OPINION OF ADVOCATE GENERAL

CRUZ VILLALÓN

delivered on 29 June 2010 1(1)

Case C?285/09

Criminal proceedings

against

R

(Reference for a preliminary ruling from the Bundesgerichtshof (Germany))

(Sixth VAT Directive – Article 28c(A)(a) – Intra-Community supply – Refusal of exemption – Fraudulent conduct)

I – **Introduction**

1. In this case, the Bundesgerichtshof (Federal Court of Justice) has referred to the Court of Justice a question on the interpretation of the Sixth VAT Directive (2) in relation to the exemption for intra-Community supplies.

2. More specifically, it asks whether the Member State of origin of the goods may regard as non-exempt from the tax a vendor, a taxable person established in that State of origin, who, although he has actually effected an intra-Community supply, has concealed certain information relating to the transaction, thereby facilitating tax evasion by a purchaser established in the Member State of destination.

3. The question was raised in criminal proceedings against Mr R, the Bundesgerichtshof considering that the conviction (brought before it in an appeal on a point of law) depends on the classification of the transaction for tax purposes, in the light of the Sixth Directive. Nevertheless, this Opinion must focus on that classification for tax purposes, disregarding any punitive consequences which it may have.

4. There is already a substantial body of case-law guided by the objective of combating fraud and abusive behaviour, both of which are frequent in a system as complex as that of VAT. However, when developing that case-law, the Court of Justice has also been careful to reconcile the objective of combating fraud with observance of the basic principles of VAT, formulating responses which are proportionate and suited to each case.

5. It is appropriate, nevertheless, to point out that, in this case, the response that common-

sense might at first sight require (depriving a taxable person acting in bad faith of a tax advantage) is not confirmed in the light of a detailed analysis of the principles governing the operation of VAT. In short, and offering my proposed response in advance, I consider that the admittedly desirable punitive outcome must be obtained by other means more proportionate and in any event more consistent with the system which governs and underpins the tax.

II – **The legal framework**

A – *Community law*

6. Council Directive 91/680/EEC, (3) introduced into the Sixth Directive a new Title XVIa, concerning the 'Transitional arrangements for the taxation of trade between Member States', and created the chargeable event of an 'intra-Community acquisition' and the exemption for 'intra-Community supplies'.

7. That title opens with Article 28a, paragraph 1(a) of which provides that 'intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B)(1)' are to be subject to value added tax.

8. Article 28c(A) provides that intra-Community supplies are to be exempt from the tax in accordance with the following:

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

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

B – *German law*

1. Criminal law

9. According to Paragraph 370(1)(1) of the Abgabenordnung (the German Tax Code; 'the AO'), (4) a person commits a criminal offence punishable by up to five years' imprisonment or a criminal fine if he makes incorrect or incomplete declarations to the tax authorities about facts which are relevant for tax purposes and as a consequence of this reduces his tax burden or thereby obtains undue tax advantages for himself or a third party.

10. According to the Bundesgerichtshof, that provision of the AO is an incomplete rule which does not contain all of the constituent elements of the offence it creates, wherefore it must be filled out by the provisions of substantive tax law, which determine which facts are relevant for tax purposes and the conditions in which tax is charged. The Bundesgerichtshof therefore considers that 'chargeability to tax is a legal requirement of criminal tax evasion'.

2. The tax legislation

11. Paragraph 1(1)(1) of the Umsatzsteuergesetz (Law on turnover tax; 'the UStG') (5) provides that the supply of goods or services effected for consideration within the territory of the country by

a taxable person is to be subject to VAT.

12. For its part, however, Paragraph 4(1)(b) of the UStG incorporates the exemption laid down in Article 28c(A)(a) of the Sixth Directive, providing that transactions coming within Paragraph 1(1)(1) of the UStG are exempt from tax where there is an intra-Community supply.

13. Paragraph 6a(1) of the UStG lists the conditions which must be fulfilled for a supply to be classified as an intra-Community supply for those purposes. It requires, inter alia, that the trader or the purchaser should transport or dispatch the object of the supply to another part of the Community (number 1), and that the acquisition of the object of the supply by the purchaser should be subject to the provisions of turnover taxation in another Member State (number 3).

14. Pursuant to Paragraph 6a(3) of the UStG, the trader must prove that the conditions in subparagraphs 1 and 2 have been fulfilled.

15. Those evidential obligations are governed in more detail in Paragraphs 17a and 17c of the Umsatzsteuer-Durchführungsverordnung (the UStG Implementation Regulations; 'the UStDV'). (6) Paragraph 17a of the UStDV introduces documentary evidence by providing that a trader must produce appropriate documentary evidence to show that the object of the supply was transported or dispatched to another part of the Union. Paragraph 17c of the UStDV specifies the trader's obligations regarding accounting in relation to intra-Community supplies, and provides that accounting evidence must be used to establish compliance with the requirements for the exemption from tax which arise from Paragraph 6a of the UStG, in particular the name and address of the purchaser and his VAT identification number.

16. Moreover, the first sentence of Paragraph 18a(1) of the UStG imposes on a domestic trader who has made the tax-free intra-Community supplies the obligation to make a declaration to the Bundeszentralamt für Steuern (Federal Tax Authority) in which he must provide details, inter alia, of the VAT identification number of the person acquiring the goods. In addition, under the first sentence of Paragraph 18b of the UStG, the trader must declare the basis of assessment of his intra-Community supplies to the competent tax authority for the undertaking.

III – **The main proceedings and the question referred**

17. The defendant, Mr R, a Portuguese national, was the manager of a German company which traded in luxury cars. According to the facts as established, since 2001 it had sold more than 500 vehicles per year, (7) mostly to car dealers established in Portugal.

18. From the year 2002, the defendant carried out a series of accounting manipulations, concealing the identity of the true purchasers of the vehicles in order to enable those undertakings to evade the payment of VAT in Portugal. This also allowed him to sell the vehicles at a price which, in other circumstances, he would have been unable to demand, thereby obtaining substantial profits.

19. That manipulation consisted specifically in the issuing of false invoices in the name of fictitious purchasers, who appeared as the addressees of the supplies. Those invoices stated in each case the business name of the alleged purchaser, his VAT identification number, the description of the vehicle (which was actually supplied to another purchaser), the purchase price and the endorsement 'tax-free intra-Community supply under Paragraph 6a of the UStG'. In that way, the impression was created that the fictitious purchaser would pay the VAT for that intra-Community acquisition in Portugal.

20. Those apparent (or 'fictitious') purchasers were actual undertakings based in Portugal. In

some cases they had agreed to the use of their business name for those purposes and in other cases they had had no knowledge of it.

