Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

29 February 2024 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Derogation provided for in Article 90(2) – Taxable amount – Reduction of the taxable amount – Total or partial non-payment of the price – Limitation period regarding applications for a subsequent reduction in the taxable amount of VAT – Date from which the limitation period begins to run – Taxable person's entitlement to interest)

In Case C?314/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 4 May 2022, received at the Court on 11 May 2022, in the proceedings

'Consortium Remi Group' AD

v

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Tenth Chamber),

composed of Z. Csehi (Rapporteur), President of the Chamber, M. Ileši? and D. Gratsias, Judges,

Advocate General: J. Kokott,

Registrar: R. Stefanova?Kamisheva, Administrator,

having regard to the written procedure and further to the hearing on 12 May 2023,

after considering the observations submitted on behalf of:

– the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by M. Koleva and S. Petkov,

– the Bulgarian Government, by T. Mitova, acting as Agent,

– the European Commission, by D. Drambozova and J. Jokubauskait?, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns, in particular, the interpretation of Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

(OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between ‘Consortium Remi Group’ AD and the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Varna ‘Tax and Social Security Appeals and Practice Board’ of the National Public Revenue Agency, Bulgaria) (‘the Director’) concerning the Director’s refusal to grant Consortium Remi Group an adjustment of the amount of value added tax (VAT) paid by it in respect of the unpaid debts of its debtors.

Legal context

European Union law

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

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

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

The VAT Directive

4 Article 63 of the VAT Directive provides:

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

5 Article 73 of that directive provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

6 Article 90 of that directive is worded as follows:

‘1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.’

7 Article 185 of that directive provides:

‘1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts

of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.'

8 The first paragraph of Article 273 of the VAT Directive provides:

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

Bulgarian law

9 Article 115 of the zakon za danak varhu dobavenata stoynos (Law on value added tax, DV No 63 of 4 August 2006), that entered into force on 1 January 2007, in the version applicable to the dispute in the main proceedings ('the ZDDS'), states:

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

(2) … The note shall be issued within five days of the event referred to in paragraph 1 and, where it concerns a supply in respect of which an invoice has been issued showing the VAT invoiced on payment of a deposit, within five days of the date of reimbursement, set off, or other non-gratuitous payment of the amount of the stipulated deposit, and shall relate to the amount of the reimbursement, set off or other non-gratuitous payment.

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

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

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

2. the reason for issuing it;

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

…

(7) … A note relating to an invoice need not state the matters required by Article 114(1)(12), (14) and (15) unless the place of performance of the transaction to which it relates is in the territory of a Member State, or unless it relates to an intra-Community transaction or distance sale of goods.'

10 Article 116 of the ZDDS is worded as follows:

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

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

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

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

1. the reason for cancellation;

2. the number and date of the cancelled document;

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

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

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

11 Article 128(1) of the Danachno-osiguritelnia protsesualen kodeks (Tax and Social Security Procedural Code) (DV No 105 of 29 December 2005), in force since 1 January 2006 ('the DOPK'), in the version applicable to the dispute in the main proceedings, provides:

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

12 Article 129 of the DOPK states:

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

…

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

…

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

13 Article 110 of the zakon za zadalzheniyata i dogovorite (Law on Obligations and Contracts) (DV No 275 of 22 November 1950), in the version applicable to the dispute in the main proceedings ('the ZZD'), provides:

'The passage of a limitation period of five years leads to the extinction of any debt for which the law doesn't provide otherwise.

…'

14 Article 116 of the ZZD states:

'The limitation period stops running:

(a) when the debtor recognises the debt;

(b) by the bringing of an action or the lodging of an objection or a request for conciliation; if the action, objection or request for conciliation is not granted, the limitation period is deemed to have not been suspended;

(c) by adopting enforcement proceedings.

…'

15 Article 117 of the ZZD is worded as follows:

'From the interruption of the limitation period, a new limitation period starts to run.

If the debt was determined by a judicial decision, the new limitation period is five years in all cases.

…'

16 Article 120 of the ZZD provides:

'The rule on limitation does not apply automatically.'

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

17 Consortium Remi Group is engaged in the construction of buildings and facilities. It was registered for VAT purposes on 16 June 1995 and was deregistered on 7 March 2019 on account of a systematic failure to fulfil its obligations under the ZDDS. By judgment of 18 September 2020, the Okrazhen sad Varna (Regional Court, Varna, Bulgaria), declared Consortium Remi Group insolvent and insolvency proceedings were opened.

