which, therefore, will alone be exempt under that provision, and that, in order to determine which of the two supplies the intra-Community transport must be ascribed to, a global assessment of all the circumstances of the individual case must be made. In that assessment, it is appropriate in particular to determine when the second transfer of the right to dispose of the goods as an owner to the person finally acquiring the goods occurred. In the situation where the second transfer of that right, that is the second supply, occurred before the intra-Community transport took place, the intra-Community transport cannot be ascribed to the first supply to the first buyer (see, to that effect, judgment of 26 July 2017, *Toridas*, C?386/16, EU:C:2017:599, paragraphs 34 to 36 and the case-law cited).

71 In the light of the objective referred to in paragraph 64 of the present judgment, the case-law cited in the preceding paragraph must be applied to the assessment of operations which, like that at issue in the main proceedings, form a chain of several successive acquisitions of excise goods that gave rise to only a single intra-Community transport.

72 Therefore, in order to determine to which of the acquisitions of the chain at issue in the main proceedings the intra-Community transport must be ascribed and which must, therefore, be classified as an intra-Community acquisition, it is for the referring court to carry out an overall assessment of all the specific circumstances of the individual case and to determine, in particular, when the transfer to Arex of the right to dispose of the goods as an owner occurred. In the event

that the transfer took place before the intra-Community transport occurred, that transport must be ascribed to the acquisition by Arex and that acquisition must therefore be classified as an intra-Community acquisition.

73 In the context of that overall assessment, the fact that the fuel transport at issue in the main proceedings was carried out under an excise duty suspension arrangement is not, however, a decisive factor in determining to which of the acquisitions of the chain at issue in the main proceedings that transport must be ascribed.

74 The case-law cited in paragraph 70 of the present judgment in essence makes the ascription of the transport to one or other acquisition in a chain of successive acquisitions dependent on a temporal criterion, in that it focuses on the time at which the conditions relating to the intra-Community transport and to the transfer of the right to dispose of property as owner are respectively fulfilled.

75 With regard to the latter condition, it is apparent from the case-law of the Court that it is not restricted to the transfer 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 actually to dispose of it as if he were its owner (see, to that effect, judgment of 3 June 2010, *De Fruytier*, C?237/09, EU:C:2010:316, paragraph 24 and the case-law cited). A transfer of the power to dispose of tangible property as owner does not require that the party to whom the property is transferred must physically possess it or that it must be physically transported to and/or received by that party (order of 15 July 2015, *Itales*, C?123/14, not published, EU:C:2015:511, paragraph 36).

76 It should be noted that Directives 92/12 and 2008/118 lay down general arrangements for excise duty in respect of excise goods. Although those directives provide, for those purposes, inter alia requirements applicable to transport under an excise duty suspension arrangement, they in no way affect the conditions for the transfer of the ownership of goods or of the right to dispose of them as an owner.

77 Furthermore, the Court has already held that the chargeable event for VAT, by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled, is the supply or import of the goods, not the levying of excise duty on the latter (judgment of 14 July 2005, *British American Tobacco and Newman Shipping*, C?435/03, EU:C:2005:464, paragraph 41).

78 In the present case, it is apparent from the documents before the Court that, after having acquired the fuel in question in the main proceedings from its Czech contractual partners, Arex took possession thereof by loading them, in Austria, into its own tanks prior to transporting them, by its own means of transport, from Austria to the Czech Republic. It is also apparent from those documents that Arex appears to have transferred the ownership of those goods, under Czech private law, at the time of loading. Subject to verification by the referring court, it thus appears from those factors that the single intra-Community transport occurred after the transfer of the right to dispose of the goods as an owner to Arex, as a result of which the acquisitions carried out by the latter must be classified as intra-Community acquisitions.

79 In the light of the foregoing, the answer to the third question is that Article 2(1)(b)(i) of the VAT Directive must be interpreted as meaning that, where there is a chain of successive acquisitions concerning the same excise goods and which gave rise only to a single intra-Community transport of those goods under an excise duty suspension arrangement, the fact that those goods are transported under that arrangement does not constitute a decisive factor in determining to which acquisition the transport is to be ascribed for the purposes of applying VAT under that provision.

Costs

80 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 (Fourth Chamber) hereby rules:

1. **Article 2(1)(b)(iii) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that it applies to intra-Community acquisitions of excise goods, in respect of which the excise duty is chargeable in the Member State of destination of the dispatch or transport of those goods, carried out by a taxable person whose other acquisitions are not subject to value added tax pursuant to Article 3(1) of that directive.**

2. **Article 2(1)(b)(iii) of Directive 2006/112 must be interpreted as meaning that, in a chain of successive transactions which gave rise only to a single intra-Community transport of excise goods under an excise duty suspension arrangement, the acquisition carried out by the trader liable for payment of the excise duty in the Member State of destination of the dispatch or transport of those goods cannot be classified as an intra-Community acquisition subject to value added tax under that provision, where that transport cannot be ascribed to that acquisition.**

3. **Article 2(1)(b)(i) of Directive 2006/112 must be interpreted as meaning that, where there is a chain of successive acquisitions concerning the same excise goods and which gave rise only to a single intra-Community transport of those goods under an excise duty suspension arrangement, the fact that those goods are transported under that arrangement does not constitute a decisive factor in determining to which acquisition the transport is to be ascribed for the purposes of applying value added tax under that provision.**

[Signatures]

* Language of the case: Czech.