21. For their part, the real purchasers of the vehicles in question sold them to private final consumers in Portugal, concealing from the authorities of that country the existence of a prior intra-Community acquisition. In that way, they seem to have avoided paying the VAT payable on intra-Community acquisitions. Moreover, the real business relationships were concealed by other measures: whenever the final consumer was already known at the time of delivery, the defendant had the vehicle registration documents issued to that person, issuing a further fictitious invoice with the final consumer as addressee and adding the (incorrect) endorsement 'taxation of profit margin pursuant to Paragraph 25a of the UStG'.

22. In that way, Mr R's undertaking sold and supplied 407 vehicles for EUR 7 720 391 in 2002, and 720 vehicles for EUR 11 169 460 in 2003. All those transactions were declared in Germany as intra-Community supplies, tax-free, therefore, in the corresponding annual VAT returns. In the declarations which had to be made to the Bundeszentralamt für Steuern in addition to the tax returns, the defendant named the fictitious purchasers given in the invoices as contractual partners in order to prevent the identification of the real purchasers in Portugal via the VAT Information Exchange System.

23. Criminal proceedings having been brought, the defendant was held on remand from 30 January 2008. By judgment of 17 September 2008, the Landgericht Mannheim (Regional Court, Mannheim) sentenced Mr R to a total of three years' imprisonment for offences of tax evasion. In the Landgericht's opinion, the falsified supplies to Portugal are not intra-Community supplies within the meaning of Article 28c and, accordingly, are not exempt from VAT. By means of the manipulation of the documentary and accounting evidence, as established, a tax reduction in Portugal, distorting intra-Community competition, had been brought about, which constitutes a deliberate abuse of Community law provisions justifying the refusal of the tax exemption in Germany. Consequently, as a result of the breach of his duty to charge VAT on those supplies, to pay it to the German tax authorities and to declare it in his annual tax returns, Mr R committed an offence of tax evasion.

24. Mr R appealed on a point of law against that sentence to the Bundesgerichtshof. In that appeal he claimed that the Landgericht had not correctly classified the transactions, for the vehicles were actually supplied to undertakings acquiring the goods in Portugal and accordingly were tax-free intra-Community supplies. Mr R considers that the concealment measures intended to evade the tax imposed on acquisitions in Portugal are irrelevant for the purpose of the classification for tax purposes of that supply, in Germany, and that there was never a risk of any loss in tax revenues in Germany, given that Portugal, as the country of destination of the goods, was entitled to that VAT.

25. By its question, the First Criminal Division of the Bundesgerichtshof, before which that appeal was brought, explains that the resolution of the dispute depends on the interpretation of Article 28c(A)(a) of the Sixth Directive. In its view, that provision must be interpreted as meaning that 'for all those involved in one or more transactions which are aimed at evading taxes, the tax advantages which are provided generally must be refused for the individual transactions if the respective taxable person knew of the abuse or fraud and participated in it'. This follows, in the national court's view, from the prohibition of abusive practices enshrined in Community law and applicable also to VAT, on the one hand, and from a teleological interpretation of that article of the Sixth Directive, on the other hand.

26. The Bundesgerichtshof considers, to that end, that the case-law of the Court of Justice is already sufficiently clear in that regard, for which reason, in two similar cases, the

Bundesgerichtshof has concluded that the tax exemption does not apply to purported intra-Community supplies, because the German trader acted in collusion with the foreign purchaser in order to enable the latter to evade tax, and as a result the conduct was classified as an offence. (8)

27. It must, however, be borne in mind that at the same time, in tax proceedings brought against Mr R on the same facts, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) has raised doubts concerning the former approach of the Bundesgerichtshof in relation to refusing the exemption. (9) The Finanzgericht Baden-Württemberg is of the opinion that the Community prohibition of abuse does not apply here, because there is an explanation of the transactions in question other than that of merely obtaining tax advantages and, in addition, the principles of neutrality and territoriality of VAT preclude the approach followed by the Bundesgerichtshof. In its decision of 29 July 2009 on an application for interim suspension the Bundesfinanzhof stated that it shared those doubts. (10)

28. It is in the light of that difference of opinions with the finance court, and because the classification of the defendant's conduct as an offence depends on whether or not the exemption from VAT should be granted, (11) that the Bundesgerichtshof has taken the view that it is necessary to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 28cA(a) of the Sixth Directive be interpreted as meaning that a supply of goods within the meaning of that provision is to be refused exemption from value added tax if the supply has actually been effected, but it is established on the basis of objective factors that the vendor, a taxable person,

(a) knew that, by his supply, he was participating in a transaction aimed at evading VAT, or

(b) took actions aimed at concealing the true identity of the person to whom the goods were supplied in order to enable the latter person or a third person to evade VAT?'

IV – **The procedure before the Court of Justice**

29. The reference for a preliminary ruling was registered at the Registry of the Court of Justice on 24 July 2009.

30. Written observations were lodged by Mr R and the Generalbundesanwalt, and the Commission and the Governments of Germany, Greece and Ireland also.

31. The representatives of Mr R, the Generalbundesanwalt beim Bundesgerichtshof, the Commission and the Governments of the Federal Republic of Germany, Greece and Ireland attended the hearing, held on 5 May 2010, to present oral argument.

V – **Preliminary considerations**

32. By its question, raised in the course of criminal proceedings for tax evasion, the Bundesgerichtshof seeks to ascertain whether, under Article 28c(A)(a) of the Sixth Directive, the exemption from VAT provided for in that provision must be refused when an intra-Community supply has actually been effected but the vendor has engaged in certain activities which may be regarded as clearly fraudulent: in particular, in the actual wording of the question, '[if he] knew that, by his supply, he was participating in a transaction aimed at evading VAT' (a), or '[if he] took actions aimed at concealing the true identity of the person to whom the goods were supplied in order to enable the latter person or a third person to evade VAT' (b).

33. Reaching a decision in the main proceedings certainly depends on the interpretation of that

provision to be given, since the conduct of Mr R (who manipulated his accounts and presented false documents and statements to the German tax authorities) may be classified as an offence only if it is possible first to arrive at the conclusion that the exemption should be refused; (12) otherwise, under national law, his false declarations constitute mere administrative offences, punishable by a fine of up to EUR 5 000 (Paragraph 26a of the UStG).

34. The Bundesgerichtshof has taken the view, and maintains in its question, that the case-law of the Court of Justice is clear and supports the view that the exemption should be refused, but it is appropriate immediately to point out that the Finanzgericht Baden-Württemberg (and the Bundesfinanzhof itself) has upheld the contrary in parallel tax proceedings against Mr R. Moreover, it is not inappropriate to recall that the Bundesverfassungsgericht has suspended a sentence imposed by the Bundesgerichtshof in another similar case, stating that it was not possible, in principle, to exclude an infringement of Article 103(2) of the Constitution (principle of legality in criminal proceedings).

