OPINION OF ADVOCATE GENERAL

BOT

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Case C?274/10

European Commission

v

Republic of Hungary

(Failure of a Member State to fulfil its obligations – Taxation – Value?added tax – National legislation allowing the refund of excess VAT only if it exceeds the amount of tax on transactions not yet paid for – Principle of fiscal neutrality)

1. Value-added tax (‘VAT’), under the common system introduced by European Union law, is a tax on consumption, charged at each stage of production or distribution, which must be borne entirely by the end consumer.

2. In order to enable economic operators, who recover it from their customers at the same time as they receive the price of their products or services, not to bear the burden, the common VAT system provides a deduction mechanism, designed to ensure the ‘neutrality’ of the tax in regard to them.

3. Economic operators who are ‘taxable persons’ are thus allowed to deduct from the tax which they have received from their customers and for which they are liable to the Member State the input VAT which they themselves paid when they purchased the goods and services necessary for carrying on their business.

4. This action for failure to fulfil obligations concerns the provisions of the common system of VAT where the taxable person’s rights to deduct exceed the amount of the tax for which he is liable.

5. Article 183 of Council Directive 2006/112/EC (2) provides that, where for a given tax period the amount of authorised deductions exceeds the amounts of VAT due, the Member States may either carry the excess forward to the following period, or make a refund according to conditions which they are to determine.

6. The Republic of Hungary considers that, in accordance with that provision, it was entitled to limit the refund to that part of the VAT actually paid by the taxable person. The European Commission, believing that that provision does not allow Member States that possibility, has

brought the present action for failure to fulfil obligations.

7. In this Opinion, I shall set out the reasons why, in my view, this action is well founded.

8. I shall maintain that, contrary to what the Commission claims in its pleadings, the limitation provided for by Hungarian law does not infringe the principle of neutrality on which the common system of VAT is based. I shall explain, however, that, as that institution has also submitted, Article 183 of Directive 2006/112, read in the light of the other provisions of the directive concerning the right to deduct, clearly limits the power of the Member States to the alternative of refunding the excess or carrying it forward to the following period, and does not distinguish between VAT which has been paid and VAT which is merely payable.

9. Therefore, a Member State cannot limit the refund of the excess to that part of the VAT which has actually been paid by the taxable person without exceeding the discretion it enjoys under Directive 2006/112.

I – **Legal context**

A – *European Union legislation*

10. According to Article 2 of Directive 67/227/EEC, (3) the principle of the common VAT system involves the application to goods and services of a general tax on consumption exactly proportional to the price of goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged. On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

11. Title VI of Directive 2006/112, entitled ‘Chargeable event and chargeability of VAT’, includes, inter alia, the following provisions:

‘Article 62

For the purposes of this Directive:

(1) “chargeable event” shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) the tax becomes “chargeable” when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

…

Article 63

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

…

Article 65

Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.

Article 66

By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

(c) where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.

…'

12. Title X of Directive 2006/112 is devoted to deductions. Chapter 1, entitled 'Origin and scope of right of deduction', includes, inter alia, Articles 167 and 168, which are worded as follows:

'Article 167

The right to deduct shall arise at the time when the deductible tax becomes chargeable.

Article 168

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

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

...'

13. Chapter 4 of Title X of Directive 2006/112 deals with the rules governing exercise of the right of deduction. It includes, inter alia, the following articles:

'Article 178

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

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

…

Article 179

The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.

…

Article 183

Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.'

14. Chapter 5 of Title X of Directive 2006/112 is entitled 'Adjustment of deductions'. It states, in Articles 184 and 185:

'Article 184

The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.

Article 185

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.'

15. The obligations of taxable persons with regard to VAT are stated in Title XI of Directive 2006/112, which contains, inter alia, the following articles:

'Article 206

Any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Article 250. The Member States may, however, fix a different date for the payment of the amount or may demand an interim payment.

…

Article 250

1. Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made …

…

Article 252

1. The VAT return shall be submitted by a deadline to be determined by Member States. That deadline may not be more than two months after the end of each tax period.

2. The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.'

B – *National legislation*

16. Paragraph 55(1) of Law No CXXVII on VAT of 2007 (4) provides:

'VAT shall become chargeable on the occurrence of the event by which the transaction which gives rise to the tax is objectively completed ("the chargeable event").