18 In respect of the period from 2006 to 2010 and in respect of 2012, Consortium Remi Group sent invoices to five companies, namely 'Promes' OOD, 'Orkid Sofia Hills' EOOD, 'Valentin Stoyanov' EOOD, 'Sunshine Coast Investment' EOOD and 'Mosstroy-Varna' AD ('the debtor companies'). Those invoices indicated the VAT and, in respect of most of the VAT periods, the VAT was paid. Nonetheless, on account of the failure by the debtor companies to pay those invoices, the total amount of the debts of Consortium Remi Group concerning the VAT relating to those invoices amounts to 618 171.16 Bulgarian leva (BGN) (approximately EUR 309 085).

19 By a tax assessment notice of 31 January 2011, Consortium Remi Group's liabilities under the ZDDS were established, for the period from 1 January 2007 to 31 July 2010, which included the VAT referred to in the invoices sent to Sunshine Coast Investment. Consortium Remi Group brought legal proceedings challenging that notice but its action was dismissed by the court of first instance, whose decision was confirmed by a judgment of the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).

20 By an application of 7 February 2020, submitted pursuant to Article 129(1) of the DOPK ('the application for set-off'), Consortium Remi Group sought from the Bulgarian tax administration, on the basis of Article 128(1) of the DOPK, a set-off of its VAT liabilities in the amount of BGN 618 171.16 together with interest for late payment, which equated to the VAT declared and paid in respect of the invoices sent to the debtor companies. In the annex to its application for set-off, Consortium Remi Group submitted a 'list of the amounts unpaid by the counterparties'.

21 That application was, however, rejected on the ground that it had been submitted after the expiry of the limitation period laid down in Article 129(1) of the DOPK. In addition, it was found that Consortium Remi Group had not adduced evidence of a total or partial non-payment of the debts concerning the VAT invoiced to the debtor companies.

22 During the administrative appeal of the decision that rejected that application, Consortium Remi Group submitted decisions initiating insolvency proceedings adopted concerning the debtor companies as well as evidence showing that those debts had been accepted by the liquidators of the debtor companies and that they were contained in the schedules of claims accepted drawn up in the context of the insolvency proceedings.

23 The decision to reject the application for set-off was confirmed in its entirety by a decision adopted on 22 May 2020 by the Director.

24 Consortium Remi Group brought an action before the Administrativen sad Varna (Administrative Court, Varna, Bulgaria) directed against the decision rejecting the application for set-off, confirmed by the Director, which that court rejected. It brought an appeal on a point of law against that judgment before the Varhoven administrativen sad (Supreme Administrative Court), which is the referring court, submitting that, in accordance with Article 90(1) of the VAT Directive, the taxable amount for VAT purposes should be reduced in cases where the taxable person did not receive all or part of the consideration due following the delivery of goods or supply of services that were made, and that that provision has direct effect and should therefore be applied where the national provisions infringe it.

25 The referring court states that Bulgarian law makes no provision for a reduction in the taxable amount of VAT in the case of non-payment, Article 115 of the ZDDS providing for such a reduction only in the event of termination of a transaction.

26 Relying on the reasoning of the Court in the judgments of 23 November 2017, *Di Maura* (C?246/16, EU:C:2017:887, paragraphs 21 to 27), and of 3 July 2019, *UniCredit Leasing* (C?242/18, EU:C:2019:558, paragraphs 62 and 65), the referring court considers that, as Consortium Remi Group maintains, the possibility of refunding VAT in the event of non-payment of the price cannot be totally excluded, notwithstanding the derogation provided for in Article 90(2) of the VAT Directive. That is the case, in particular, where the taxable person proves that, in view of the circumstances, the obligation to pay an invoice, on the part of the recipient of that invoice, is unlikely to be fulfilled.

27 According to the referring court, the derogation provided for in Article 90(2) of that directive

was not taken into account in specific legislation in Bulgaria, both in so far as the manner in which the tax base is adjusted where the obligation to pay a VAT debt is not likely to be fulfilled and with regard to the conditions in which the refunding of the VAT paid may be requested.

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

‘(1) In the event of a derogation in accordance with Article 90(2) of the VAT Directive, do the principle of neutrality and Article 90 of that directive allow a provision of national law such as the second sentence of Article 129(1) of the [DOPK], which provides for a limitation period for the submission of an application for a set-off or refund of the tax charged by the taxable entity in respect of the supply of goods or services in the event of total or partial non-payment by the recipient of the supply?

(2) Irrespective of the answer to the first question, in the circumstances of the main proceedings, is it a necessary condition for the recognition of the right to a reduction in the taxable amount under Article 90(1) of the VAT Directive that the taxable entity corrects the invoice which it has issued, as regards the VAT charged, on account of total or partial non-payment by the recipient of the price of the supply under the invoice, before submitting the application for a refund?

(3) Depending on the answers to the first two questions: How must Article 90(1) of the VAT Directive be interpreted when determining the time at which the ground for a reduction of the taxable amount arises in the event of total or partial non-payment of the price where there is no national provision in place on account of a derogation from Article 90(1)?