VI – **The alleged inadmissibility of the question referred**

35. In the light of the foregoing, Mr R submits in his pleadings that the question referred is ‘hypothetical in nature’, on account of the criminal nature of the main proceedings. Mr R takes the view that his conduct cannot be subject to criminal sanctions without exceeding the limits on the interpretation of criminal provisions laid down by German constitutional law and in particular the principle of legality in criminal proceedings. Moreover, in his view, the obligation to interpret national criminal legislation in accordance with the directive cannot lead to a criminal conviction in the main proceedings, even if the Court of Justice were to accept the interpretation proposed by the Bundesgerichtshof.

36. Certainly, whatever the response given to the question referred by the Bundesgerichtshof may be, there is nothing to prevent the principle of legality in criminal proceedings, where appropriate, from precluding under national law the imposition of a criminal conviction on Mr R. Nevertheless, that possibility does not imply that the question referred is, on that basis alone, merely hypothetical.

37. Indeed, it must be taken into account, and this should be sufficient for the purposes of this case, that the German courts, which have a better knowledge of national law, are already aware of that aspect but have not considered that it is necessary to seek the guidance of the Court of Justice on that specific matter.

38. Mr R also relies in his pleadings on the Community principle of legality in criminal proceedings, stating that it is the settled case-law of the Court of Justice that a directive cannot have direct effect to the detriment of an individual, in particular in criminal matters. (13)

39. Indeed, the cited judgments state that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive. (14)

40. Nevertheless, in most of the cases cited, unlike this case, the Court of Justice was dealing with the non-transposition or incomplete transposition of the directives in question, which meant that the specific conduct was unlawful from the perspective of Community law, but could not be penalised under the national legislation in force. In other cases, such as *Berlusconi*, the question to be determined was whether a directive could have the effect of overriding or displacing the contrary national legislation in force, thereby adversely affecting an individual, who would be subject, in that case, to more stringent penalties laid down in the earlier national legislation. The

factual and legal background to this case clearly differs from the preceding ones: indeed, on this occasion, the national court seeks to determine, not the effectiveness of provisions of a directive that impose penalties, but whether it is possible to supplement an incompletely formulated penal provision with provisions of a directive of a fiscal nature.

41. Those considerations, however, go beyond the limits of the question referred, which, in the terms in which it has been raised, is concerned solely with a provision of the Sixth Directive, and not with its penal consequences or its possible direct effect to the detriment of a taxpayer.

42. Nor is it appropriate from that perspective, therefore, to declare inadmissible the question referred, which it is difficult to regard as purely 'hypothetical' or as 'irrelevant' or 'manifestly without effect' as regards the decision in the main proceedings. (15)

VII – **Analysis of the question referred**

43. Even at the strictly fiscal level, the existence of fraudulent conduct (16) dominates the whole analysis of the question referred in this case, for the issue to be determined is whether good faith is an essential element for entitlement to the exemption for intra-Community supplies.

44. Two factors suggest, in principle, that that question should be answered in the negative:

– First, all the conditions explicitly laid down in the Sixth Directive for the existence of a tax-free intra-Community supply have been fulfilled (A).

– Secondly, if the exemption were refused, the country of origin of the goods (Germany) would have to collect VAT to which, in principle, it is not entitled, a solution which could breach the principles of territoriality and neutrality governing the tax (B).

45. Those two principles, however, are not absolute. Hence, as the following step in my analysis, I raise the issue whether, in the light of the case-law, it is possible to exclude those principles as proposed by the Bundesgerichtshof (C), and, finally, whether that solution is consistent with the principle of proportionality (D).

A – *The conditions of the directive for the existence of an intra-Community supply have been fulfilled*

46. According to the case-law, Article 28c(A)(a) of the Sixth Directive places only three conditions on the classification of a transaction as an intra-Community supply of goods exempt from VAT: (17) the transfer of the right to dispose of the relevant goods as owner; the physical movement of the goods from one Member State to another; and the status as a taxable person of the person acquiring the goods (who may also be a non-taxable legal person 'acting as such in a Member State other than that of the departure of the dispatch or transport of the goods').

47. The Bundesgerichtshof, without any discussion of this, starts from the assumption that the supply fulfils all those conditions, but raises the question whether the fact that the vendor was aware or participated in an activity aimed at evading the payment of the corresponding VAT in the country of destination has any relevance on the exemption provided for in the Sixth Directive. It is concerned, in short, with determining whether it is possible from the wording of the Sixth Directive to infer the existence of a further, implicit and strictly subjective, condition, relating to the vendor's good faith, which would mean that the sale in question should be taxed in Germany.

48. Some interveners argue that that condition exists on the basis of a teleological interpretation of the directive, the objectives of which undoubtedly include the combating of VAT fraud. However, a purposive interpretation of that kind, which leads to the addition of conditions

other than those expressly laid down in the directive, raises several difficulties.

49. The first is that Article 28c(A) of the Sixth Directive itself allows the Member States to lay down further conditions 'preventing any evasion, avoidance or abuse'. Notwithstanding 'the relatively wide discretion enjoyed by the Member States in implementing certain provisions of the Sixth Directive', (18) Article 28c seems to refer to conditions laid down by legislation. However, Germany seems not to have strictly exercised that power, which could now require it to address the difficulties arising from a gap in its own tax legislation. (19) In any event, the case-law states that such measures must be proportionate and not undermine the principle of the neutrality of the tax. (20)

50. The essential consideration, however, lies in the objective nature of the arrangements applicable to intra-Community transactions, introduced in 1991 as Title XVIa of the Sixth Directive. Those arrangements (transitional in nature, as is well known) were adopted as a solution intended to be provisional against a background of disparities in tax rates among the various Member States, which made it extremely dysfunctional to extend to intra-Community trade the logical framework of taxation at origin inherent in the internal supplies of goods. (21)

51. Those transitional arrangements were therefore established with the fundamental purpose of maintaining intact the distribution of tax sovereignty between Member States (that is to say, in order that VAT should continue to be collected by the Member State in which final consumption takes place). (22) To that end, two new categories were established: the chargeable event known as an 'intra-Community acquisition', which, in practical terms, takes the form of taxation at destination; and the exemption of 'intra-Community supplies', intended to avoid double taxation and thereby an infringement of the principle of fiscal neutrality inherent in the common system of VAT. (23)

52. The exemption for intra-Community supplies thus appears to be markedly *sui generis* in contrast with the other exemptions provided for in the Sixth Directive (Article 13(A) and (B)), based on subjective reasons or the nature of specific activities. The exemption in Article 28c(A) is based on logic very different from that of the preceding exemptions: the logic of ensuring the proper functioning of the VAT system at the intra-Community level. To those ends it creates a more or less artificial division into two of the chain of taxation, thereby ensuring the taxation of goods at destination. (24)

53. The Court of Justice has emphasised, as indeed it must, the objective nature of those concepts of 'intra-Community supply' and 'intra-Community acquisition', which 'apply without regard to the purpose or results of the transactions concerned'. (25) A different approach would immediately frustrate the attainment of the aims of the transitional arrangements, thereby infringing its governing principles of neutrality and territoriality, as well as the principle of legal certainty. (26)

54. In short, the exemption is laid down for objective reasons (the observance of neutrality of the tax and the distribution of tax sovereignty between the Member States) and, in principle, its assessment must also be objective, even if that is to the advantage of the perpetrators of more or less unlawful activities, as in the present case.