17. Under Paragraph 56 of the Hungarian law on VAT, '[u]nless otherwise provided in this Law, the amount of VAT payable shall be determined at the time the chargeable event occurs'.

18. Paragraph 119(1) of that Law provides:

'Unless otherwise provided in this Law, a right of deduction shall arise at the time the amount due in respect of input VAT is determined [Paragraph 120].'

19. Paragraph 131 of the Hungarian law on VAT provides:

'(1) A taxable person registered for VAT on national territory may deduct from the total amount of tax for which he is liable for a given tax period the amount of deductible input VAT which has arisen during the same tax period or previous period or periods.

(2) If the difference calculated according to subparagraph (1) is negative, the person registered for VAT in the national territory:

(a) may treat that difference, during the following tax period, as an entry reducing the total amount of VAT for which he is liable in accordance with subparagraph 1 for that tax period, or

(b) may claim the difference from the state tax authorities under the conditions and according to the procedures set out in Paragraph 186.'

20. Paragraph 186 of that law provides as follows:

'(1) The refund of the amount of the negative difference calculated according to subparagraph 1 of Paragraph 131 – adjusted in accordance with subparagraph 2 – may be claimed as from the due date specified in Law XCII of 2003 on the taxation system,(5) if

(a) the taxable person registered for VAT in the national territory puts in a claim to the tax authorities when he submits his tax return in accordance with Paragraph 184; …

...

(2) If the taxable person registered for VAT in the national territory acting in accordance with

subparagraph 1(a) does not pay immediately, by the deadline specified in subparagraph 1, the amount, inclusive of VAT, payable in respect of the transaction giving rise to the chargeability of VAT, or if his debt is not eliminated in any other way by that date, the total deductible input VAT corresponding to that transaction shall be deducted from the amount, expressed as an absolute value, of the negative difference calculated in accordance with Paragraph 131(1), up to that amount.

(3) Paragraph 131(2)(a) shall apply to the sum that is to be subtracted, pursuant to subparagraph (2), from the amount, expressed as an absolute value, of the negative difference calculated in accordance with Paragraph 131(1), up to that amount.

...'

21. It is apparent from Paragraph 37(1) of Law XCII of 2003 on the taxation system that the due date is the time limit for payment of the tax:

'The tax must be paid by the date indicated in the Annex to the Law or in the Law itself (due date) ...'

22. Under Annex II, Part I, point 2(a) of that Law:

'A taxable person liable for [VAT] shall pay the net amount of [VAT] payable

– in the case of monthly tax returns, by the 20th day of the month following the current month,

– in the case of quarterly tax returns, by the 20th day of the month following the quarter,

– in the case of annual tax returns, by 25 February of the year following the tax year

and may claim the refund thereof from that same date.'

II – **Procedure and forms of order sought by the parties**

23. The Commission sent the Republic of Hungary a letter of formal notice on 21 March 2007, and subsequently a reasoned opinion on 8 October 2009, in which it explained to that Member State the reasons why it considered that its legislation infringed Article 183 of Directive 2006/112. It also requested the Republic of Hungary to comply with that provision.

24. Since the Republic of Hungary, which contests that assessment, had not complied with its request, the Commission, by document of 20 May 2010, brought the present action in which it claims that the Court should:

– declare that the Republic of Hungary has failed to fulfil its obligations under Directive 2006/112 …

– by requiring taxable persons whose tax declaration for a given tax period records an 'excess' within the meaning of Article 183 of [Directive 2006/112] to carry forward that excess or a part of it to the following tax year where the taxable person has not paid the supplier the full amount for the purchase in question, and

– because, as a result of that requirement, certain taxable persons whose tax declarations regularly record such an 'excess' may be required more than once to carry forward the excess to the following tax year;

– order the Republic of Hungary to pay the costs.

25. The Republic of Hungary considers that the Commission's application should be dismissed and that the Commission should be ordered to pay the costs.