(4) How must the reasoning in the judgments of [23] November 2017, … *Di Maura* (C?246/16, EU:C:2017:887, paragraphs 21 to 27), and of 3 July 2019, *UniCredit Leasing* (C?242/18, EU:C:2019:558, paragraphs 62 and 65) be applied if Bulgarian law does not contain any specific conditions for the application of the derogation under Article 90(2) of the VAT Directive?

(5) Are the principle of neutrality and Article 90 of the VAT Directive consistent with a tax and insurance practice under which, in the event of non-payment, no correction of the tax charged is permitted until the recipient of the supplies or services – provided that the recipient is a taxable entity – has been notified of the cancellation of the tax, so that the deduction initially made by the recipient is corrected?

(6) Does the interpretation of Article 90(1) of the [VAT Directive] permit the assumption that a possible right to a reduction of the taxable amount in the event of total or partial non-payment gives rise to a right to a refund of the VAT paid by the supplier, plus interest for late payment, and from what point in time?’

The jurisdiction of the Court

29 According to settled case-law, the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State’s accession to the European Union (judgement of 17 December 2020, *FRANCK*, C?801/19, EU:C:2020:1049, paragraph 16 and the case-law cited).

30 It follows, in particular, that the Court is not competent to interpret EU directives relating to VAT where the recovery of taxes at issue in the main proceedings pre-dates the accession of the Member State concerned to the European Union (judgment of 3 July 2019, *UniCredit Leasing*, C?242/18, EU:C:2019:558, paragraph 31).

31 Since the obligation to adjust is inextricably linked to the chargeability of the VAT due or paid as input tax and the right to deduct resulting therefrom, the appearance, after the accession of a Member State to the European Union, of factors which are, in principle, capable of justifying this requirement does not allow the Court to interpret the VAT Directive if the supply of goods or services is made before that accession (judgment of 27 June 2018, *Varna Holideis*, C?364/17, EU:C:2018:500, paragraph 31).

32 In the present case, the dispute in the main proceedings relates to the taxable periods for VAT purposes in respect of the years 2006 to 2010 and in respect of the year 2012. Accordingly, the Court has no jurisdiction to rule on the questions referred for a preliminary ruling in so far as they concern the supplies of goods or services that took place in 2006, occurring before the accession of the Republic of Bulgaria, on 1 January 2007, to the European Union.

Consideration of the questions referred

The first, third and fourth questions

33 By way of a preliminary observation, it should be pointed out that, in order to provide a useful answer to the referring court, the Court of Justice may deem it necessary to consider provisions of EU law to which the national court has not referred in its questions, in particular by extracting from the statement of grounds in the order for reference the elements of EU law which, having regard to the subject matter of the dispute, require interpretation (judgment of 2 March 2023, *Åklagarmyndigheten*, C?666/21, EU:C:2023:149, paragraph 22 and the case-law cited).

34 In the present case, whilst, in the wording of the questions referred for a preliminary ruling, the referring court only made reference to the principle of fiscal neutrality, that factor does not prevent the consideration of other general principles of EU law that may be relevant in dealing with those questions.

35 Accordingly, it should be considered that, by its first, third and fourth questions, which it is necessary to examine together, the referring court asks, in essence, whether, taking into account the derogation provided for in Article 90(2) of the VAT Directive, Article 90(1) of that directive, read in conjunction with the principles of fiscal neutrality, proportionality and effectiveness, must be interpreted as precluding legislation of a Member State which provides for a limitation period to apply for a VAT refund resulting from a reduction in the taxable amount of VAT in the event of total or partial non-payment of an invoice issued by a taxable person, and, if not, from which date such a limitation period must begin to run, in the absence of specific national provisions in that regard.

36 It should be recalled that Article 90(1) of the VAT Directive provides that, in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly under conditions which are to be determined by the Member States. That provision requires the Member States to reduce the taxable amount for VAT purposes and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding

the tax which the taxable person received (judgment of 11 November 2021, *ELVOSPOL*, C?398/20, EU:C:2021:911, paragraphs 24 and the 25).

37 Article 90(2) of the VAT Directive, for its part, provides that, in the case of total or partial non-payment of consideration, Member States may derogate from the obligation to reduce the taxable amount for VAT purposes provided for in Article 90(1) of that directive.

38 In that regard, the Court has already held that a national provision which, in setting out the situations in which the taxable amount is reduced, does not refer to the situation of non-payment of the transaction price must be regarded as the result of the exercise by the Member State of the power of derogation granted it under Article 90(2) of the VAT Directive (judgment of 3 July 2019, *UniCredit Leasing*, C?242/18, EU:C:2019:558, paragraph 60 and the case-law cited).