55. In this case, given that the only three conditions imposed by Article 28c(A)(a) of the Sixth Directive have been fulfilled (the transfer of the right to dispose of the goods, the physical movement of the goods and the status as a taxable person of the person acquiring the goods), declaring that the exemption should be refused would be a disproportionate response, insofar as it would eliminate an essential piece of the system, putting at risk the attainment of its aims.

56. That objective approach ought to guide the Court of Justice when analysing the question

referred by the Bundesgerichtshof, and without doubt decisively influences the response to that question which I will propose at the end of this Opinion. I would also point out in advance that that response is consistent with how, in my view, it is necessary to read the case-law of the Court of Justice on the effect of bad faith and abuse of rights.

B – *In this case, considering that the exemption should be refused would entail a breach of the principles of territoriality and of neutrality of VAT*

57. The conclusion that the exemption for an intra-Community supply which has actually been effected (27) should be refused when there has been bad faith could also be contrary to some of the basic principles of the VAT system.

1. Breach of the principle of neutrality

58. Framed as a tax on consumption, VAT must fall on the final consumer. In accordance with the principle of neutrality, a trader must be relieved entirely of the VAT payable or paid in the course of all his economic activities, 'whatever their purpose or results'. That objective is attained, since that is its basic idea, by means of the system of deducting input VAT, which transforms the output VAT, for a trader, into something objectively not dissimilar to an accounting entry. (28)

59. As a result of the foregoing, the principle of neutrality precludes 'treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes'. (29)

60. The German Government disputes the application of the principle of neutrality in this case with the argument that granting the exemption could distort competition. (30) It relies for that purpose on the recent judgment in *NCC Construction Danmark A/S*, in which the Court of Justice asserted that the principle of neutrality cannot preclude certain national measures intended to avoid distortions of competition in the internal market. (31) However, that judgment by no means establishes a general exception to the principle of neutrality and covers a situation which is in no way similar to that being considered here. (32) I take the view that by that judgment the Court of Justice did not seek to grant the Member States a kind of carte blanche to exclude the VAT system simply by raising the defence of freedom of competition.

61. Less relevant, were that possible, is the argument that application of the principle of neutrality should be excluded solely because certain unlawful conduct occurs at the same time as the transaction. According to the settled case-law, that principle precludes a generalised differentiation between lawful and unlawful transactions. (33) As a result, that circumstance cannot influence the classification for tax purposes of the transaction if this infringes the principle of neutrality.

62. In this case, and in my view, the principle of neutrality would inevitably be undermined if this supply was declared non-exempt and Mr R regarded as being required to pay the German authorities the VAT on the selling price (as if he had carried out an internal transaction). Moreover, unlike a supplier who sells within the country, Mr R, by definition, could not pass on that amount to the purchaser, already liable in the country of destination of the goods, since he is artificially regarded as the final consumer.

63. Accordingly, if Mr R is refused the exemption and, at the same time, the Portuguese authorities succeed in collecting the VAT to which they are entitled, it would create a situation of double taxation which would also be contrary to the principle of neutrality.

64. In its question, the Bundesgerichtshof states that that double taxation may be avoided if the German authorities refund the collected VAT to Mr R when it is established that tax has already

been paid on the same transaction in Portugal. I consider, however, that that refund mechanism (provided for in Paragraph 227 of the AO) does not serve to prevent double taxation, but only to remedy its effects once it has occurred. Accordingly, it seems insufficient to safeguard the principle of neutrality of the tax. (34)

65. The German High Court also relies on *Transport Service*, (35) in paragraph 31 of which the Court states that the principle of neutrality does not preclude a Member State from recovering VAT, after the event, from a taxable person which has *wrongly* invoiced a supply of goods as being exempt and that it is irrelevant, in that regard, whether the VAT on the later sale to the end user has been paid to the public purse or not. However, the intra-Community supply did not take place in that case, which was instead concerned with regularising a situation in which the exemption was *wrongly* applied; there was, accordingly, no risk to the principle of neutrality.

2. Breach of the principle of territoriality

66. The breach of the principle of territoriality appears, in my opinion, even more evident.

67. In accordance with that principle, collecting VAT, whatever its amount, is the responsibility of the Member State in which final consumption of the goods takes place. That rule makes it possible strictly to allocate revenues from VAT on intra-Community transactions and to delimit clearly the authority to tax of the Member States concerned. (36)

68. In this case, if the country of origin of the goods (Germany) did not apply the exemption in favour of Mr R, that would mean that Germany would collect the VAT even though it is not entitled to any tax credit, since the very logic of the transitional arrangements is simply that it should be the country in which the goods are consumed (Portugal) which receives the tax in its entirety. This would be a serious breach of the principle of territoriality. Agreement as regards the allocation of tax sovereignty between the Member States constitutes, in my view, a primary objective, to which exceptions cannot be made proportionately on account of the objective, in itself justified, of penalising unlawful conduct and combating fraud, when that objective can be achieved without difficulty by means of legislative provisions which are always available to the States.

69. In that regard, it should be pointed out that the Community legislature and the case-law have established a number of rules which reveal a certain intention to make it easier to apply that division of powers in practice.

70. First, Article 21 of Regulation (EC) No 1777/2005 (37) provides that ‘[w]here an intra-Community acquisition of goods within the meaning of Article 28a of Directive 77/388/EEC has taken place, the Member State in which the dispatch or transport ends shall exercise its power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began’.

71. Secondly, in *Teleos* (38) it was established that ‘[i]n the context of the transitional arrangements for intra-Community supplies and acquisitions, it is necessary, in order to ensure the proper collection of VAT, that the competent tax authorities check, independently of each other, whether the conditions for intra-Community acquisition and for the exemption of the corresponding supply are satisfied’.

72. Accordingly, in spite of the fact that, as stated in the case-law, ‘the intra-Community supply of goods and their intra-Community acquisition are, in fact, one and the same financial transaction’, (39) tax sovereignty in respect of that transaction is divided between several Member States, which are respectively responsible for exercising their powers. (40)

73. The foregoing is, in my view, merely one more consequence of that objective nature of the transitional arrangements: this means that each of the Member States involved must verify the nature of the transactions at issue for the purpose of their exemption or, on the contrary, their taxation, but without interfering in the area of competence of another Member State.

74. Coordination and, therefore, protection against fraud have already been achieved as a result of the mechanisms for administrative cooperation and the exchange of information governed by Regulation (EC) No 1798/2003. (41) That cooperation constitutes a potentially more effective instrument and, most importantly, a more proportionate solution for combating fraud in intra-Community transactions than that which follows from the approach set out in the reference for a preliminary ruling. As the Commission correctly points out in its written observations, it would be a betrayal of those mechanisms if the power to collect VAT were delegated to the country of dispatch, contrary to the division of powers of taxation provided for in the Sixth Directive.

75. In my view, *X*, (42) repeatedly relied on at the oral hearing, merely reinforces the importance of that principle of territoriality. According to that judgment, intra-Community acquisitions taxable in the Member State which issued the value added tax identification number (a situation which occurs, in accordance with the first subparagraph of Article 28b(A)(2) of the Sixth Directive, unless the person acquiring the goods establishes that that acquisition has been subject to tax in the place of arrival of the dispatch or transport of the goods) cannot generate a right to a deduction within the meaning of Article 17 of the Sixth Directive. The Court of Justice considers that the granting of a right to deduct in such cases 'would risk undermining the effectiveness of the second and third subparagraphs of Article 28b(A)(2) of the Sixth Directive in view of the fact that the taxable person, having had the right to deduct in the Member State which issued the identification number, would no longer have any incentive to establish that the intra-Community acquisition in question had been taxed in the Member State of arrival of the dispatch or transport. Such a solution could ultimately jeopardise the application of the basic rule that, in the case of an intra-Community acquisition, the place of taxation is deemed to be the Member State of arrival of the dispatch or transport, that is to say, the Member State of final consumption, which is the purpose of the transitional arrangements'. (43) In my view, that decision once again emphasises the need to respect the division of powers of taxation in matters relating to VAT.

C – *The possible impact of the fraud*

76. Nevertheless, it is impossible to conclude from all the foregoing that the principles of neutrality and territoriality are absolute. Consequently, it remains necessary to supplement the reasoning by examining whether the specific circumstances of the case could even lead to the exclusion here of the application of the principles of neutrality and territoriality of the tax.

77. Several lines of case-law are relevant to this end. First, the Court of Justice has developed a considerable body of case-law on the abuse of rights and, at the same time, has ruled on the consequences which the existence of fraud may have on the system of deducting input VAT. Secondly, in a series of cases which affect intra-Community supplies, the case-law has recognised that strict application of the principle of neutrality is possible only when the person concerned acts in good faith or has wholly eliminated the risk of any loss of tax revenues.

78. A summary analysis of the first group of judgments referred to could lead to the hasty conclusion that the country of origin of the goods (in this case, Germany) is free to decide whether to grant the exemption, refusing to grant it to a person who has acted in bad faith.

79. Nevertheless, before drawing that conclusion it is necessary to examine with particular care the most relevant case-law on intra-Community supplies, which better highlights the delicate

balance between the mechanisms of combating fraud, on the one hand, and the principles of neutrality and territoriality, on the other hand.

80. I shall then examine the criteria set out in all those judgments and their applicability to the present case, with particular reference to *Collée*.

1. The case-law on abuse and fraud

81. The Court of Justice has consistently and generally ruled that preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive and that Community law cannot be relied on for abusive or fraudulent ends. (44)

82. With regard, first of all, to abuse of rights, the case-law today provides specific criteria to determine when this occurs and, more importantly, to gauge its effects. (45) In the field of VAT, in particular, *Halifax*, cited above (footnote 20), stated that an abusive practice can be found to exist only if:

– first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions; and

– second, that the essential aim of the transactions is to obtain a tax advantage.

83. In the case of R, however, it seems clear that there was not merely a 'formal application of the conditions laid down by the relevant provisions', for the supply was actually effected.

84. Similarly, it is highly doubtful that the 'essential aim' of those transactions was to obtain a tax advantage, even if this is interpreted broadly, that is to say, as meaning obtaining a tax advantage for oneself or for a third party (in this case, the purchasers operating in Portugal). The sales made by Mr R were economically profitable transactions, not fictitious transactions effected solely for the purpose of obtaining a tax advantage.

85. Certainly, the real objective pursued by Mr R was anti-competitive, for it may be considered that concealing the identity of the recipients enabled him to charge them a price which was higher and at the same time more favourable to them than that offered by his 'honest tax-paying' competitors (to use the terms of the Bundesgerichtshof). Nevertheless, that fact is not sufficient for Mr R's transactions to be classified as abusive within the meaning of the Court's case-law, which instead would seem to require an entirely artificial arrangement.

86. In line with that, the Court of Justice held in *Halifax* that the transactions 'involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice'. (46) Accordingly, even if Mr R had declared to the German authorities the identity of the true purchasers, instead of other false ones, the supply would have continued to be an intra-Community supply and, therefore, exempt from VAT. In this case there is no causal link between the fraudulent declaration and the tax advantage obtained (save that it might be asked whether Mr R would have had such an interest in carrying out that transaction if that information had not been concealed).

87. In the light of all the foregoing, I consider that Mr R's conduct does not constitute an abuse of rights within the meaning of *Halifax*.

88. Even disregarding its abusive nature within the meaning of the case-law, it is difficult to deny that Mr R's conduct remains fraudulent according to the facts as established. The issue, however, is whether refusing the exemption is the most appropriate and proportionate way of

penalising that conduct. None the less, on this point the case-law also provides insufficient reasons for declaring that the exemption should be refused.

89. There are certainly numerous judgments in which a tax advantage was withdrawn in the case of fraud. (47) Many of them have been repeatedly relied on in these proceedings, but they are, in the main, cases which concerned only the right to deduct input VAT, not an exemption for an intra-Community supply, in which the principle of territoriality was involved. It does not seem appropriate, therefore, automatically to apply, by analogy, the criteria set out in those judgments.

2. The case-law on bad faith in intra-Community supplies

90. Having disregarded the case-law on abuse and bad faith in internal transactions, only the case-law concerning cases of intra-Community supplies provides, in my view, any elements which are relevant to this case.

91. Two recent judgments, *Teleos*, and *Collée*, (48) are concerned with the grant of exemption for intra-Community supplies when a supplier may have acted in bad faith.