39 In the present case, it follows from both the order for reference and the oral observations of the Bulgarian Government that the national legislation, setting out in Article 115(1) of the ZDDS the situations in which the tax base is corrected, does not provide for any correction in the event of non-payment of the price of the transaction subject to VAT.

40 Accordingly, as regards the period at issue in the main proceedings, the Republic of Bulgaria must be regarded as having exercised its power to derogate from the obligation to reduce the taxable amount in the event of non-payment, with the result that the taxable person cannot rely on such a right (see, to that effect, judgment of 3 July 2019, *UniCredit Leasing*, C?242/18, EU:C:2019:558, paragraph 61).

41 Nevertheless, according to settled case-law of the Court, that option to derogate, which is strictly limited to situations of total or partial non-payment, is based on the notion that, in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary (judgment of 11 November 2021, *ELVOSPOL*, C?398/20, EU:C:2021:911, paragraph 27 and the case-law cited).

42 It follows that the exercise of that option to derogate must be justified if the measures taken by the Member States for its implementation are not to undermine the objective of fiscal harmonisation pursued by the VAT Directive, and it cannot allow the Member States to exclude altogether reduction of the taxable amount for VAT purposes in the event of non-payment (judgment of 11 November 2021, *ELVOSPOL*, C?398/20, EU:C:2021:911, paragraph 28 and the case-law cited).

43 Indeed, to accept that it is possible for Member States to exclude any reduction of the taxable amount for VAT purposes in the event of definitive non-payment would run counter to the principle of the neutrality of VAT, which means, inter alia, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of its economic activities which are themselves subject to VAT (judgment of 11 November 2021, *ELVOSPOL*, C?398/20, EU:C:2021:911, paragraph 31 and the case-law cited).

44 In that regard, it should be recalled that, first, Article 90(1) of the VAT Directive fulfils the conditions for it to have direct effect (judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraph 51 and the case-law cited) and, secondly, the option of derogation provided for in paragraph 2 of that article is intended only to enable Member States to counteract the uncertainty associated with recovery of the sums owed and does not resolve the question whether the taxable amount for VAT purposes may not be reduced in the case of definitive non-payment (judgment of 11 June 2020, *SCT*, C?146/19, EU:C:2020:464, paragraph 24 and the case-law cited).

45 Moreover, as the Advocate General observed, in essence, in points 41 and 56 of her Opinion, Article 90(1) of the VAT Directive may be directly applicable where the Member State, as in the present case, does not allow any reduction of the taxable amount in the event of total or partial non-payment without taking into account the degree of uncertainty as to the definite non-payment.

46 As regards the temporal limit on the right to reduction of the taxable amount referred to in Article 90 of that directive, it must be noted, in the first place, that it follows from the case-law of the Court that the possibility of applying for the refund of VAT without any temporal limit would be contrary to the principle of legal certainty, which requires that the tax position of the taxable person, having regard to its rights and obligations vis-à-vis the tax authority, not be open to challenge indefinitely (see, to that effect, order of 3 March 2021, *FGSZ*, C?507/20, EU:C:2021:157, paragraph 23 and the case-law cited).

47 Furthermore, the Court has ruled, regarding the VAT deduction scheme, which the Court held must be interpreted consistently with Article 90 of the VAT Directive (see, to that effect, judgment of 22 February 2018, *T?2*, C?396/16, EU:C:2018:109, paragraph 35), that a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of the input VAT, by making it forfeit its right to deduct VAT, cannot be regarded as incompatible with the regime established by the VAT Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, second, that it does not in practice render impossible or excessively difficult the exercise of the right to deduct VAT (principle of effectiveness) (judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraph 37 and the case-law cited).

48 Accordingly, as regards the national legislation at issue in the main proceedings, which sets a limitation period following the expiry of which the application for a tax refund is inadmissible, it is sufficient to note, as did the Advocate General in point 44 of her Opinion, that Article 90(1) of the VAT Directive does not preclude such a temporal limit on the right to a reduction of the taxable amount.

49 In the second place, while the existence of a limitation period, the expiry of which results in a creditor no longer being able to apply for a reduction in the taxable amount of VAT in respect of certain claims, cannot in itself be regarded as incompatible with the VAT Directive, the determination of the date from which that period begins to run is a matter for national law, subject to compliance with the principles of equivalence and effectiveness (see, to that effect, order of 3 March 2021, *FGSZ*, C?507/20, EU:C:2021:157, paragraph 23 and the case-law cited).

50 With regard to, more specifically, the principle of effectiveness, it may be deduced from the case-law of the Court that a limitation period which began to run from the date of issue of the initial invoices and expired, for certain transactions, before the application for set off was submitted cannot validly preclude the exercise of the right to reduce VAT if the taxable person has not shown a lack of diligence, and in the absence of abuse or fraudulent collusion (see, to that effect, order of 3 March 2021, *FGSZ*, C?507/20, EU:C:2021:157, paragraph 25 and the case-law cited).