92. In *Teleos*, the Court of Justice started from a situation in which intra?Community supply did not take place (the goods did not leave the territory of the country of dispatch), but the provider presented at the proper time evidence which made it possible to apply the exemption. In that case it was decided that, provided that the supplier shows that he had acted in utmost good faith, he could not be required subsequently to pay the tax.

93. It follows from that judgment that, although there was no intra-Community supply within the meaning of the Sixth Directive, if the supplier acted in good faith it is not possible subsequently to seek to recover from him the unduly exempted VAT. (49)*A contrario sensu*, it must be concluded that, if there was no supply but the supplier acted in bad faith, the amount of the VAT should be recovered from him. In both cases, the person concerned is not entitled to the exemption, but, where the taxable person acts in good faith, the Court of Justice requires the Member State concerned to refrain from collecting the VAT to which it is entitled (in short, it refrains from regularising the situation in the light of that good faith).

94. However, it is not clear that it is possible to infer from the actual wording of *Teleos* – as the German Government claims – that the mere existence in fact of bad faith is sufficient, in any circumstances (particularly when, as here, there has indeed been an intra-Community supply), to declare that the exemption in favour of the supplier should be refused and to allow the Member State of origin of the goods to collect VAT to which it is not entitled. It is therefore doubtful that it applies in this case.

95. This conclusion may be confirmed by a reading of *Collée*, which relates to a case in which there was indeed an intra-Community supply, although it was initially concealed by the supplier for non-fiscal reasons. Although not identical, the factual background to that case is that which is most similar to the case at issue: in both there was an intra-Community supply and the corresponding acquisition, but in *Collée* the vendor preferred to conceal the intra-Community nature of the supply (sacrificing the corresponding exemption) so as thereby not to jeopardise a commercial commission to which he was not entitled if he sold outside the territory which was contractually reserved for him; (50) in the present case, on the contrary, Mr R concealed the true identity of the recipients of the supplies, although not the supply as such.

96. Of particular interest are Paragraphs 35 *et seq.* of *Collée*, in which the Court of Justice puts forward a two-stage line of argument.

97. Firstly, taking *Genius Holding* (51) and *Schmeink & Cofreth* (52) as its starting point, paragraph 35 of *Collée* makes the possibility of adjusting the improperly invoiced VAT conditional upon the fact that the supplier 'has in sufficient time wholly eliminated the risk of any loss in tax revenues'. If that has been done, the principle of neutrality itself requires that the exemption should be granted and accordingly the outcome is unrelated to whether the supplier was acting in good faith or bad faith. (53)

98. The same principle seems to be applicable to R's case, although here the 'adjustment' which the German authorities seek to implement seems to consist in refusing an exemption already granted for a transaction which has always been stated to be what it is: an intra-Community supply. The difficulty in the case at issue lies in determining whether that risk of any loss in tax revenues must apply to the Member State seeking 'to make the adjustment' or whether it is sufficient that it applies to the VAT system in general.

99. The Generalbundeswalt considers in its pleading that, in so far as combating fraud is one of the objectives of the Sixth Directive, the case-law can refer only to the risk of loss in tax revenues in the Community as a whole. The Irish Government supports the same approach, expressly referring to paragraph 36 of *Collée* itself, in which reference is made to 'loss in tax revenues or jeopardis[ing] the levying of VAT'. That last comment could actually suggest that it is immaterial which Member State is entitled to the tax credit.

100. However, paragraph 34 of *Collée* clearly states that the answer to the question whether the exemption from VAT may be conditional upon the good faith of that person 'depends on whether *the Member State concerned* is at risk of losing any tax revenues'. (54) Moreover, according to paragraph 37, 'the non-collection of the VAT relating to an intra-Community supply which, initially, was incorrectly described as a supply effected within the territory of the country … cannot be regarded as a loss in tax revenues. According to the principle of territorial application of tax, such revenues belong to the Member State in which final consumption occurred'.

101. In my view, the analogy with R's case is obvious. The actual wording of the judgment is very clear on this point and it seems difficult to maintain, as does the Generalbundeswalt, that the rule set out therein is not applicable to the case at issue simply because in *Collée* the recipient had paid the VAT from the outset.

102. Although it is true that the loss of tax revenues to a Member State should be a concern for the Community as a whole, (55) I consider that the Court of Justice, in the paragraphs of *Collée* reproduced, sought to give priority to the application of the principle of territoriality, even when there has been bad faith. That is a logical solution: in cases such as R's, denial of the exemption would be a penalty entirely unrelated to tax matters, for Germany is not entitled to any credit by way of VAT. The idea of the case-law when establishing 'loss in tax revenues' as a criterion for assessing the effects of the bad faith is to rebalance the financial situation of the public exchequer concerned, re-establishing the situation that would have prevailed if there had been no fraud or abuse. (56)

103. The line of argument in *Collée* was not exhausted at that point. In the following paragraphs the Court offered a clear invitation to the national court to check whether there had been an abusive or fraudulent transaction, expressly referring to *Kittel and Recolta Recycling* (57) and to *Halifax* as regards abuse of rights. (58) However, as set out above, Mr R's conduct cannot be regarded as abusive for the purposes of the case-law and, although the conduct is fraudulent in nature, the requirements for refusing to exempt the intra-Community supply which was carried out have not been fulfilled.

D – *Refusal of the exemption is a disproportionate solution*

104. Finally, the Court of Justice made clear in *Collée* that 'Community law does not prevent Member States – in certain circumstances – from treating the concealment of the existence of an intra-Community transaction as an attempt to evade VAT and from imposing, in such a case, fines or penalty payments prescribed by their domestic law', which in any event must be proportionate to the gravity of the abuse. (59)

105. I consider that that clarification in the case-law refers to the possible imposition of other alternative penalties more proportionate than the refusal to grant an exemption, which would change the entire system of territorial distribution of fiscal sovereignty in VAT matters.

106. Under that case-law and Article 28c(A) of the Sixth Directive itself, the Member States may without doubt introduce legislative provisions imposing penalties (whether administrative or criminal) for such conduct. (60) Moreover, there would be nothing to prevent the amount of any financial penalty from being the same as the exemption applied (it would, on the contrary, be proportionate and reasonable). In such a case, however, the Member State of destination of the goods would collect that amount in the exercise of its powers to impose penalties which, as is logical, is possible only where supported by express legislative provisions, which do not seem to be available to the German authorities in this case.

107. Such legislative provisions, supplemented by the administrative cooperation mechanisms governed by Regulation (EC) No 1798/2003, to which I have already referred, would be a more proportionate response – and, at the same time, a response more consistent with the internal logic of the tax – to the risk of exposure to fraud, which, as the Generalbundesanwalt points out, is almost inherent in systems involving action by various national tax authorities.

108. In conclusion, notwithstanding the relevance of arguments such as the need to safeguard the proper functioning of the VAT system as a whole and not to promote anti-competitive behaviour, I consider that the finding that the exemption should be refused, leaving aside entirely the issue of its consequences in terms of integration into a criminal offence, would constitute a disproportionate response, insofar as there are other means which would allow those objectives to be achieved without a substantial breach of the principles of neutrality and territoriality.

VIII – **Conclusion**

109. Accordingly, I suggest that the Court of Justice should give the following answer to the question referred by the Bundesgerichtshof:

Article 28c(A)(a) of the Sixth Directive must be interpreted as meaning that it does not incorporate a derogation from the exemption from value added tax for supplies of goods within the meaning of that provision in those cases in which the supply has actually been effected, but it is established on the basis of objective factors that the vendor, a taxable person,

(a) knew that, by his supply, he was participating in a transaction aimed at evading VAT, or

(b) took actions aimed at concealing the true identity of the person to whom the goods were supplied in order to enable the latter person or a third person to evade VAT.

1 – Original language: Spanish.

2– Council Directive 77/388/EEC of 17 May 1977, Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax:

uniform basis of assessment (OJ 1977 L 145, p. 1; ‘the Sixth Directive’).

3 – Directive of 16 December 1991 supplementing the common system of value added tax and amending the Sixth Directive with a view to the abolition of fiscal frontiers (OJ 1991 L 376 p. 1).

4 – BGB1. 1976 I, p. 613 and 1977 I, p. 269.

5 – BGB1. 1993 I, p. 565.

6 – BGB1. 1999 I, p. 1308.

7 – Mr R’s lawyer confirmed at the hearing that the vehicles at issue were second-hand. If they had been ‘new means of transport’, Article 28c(A)(b) of the Sixth Directive would apply instead of Article 28c(A)(a).

8 – Decisions of 20 November 2008 (Case 1 StR 354/08) and of 19 February 2009 (Case 1 StR 633/08). An appeal was brought against the first of those two decisions before the Bundesverfassungsgericht (Federal Constitutional Court), which, by decision of 23 July 2009 (Case 2 BvR 542/09), suspended the prison sentence imposed pending its final decision and stated that it was not possible, in principle, to exclude in that case an infringement of Article 103(2) of the Constitution (principle of legality in criminal proceedings).

9 – Decision of 11 March 2009; Case 1V 4305/08.

10 – Case XI B 24/09, DstR 2009, p. 1693.

11 – If the operation constitutes a tax-exempt Community supply, false statements concerning the persons acquiring the goods do not amount to criminal offences but merely administrative offences punishable by a fine of up to EUR 5 000 (Paragraph 26a(2) of the UStG).

12 – According to the information provided by the Bundesgerichtshof, neither the penal provision (Paragraph 370 of the AO) nor German VAT law (Paragraphs 4 and 6a of the UStG) expressly contemplates fraudulent acts such as those at issue here, or lays down the criminal or tax consequences which must be attributed to such acts: it is not possible under Paragraph 370 of the AO to classify the manipulations and concealments effected by Mr R as an offence if the transaction was VAT-free, and the actual wording of the UStG is not sufficient to declare that the exemption should be refused in this case.

13 – He cites, in that regard, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13; Joined Cases C?74/95 and C?129/95 *X* [1996] ECR I?6609, paragraph 24, and Joined Cases C?387/02, C?391/02 and C?403/02 *Berlusconi* [2005] ECR I?3565, paragraph 73 *et seq*.

14 – To the same effect, see Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 20; Case C?168/95 *Arcaro* [1996] ECR I?4705, paragraph 37, and Case C?60/02 *X* [2004] ECR I?651, paragraph 61.

15 – See, inter alia, Case C?206/99 *SONAE* [2001] ECR I?4679, paragraphs 45 to 47; Joined Cases C?430/99 and C?431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I?5235, paragraphs 47 and 48, and Case C?147/02 *Alabaster* [2004] ECR I?3101, paragraph 55. Moreover, it should be recalled that, according to settled case-law, it is for the national court, before which the dispute has been brought and which must assume responsibility for the forthcoming judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case 5/77 *Tedeschi* v *Denkavit* [1977]

ECR 1555, paragraphs 17 to 19; Case C?326/00 *IKA* [2003] ECR I?1703, paragraph 27; Case C?145/03 *Keller* [2005] ECR I?2529, paragraph 33; Case C?419/04 *Conseil générale de la Vienne* [2006] ECR I?5645, paragraph 19, and Case C?537/07 *Gómez-Limón* [2009] ECR I?6525, paragraph 24).

16 – In that regard, I believe it is appropriate to specify that it is not my intention to provide a legal classification of the facts, in the strict sense, which is the responsibility of the national court, but to carry out an analysis of the situation and give a response to the question in the terms in which it has been raised and on the basis of the facts as set out in the order for reference, without prejudging their accuracy.

17 – Case C?409/04 *Teleos* [2007] ECR I?7797, paragraph 70.

18 – Case C?62/93 *BP Soupergaz* [1995] ECR I?1883, paragraph 34.

19 – The Generalbundesanwalt and the Irish Government suggested in the course of the hearing that Paragraph 6a(1) of the UStG and Paragraph 17 of the UStDV are measures to combat VAT fraud and evasion and that they would be sufficient to refuse the exemption in this case. Obviously, it is not for the Court of Justice to interpret such a national rule, but it is certainly true that, if that interpretation were correct, the question referred would not have been raised in the same terms. The Bundesgerichtshof does not ask whether such a provision is compatible with the Sixth Directive, but whether it follows directly from that provision that the exemption should be refused where there is bad faith.

20 – Case C?255/02 *Halifax* [2006] ECR I?1609, paragraph 92. In that regard, see also Case C?25/07 *Sosnowska* [2008] ECR I?5129, paragraph 23.

21 – Taxation at origin would have benefited those Member States from which the greatest numbers of intra-Community supplies originate, distorting the nature of VAT as a tax on consumption. Such imbalances could be corrected by means of a system of automatic compensation between Member States. However, the practical complexity of such a mechanism (which would result in the flow of funds between the States) and the difficulty, at least in the short term, in attaining greater uniformity in tax rates, led the Community legislature to introduce those transitional arrangements, which, initially intended until the end of 1996, remain in force today and have been temporarily reproduced by the new VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax; OJ 2006 L 347 p. 1).

22 – In that regard, see the Opinion of Advocate General Kokott in *Teleos*.

23 – *Teleos*, paragraph 25.

24– It is precisely the specific nature of that ‘exemption’, in contrast with those in Article 13 of the Sixth Directive, which leads to doubts as to whether it should be understood as an ‘exception’, which must therefore automatically be interpreted restrictively, contrary to the arguments of the interveners.