51 In that regard, it should be held, as the Advocate General also observed in point 50 of her Opinion, that, having regard to the principle of the neutrality of VAT, from which it stems that the trader, who pre-finances the VAT by collecting it on behalf of the State, is to be relieved entirely of the burden of the tax in the course of its economic activities subject to VAT, the starting point of the limitation period for the exercise of the right to a reduction of the taxable amount, under Article 90(1) of the VAT Directive, must have a sufficient link with the date from which the taxable person,

acting in a diligent manner, may avail itself of that right.

52 Moreover, in the absence of national provisions concerning the rules governing the exercise of the right to a reduction of the taxable amount in the event of total or partial non-payment, as in the dispute in the main proceedings, the principles of proportionality and legal certainty require that the starting point for such a limitation period is identifiable by the taxable person with a reasonable degree of probability.

53 It must be stated, in that regard, that the uncertainty as to definitive non-payment could also be taken into account by granting the reduction of the VAT taxable amount when the creditor demonstrates, before the outcome of the insolvency or winding up proceedings of its debtor, a reasonable probability that the debt will not be honoured, even if that taxable base is re-evaluated upwards in the event that payment nonetheless occurs. It would thus be for the national authorities to determine, with due regard to the principle of proportionality and subject to review by the courts, the evidence for a probable extended period of non-payment to be provided by the creditor, according to the specific features of the applicable national law. Such a rule would be an equally effective means of attaining the objective pursued, while being less onerous for the creditor, who pre-finances the VAT by collecting it on behalf of the State (judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraph 48 and the case-law cited).

54 That finding applies a fortiori in the context of insolvency or winding-up proceedings, in which the certainty that the debt is definitively irrecoverable can, in principle, be established only after a lengthy period. Such a period is, in any event, such as to inflict on traders subject to the legislation providing for such proceedings, when they are confronted with non-payment of an invoice, a cash-flow disadvantage compared to their competitors in other Member States, which would clearly undermine the objective of fiscal harmonisation pursued by the VAT Directive (see, to that effect, judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraph 50 and the case-law cited).

55 In the present case, while the supplies of goods and services at issue in the main proceedings were made during 2007 to 2010 and in 2012, Consortium Remi Group only applied for a VAT refund resulting from the reduction in the taxable amount of VAT in 2020. It is apparent both from the documents of the file before the Court and the answers of the parties to the main proceedings to the questions raised during the hearing that, among the debtor companies, the first two had been deregistered from the companies register before the date on which the application was made, respectively in 2012 and in 2017, the third was deregistered during the procedure at issue in the main proceedings and, lastly, the final two are subject to insolvency proceedings opened before the application was made.

56 Consequently, it is for the referring court, which alone has jurisdiction to rule on the facts, to ascertain the date from which Consortium Remi Group could, without showing a lack of diligence, assert its right to a reduction of the taxable amount in the event of total or partial non-payment, in particular having regard to the potentially irrecoverable nature of its debts.

57 In the light of all of the foregoing considerations, the answer to the first, third and fourth questions is that Article 90 of the VAT Directive, read in conjunction with the principles of fiscal neutrality, proportionality and effectiveness, must be interpreted as not precluding legislation of a Member State which provides for a limitation period to apply for a VAT refund resulting from a reduction in the taxable amount of VAT in the event of total or partial non-payment, the expiry of which results in penalising an insufficiently diligent taxable person, provided that that limitation period only begins to run from the date on which that taxable person was able, without showing a lack of diligence, to assert its right to a reduction. In the absence of national provisions concerning

the rules governing the exercise of that right, the starting point for such a limitation period must be identifiable by the taxable person with a reasonable degree of probability.

The second and fifth questions referred

58 Having regard to the case-law recalled in paragraph 33 of the present judgment, it should be understood that, by its second and fifth questions, which it is necessary to examine together, the referring court asks, in essence, whether Article 90(1) and Article 273 of the VAT Directive, read in conjunction with the principles of fiscal neutrality and proportionality, must be interpreted as precluding, in the absence of specific national provisions, a requirement on the part of the tax authority which renders the reduction in the taxable amount of VAT, in the event of total or partial non-payment of an invoice issued by a taxable person, subject to the condition that that taxable person corrects the initial invoice beforehand and that it communicates beforehand to its debtor, provided that that debtor is a taxable person, its intention to cancel the VAT.

59 As a preliminary point, so far as concerns the condition which renders the reduction in the taxable amount of VAT subject to the fact that the taxable person has corrected the invoices initially issued, it must be noted that, contrary to the argument put forward by the Director and the European Commission, such a condition does not stem from Article 203 of the VAT Directive.

60 According to the case-law of the Court, that provision applies only where the VAT was incorrectly invoiced and, therefore, does not cover situations in which the tax stated on the invoice is correct (see, to that effect, judgment of 8 December 2022, *Finanzamt Österreich (Wrongly invoiced VAT to final consumers)*, C?378/21, EU:C:2022:968, paragraphs 21 and 23).

61 On the other hand, both a requirement to correct the initial invoice and a requirement which makes the corresponding reduction of the taxable amount of a taxable person contingent, in the case of non-payment, on that person giving prior notice to its debtor, if the latter is a taxable person, of its intention to cancel a part or all of the VAT, falls within the scope of both Article 90(1) and Article 273 of the VAT Directive (see, to that effect, judgments of 26 January 2012, *Kraft Foods Polska*, C?588/10, EU:C:2012:40, paragraph 24, and of 6 December 2018, *Tratave*, C?672/17, EU:C:2018:989, paragraph 35).

62 In that regard, it should be borne in mind that, pursuant to Article 273 of the VAT Directive, Member States may impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, provided, inter alia, that that option is not relied on in order to impose additional invoicing obligations over and above those laid down in Chapter 3 of that directive.

63 Given that Article 90(1) and Article 273 of the VAT Directive do not, outside the limits laid down therein, specify either the conditions or the obligations which the Member States may impose, those provisions give the Member States a margin of discretion, inter alia, as to the formalities to be complied with by taxable persons vis-à-vis the tax authorities in order to ensure that the taxable amount is reduced (judgment of 11 June 2020, *SCT*, C?146/19, EU:C:2020:464, paragraph 35 and the case-law cited).

64 However, the measures that the Member States have the option of adopting under Article 273 of the VAT Directive may not, in principle, derogate from the rules relating to the taxable amount of VAT except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining VAT neutrality, which is a fundamental principle of the common system of VAT established by the relevant EU legislation (judgment of 6 October 2021, *Boehringer Ingelheim*, C?717/19, EU:C:2021:818,

paragraph 60 and the case-law cited).

65 In addition, if refunding the VAT becomes impossible or excessively difficult as a result of the conditions under which applications for reimbursement of tax may be made, that principle of neutrality of VAT and the principle of proportionality may require that the Member States provide for the instruments and the procedural rules necessary to enable the taxable person to recover the unduly invoiced tax (see, to that effect, judgment of 26 January 2012, *Kraft Foods Polska*, C?588/10, EU:C:2012:40, paragraph 29 and the case-law cited).

66 Consequently, the formalities to be complied with by taxable persons in order to exercise, vis-à-vis the tax authorities, the right to reduce the taxable amount for VAT purposes must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received. It is for the national courts to ascertain whether that is true of the formalities required by the Member State concerned (see, to that effect, judgment of 6 October 2021, *Boehringer Ingelheim*, C?717/19, EU:C:2021:818, paragraph 61 and the case-law cited).

67 In that regard, the Court has repeatedly held that the requirement that, in order to be able to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services may, in principle, contribute not only to ensuring the correct collection of VAT and preventing evasion but also to eliminating the risk of loss of tax revenue and, therefore, pursues the legitimate objectives set out in Article 90(1) and in Article 273 of the VAT Directive (see, to that effect, judgment of 26 January 2012, *Kraft Foods Polska*, C?588/10, EU:C:2012:40, paragraphs 32 and 33).

68 As is apparent from the case-law of the Court, that finding also applies to the requirement which makes the reduction of the taxable amount contingent on the taxable person giving prior notice to its debtor, if the latter is a taxable person, of its intention to cancel a part or all of the VAT (see, to this effect, judgment of 6 December 2018, *Tratave*, C?672/17, EU:C:2018:989, paragraphs 35 and 36).

69 Consequently, requirements, such as those at issue in the main proceedings, that, in order to be able to reduce the taxable amount, the taxable person must correct the initial invoice on account of the total or partial non-payment and provide prior notice to its debtor of its intention to cancel the tax, so that the latter is aware for the purpose of adjusting the initial deduction, do not have the effect of undermining, in principle, the neutrality of VAT (see, to that effect, judgments of 26 January 2012, *Kraft Foods Polska*, C?588/10, EU:C:2012:40, paragraph 37, and of 6 December 2018, *Tratave*, C?672/17, EU:C:2018:989, paragraph 39).

70 That said, the fact remains that it is for the referring court to ascertain whether such requirements do not appear to be, in the present case, excessively onerous for the taxable person, the supplier of goods or services (see, to that effect, judgment of 6 December 2018, *Tratave*, C?672/17, EU:C:2018:989, paragraph 41).