25 – *Teleos*, paragraphs 38 and 40. That objective nature also applies to other expressions which define taxable transactions for the purposes of the Sixth Directive (Joined Cases C?354/03, C?355/03 and C?484/03 *Optigen and Others* [2006] ECR I?483, paragraph 44, and Joined Cases C?439/04 and C?440/04 *Kittel and Recolta Recycling* [2006] ECR I?6161, paragraph 41].

26 – In that regard, the Court has stated in its case-law that ‘requiring the tax authorities to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of

the common system of VAT of ensuring legal certainty and facilitating the measures necessary for the application of VAT by having regard, save in exceptional cases, to the objective character of the transaction concerned' [Case C?4/94 *BLP Group* [1995] ECR I?983, paragraph 24; *Optigen and Others*, paragraph 45; *Kittel and Recolta Recycling*, paragraph 42, and *Teleos*, paragraph 39].

27 – Or refusing the status of intra-Community supply to one which fulfils all the objective requirements laid down for classification as such.

28 – Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case C?37/95 *Ghent Coal Terminal* [1998] ECR I?1, paragraph 15; Case C?223/03 *University of Huddersfield* [2006] ECR I?1751, paragraph 47, and Case C?437/06 *Securenta* [2008] ECR I?1597), paragraph 25.

29 – Case C?240/05 *Eurodental* [2006] ECR I?11479, paragraph 46, and *Teleos*, paragraph 59.

30 – According to the German Government, R 'would find himself in a more advantageous position than a provider in good faith who has simply been unable to provide evidence that he adopted all the necessary precautions concerning the required evidence, and whose supply is regarded as taxable'. The Bundesgerichtshof also states that there is no competition 'between honest tax-paying undertakings and dishonest non-tax-paying undertakings, which evade tax by means of systematic concealment measures'.

31 – Case C?174/08 [2009] ECR I?10567, paragraphs 46 and 47.

32 – The case concerned a building business which was required to pay VAT on supplies relating to construction effected on its own account (self-supply). The Court of Justice held, in the sentence in question, that the principle of neutrality could not preclude that business from being unable fully to deduct the VAT relating to the general costs incurred thereby, since the turnover from the sale of buildings thus constructed is exempt from the tax.

33 – Case 269/86 *Mol* [1988] ECR 3627, paragraph 18; Case 289/86 *Happy Family* [2008] ECR 3655, paragraph 20, and Case C?111/92 *Lange* [1993] ECR I?4677, paragraph 16. That case-law excludes the supply of products, such as narcotic drugs, which have special characteristics inasmuch as, because of their very nature, they are subject to a total prohibition on their being put into circulation in all the Member States, with the exception of strictly controlled economic channels for use for medical and scientific purposes. However, that exception does not seem to apply in the present case.

34 – In that regard, it is perhaps appropriate to make an exception from the exclusively fiscal assessment of the case and focus for a moment on its somewhat paradoxical consequences as regards criminal law, for if it were possible to form a criminal conviction against Mr R, as the national court suggests, on the basis that the exemption should be refused, it would be necessary to ask what would be the consequences of a subsequent refund of that amount on the sentence.

35 – Case C?395/02 [2004] ECR I?1991.

36– Case C?245/04 *EMAG Handel Eder* [2006] I?3227, paragraph 40. See also the Opinion of Advocate General Kokott in that case, points 23 and 24, and the Opinion of Advocate General Ruiz-Jarabo in Case C?68/03 *Lipjes* [2004] ECR I?5879, point 25.

37 – Council Regulation of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax (OJ 2005 L 288 p. 1).

38 – Case C?409/04 [2007] ECR I?7797, paragraph 71.

39 – *Teleos*, paragraph 23.

40 – In that regard, it seems to me that point 31 of the Opinion of Advocate General Kokott in *Teleos* is very revealing: ‘[t]hrough intra-Community acquisition, the right to tax shifts from the State of origin to the State of destination’; she explains in a footnote that ‘[t]he findings by the authorities of the State of destination concerning intra-Community acquisition do not… bind the authorities in the State of origin when examining whether the requirements for exempting the intra-Community supply have been met’.

41 – Council Regulation of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264 p. 1).

42 – Joined Cases C?536/08 and C?539/08 [2010] ECR I?0000.

43 – *X*, paragraph 44.

44 – Case C?367/96 *Kefalas and Others* [1998] ECR I?2843, paragraph 20; Case C?373/97 *Diamantis* [2000] ECR I?1705, paragraph 33; Joined Cases C?487/01 and C?7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I?5337, paragraph 76; Case C?32/03 *Fini H* [2005] ECR I?1599, paragraph 32, and *Kittel and Recolta Recycling*, paragraph 54.

45 – After a long process of development in the case-law, the legal doctrine on abuse of rights today occupies a pre-eminent place in European Union law, in some cases raising the possibility of classifying it as a general principle. This was asserted, for example, by Advocate General Poiares Maduro in his Opinion in *Halifax*, point 64, and also, though less clearly, by Advocate General La Pérgola in his Opinion in *Centros* [Case C?212/97 [1999] ECR I?1459], point 20. In the legal literature, see De la Feria, R., ‘Prohibition of abuse of (Community) law: the creation of a new general principle of EC law through tax’, Common Market Law Review, 45, 2008, p. 395.

46 – *Halifax*, paragraph 94.

47 – Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C?110/94 *INZO* [1996] ECR I?857, paragraph 24; Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Others* [2000] ECR I?1577; *Fini H*, paragraph 34, and *Kittel and Recolta Recycling*, paragraph 55. It is sufficient that the person concerned knew that, by his conduct, ‘he was taking part in a transaction connected with fraudulent evasion of VAT’; and in that case ‘must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud’ (*Kittel and Recolta Recycling*, paragraph 56).

48 – Case C?146/05 [2007] ECR I?7861.

49 – *Teleos*, paragraph 2 of the operative part.

50 – *Collée*, paragraphs 13 and 39.

51 – Case C?342/87 [1989] ECR 4227.

52 – Case C?454/98 [2000] ECR I?6973.

53 – To the same effect, Joined Cases C?78/02 and C?80/02 *Karageorgou* [2003] ECR I?13295, paragraph 50.

54 – Emphasis added.

55 – As the Government of Ireland correctly pointed out.

56 – As follows from *Halifax*, paragraph 94.

57 – Cited above, footnote 25.

58 – *Collée*, paragraph 38 and 39.

59 – *Collée*, paragraph 40. To the same effect, *Schmeink & Cofreth*, paragraph 62.

60 – In this case, in fact, the German legislation provides for the possibility of imposing an administrative penalty.