71 It is apparent from the documents of the file before the Court, which were confirmed during the hearing, that, first, the Bulgarian legislation, in the version applicable to the facts of the dispute in the main proceedings, did not provide for requirements to adjust the initial invoice and inform the debtor of the cancellation of the tax in the event of non-payment.

72 Secondly, in accordance with that same information, Consortium Remi Group was deregistered from the VAT register on 7 March 2019 so that, on the date the application for set off at issue in the main proceedings was submitted, that taxable person no longer had the possibility

of issuing corrected invoices. The Director specified in that regard, without being challenged on that point, that, under the relevant national provisions *ratione temporis*, the correction of the VAT could not be made when the taxable person had been deregistered from that register.

73 Therefore, clearly, the correction of an invoice being, in the practice of the Bulgarian tax authorities, an essential condition for obtaining a reduction of the taxable amount, VAT neutrality is affected when it is impossible or excessively difficult for the taxable person to adjust such an invoice (see, to that effect, judgment of 6 October 2021, *Boehringer Ingelheim*, C?717/19, EU:C:2021:818, paragraph 63).

74 Consequently, in a case such as that of the dispute in the main proceedings in which the taxable person is unable to issue a rectifying document in respect of invoices whose amount was not paid, the principles of VAT neutrality and proportionality require that the Member State concerned enables that taxable person to establish, by other means, before the national tax authorities, the non-payment of those invoices, which is at the origin of its right to the reduction of the taxable amount (see, to that effect, judgment of 6 October 2021, *Boehringer Ingelheim*, C?717/19, EU:C:2021:818, paragraph 65).

75 In those circumstances, it must be held that the fact of rendering the right of reduction in the taxable amount of VAT, in the absence of relevant national provisions, subject to the condition that the initial invoice had been the subject of a correction goes beyond what is necessary to attain the objective pursued by Article 273 of the VAT Directive, consisting in eliminating the risk of loss of tax revenue, where that condition became impossible to satisfy.

76 The same is true, a fortiori, of the obligation to inform the recipient of that invoice of the intention of the issuer of the invoice to cancel the VAT, such as that referred to by the fifth question, from whose very wording it is apparent, as it is from other statements set out in the request for a preliminary ruling, that that obligation constitutes a necessary condition, imposed by the practice of the Bulgarian tax authorities, for adjusting the VAT invoiced in the event of total or partial non-payment.

77 That said, it should be observed that, in the present case, Consortium Remi Group was deregistered from the VAT register on account of a systematic failure to fulfil its obligations stemming from the ZDDS and that its application for set off related to the non-payment of invoices issued several years before its removal from the register. Accordingly, it is for the referring court to ascertain whether the taxable person is not responsible for being unable to issue corrected invoices.

78 Having regard to the foregoing considerations, the answer to the second and fifth questions is that Article 90(1) and Article 273 of the VAT Directive, read in conjunction with the principles of fiscal neutrality and proportionality, must be interpreted as precluding, in the absence of specific national provisions, a requirement on the part of the tax authority which renders the reduction in the taxable amount of VAT, in the event of total or partial non-payment of an invoice issued by a taxable person, subject to the condition that that taxable person corrects the initial invoice beforehand and that it communicates beforehand to its debtor its intention to cancel the VAT, where it is impossible for that taxable person to make such an adjustment in due time, for reasons beyond its control.

The sixth question

79 By its sixth question, the referring court asks whether Article 90(1) of the VAT Directive must be interpreted as meaning that any right to a reduction in the taxable amount of VAT in the event of total or partial non-payment of an invoice issued by a taxable person gives a right to a refund of

the VAT paid by that taxable person, together with interest for late payment, and, if the question is answered in the affirmative, from which date such a right may be relied upon.

80 In that regard, as recalled in paragraph 42 of the present judgment, the common system of VAT guarantees the neutrality of VAT and seeks to entirely relieve the trader of the VAT burden due or paid in all its economic activities. It is also apparent from the case-law cited in paragraph 63 of the present judgement that, while the Member States have a margin of discretion in determining the rules referred to in Article 90 of the VAT directive, those rules cannot undermine the principle of fiscal neutrality by making the taxable person bear the VAT burden in whole or in part.

81 In particular, those rules must enable the taxable person, in appropriate circumstances, to recover the entirety of the debt arising from a reduction in the taxable amount of VAT, which implies that the refund must be made within a reasonable period of time by a payment in liquid funds or equivalent means and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (see, to that effect, judgment of 12 May 2021, *technoRent International and Others*, C?844/19, EU:C:2021:378, paragraph 38).

82 If, in the event that the refund from a reduction in the taxable amount of VAT is not made within a reasonable period of time, the taxable person were not entitled to default interest, the taxable person's situation would be negatively affected, in breach of the principle of fiscal neutrality (see, to that effect, judgment of 12 May 2021, *technoRent International and Others*, C?844/19, EU:C:2021:378, paragraphs 39 and 41).

83 It follows that, even though Article 90 of the VAT directive does not lay down an obligation to pay interest on the VAT to be refunded following a reduction in the taxable amount of VAT or specify the date from which such interest is payable, the principle of fiscal neutrality of the VAT system requires that the financial loss incurred on account of a refund of excess VAT not made within a reasonable period of time be compensated through the payment of default interest (see, to that effect, judgment of 12 May 2021, *technoRent International and Others*, C?844/19, EU:C:2021:378, paragraphs 40 and 41).

84 In such a situation, the taxable person receives excess VAT which must be refunded to it, but which is likely to incur financial loss in that regard, on account of the unavailability of the sums of money at issue. If, in the event that the tax authorities do not reimburse that excess within a reasonable period of time, the taxable person were not entitled to default interest, the taxable person's situation would be negatively affected, thereby undermining the principle of fiscal neutrality (judgment of 12 May 2021, *technoRent International and Others*, C?844/19, EU:C:2021:378, paragraph 42).

85 As regards, more specifically, the rules for applying interest in relation to the refund arising from a reduction in the taxable amount of VAT, those rules fall within the procedural autonomy of the Member States, circumscribed by the principles of equivalence and effectiveness (see, by analogy, judgment of 13 October 2022, *HUMDA*, C?397/21, EU:C:2022:790, paragraph 45).

86 Accordingly, it is for the referring court to determine, in the light of those principles and all the particular circumstances of the dispute before it, whether, in the present case, it is necessary to pay a refund arising from the reduction in the taxable amount of VAT and, in so far as it finds that that refund was not paid within a reasonable period of time, the point from which default interest is added to the amount of that refund (see, to that effect, order of 5 October 2023, *ZSE Elektrárne*, C?151/23, EU:C:2023:751, paragraph 28).

87 In the present case, as observed by, in essence, the Advocate General in points 99, 100 and 102 of her Opinion, in the absence of specific rules provided for by national law, interest in

relation to the right to a refund by reason of a reduction in the taxable amount of VAT can only be calculated from the date on which the taxable person considers that the non-payment of the debt at issue is definitive, within the meaning of Article 90 of the VAT Directive, and asserts its right to a reduction in the taxable amount of VAT in the VAT return relating to the ongoing tax period since, before that date, the legal basis for the payment of the VAT exists on the basis of Article 63 of that directive.

88 In the light of the foregoing, the answer to the sixth question is that Article 90(1) of the VAT Directive, read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that any right to a reduction in the taxable amount of VAT in the event of total or partial non-payment of an invoice issued by a taxable person gives a right to a refund of the VAT paid by that taxable person, together with interest for late payment, and that, in the absence of rules in the legislation of a Member State for applying any interest due, the date from which the taxable person asserts its right to that reduction in the VAT return relating to the ongoing tax period is the starting point for the calculation of that interest.

Costs

89 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

1. **Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principles of fiscal neutrality, proportionality and effectiveness,**

must be interpreted as not precluding legislation of a Member State which provides for a limitation period to apply for a value added tax (VAT) refund resulting from a reduction in the taxable amount of VAT in the event of total or partial non-payment, the expiry of which results in penalising an insufficiently diligent taxable person, provided that that limitation period only begins to run from the date on which that taxable person was able, without showing a lack of diligence, to assert its right to a reduction. In the absence of national provisions concerning the rules governing the exercise of that right, the starting point for such a limitation period must be identifiable by the taxable person with a reasonable degree of probability.

2. **Article 90(1) and Article 273 of Directive 2006/112, read in conjunction with the principles of fiscal neutrality and proportionality,**

must be interpreted as precluding, in the absence of specific national provisions, a requirement on the part of the tax authority which renders the reduction in the taxable amount of value added tax (VAT), in the event of total or partial non-payment of an invoice issued by a taxable person, subject to the condition that that taxable person corrects the initial invoice beforehand and that it communicates beforehand to its debtor its intention to cancel the VAT, where it is impossible for that taxable person to make such an adjustment in due time, for reasons beyond its control.

3. **Article 90(1) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality,**

must be interpreted as meaning that any right to a reduction in the taxable amount of value added tax (VAT) in the event of total or partial non-payment of an invoice issued by a taxable person gives a right to a refund of the VAT paid by that taxable person, together

with interest for late payment, and that, in the absence of rules in the legislation of a Member State for applying any interest due, the date from which the taxable person asserts its right to that reduction in the VAT return relating to the ongoing tax period is the starting point for the calculation of that interest.

[Signatures]

* Language of the case: Bulgarian.