III – **Arguments of the parties**

A – *The Commission*

26. The Commission points out that Paragraph 186(2) of the Hungarian Law on VAT precludes the refund of the excess in so far as the input VAT is on transactions for which consideration, including VAT, has not yet been paid and the obligation to pay has not been eliminated in any other way. It maintains that that limitation is contrary to European Union law.

27. In the first place, that limitation does not observe the principle of fiscal neutrality as interpreted and given concrete expression by the Court. Article 183 of Directive 2006/112, in particular the words 'in accordance with conditions which they shall determine', must be interpreted in the light of that principle, which constitutes a fundamental principle of the common VAT system and according to which the purpose of the deduction mechanism is to free a trader entirely from the burden of VAT which he has to pay or has paid in the course of any of his business transactions.

28. The Commission claims that, under Articles 62 and 63 of that directive, output VAT becomes chargeable at the moment goods are delivered or services are provided, irrespective of whether the consideration for the transaction concerned has been paid. A supplier of goods or provider of services is therefore required to pay the VAT to the Treasury even if he has not yet been paid by his customers before the end of the tax period. Given that, in such a situation. Paragraph 186(2) of the Hungarian Law on VAT prevents the customer from applying for the refund of the VAT corresponding to the transaction in question, it enriches the Treasury until payment of the transaction and destabilises the VAT system.

29. The exclusion of the refund of the deductible VAT excess imposes a burden on the operators concerned. First, the postponement of payment by the State of the amount owed to the taxable person seeking a refund temporarily reduces the value of the assets of that taxable person, which reduces his profitability or liquidity and therefore increases his commercial risk. Second, by decreasing the liquidity of the buyer of the goods or recipient of the services, the failure to refund the VAT excess simultaneously increases the risk that that buyer or recipient will not be able to pay – or will only be able to do so late – for the goods or services supplied to him. Thus, that exclusion also increases the commercial risk of the supplier of the goods or provider of the services and even has the effect of reducing the likelihood that the condition for obtaining the refund will be satisfied.

30. Even though the VAT system introduced by Directive 2006/112 imposes various burdens on taxable persons, in particular the obligation to pay output VAT to the State irrespective of whether the consideration for the transaction concerned has been paid by the customer, so that the principle of fiscal neutrality is implemented in that system with certain restrictions, those restrictions are to be interpreted restrictively. In its judgment in *Commission* v *Italy*, (6) the Court held, inter alia, that the Member States cannot determine conditions for the refund of the VAT excess which make the taxable person bear, in whole or in part, the burden of the VAT.

31. According to the Commission, Article 183 of Directive 2006/112 only provides that the Member States may define the procedural rules governing that refund in order that those rules are

properly included in the various legislative provisions governing administrative procedure. On the other hand, that article does not make it possible to limit that refund by means of conditions relating to the substance. Such a limitation would be contrary to the objective of that article, would generate unjustified legislative differences between the Member States and would infringe the principle of fiscal neutrality. However, the national legislation at issue does not establish formal rules, but attempts to fix substantive limits to the refund of VAT.

32. In the second place, the Commission states that that national legislation is also incompatible with Article 183 of Directive 2006/112 because it contains no temporal restriction on carrying forward the excess to the following tax period.

33. It is apparent from the wording of that article that the excess must be refunded at the latest during the second tax period following the tax period in which it arose. In contrast, under the national legislation at issue, the taxable person might have to carry the VAT excess forward several times, in particular in the case of a taxable person carrying out transactions in respect of which the deductible input VAT regularly exceeds the amount of output VAT. This is the position inter alia of taxable persons carrying out essentially export activities, in accordance with Articles 146 (1) (a) and 169 (b) of Directive 2006/112.

34. The national legislation at issue likewise does not guarantee that the taxable person will actually recover the VAT excess. If the taxable person were to cease activity owing to insolvency, without having paid for all his purchases, the VAT excess relating to the purchases which have not been paid for would ultimately be retained by the State.

B – *The Republic of Hungary*

35. The Republic of Hungary considers that the condition laid down by its legislation, that only the tax actually paid may be refunded, infringes neither the principle of fiscal neutrality nor Article 183 of Directive 2006/112, which clearly confers on the Member States the power to define the conditions for granting a refund.

36. In the first place, the Republic of Hungary claims that that condition does not represent a burden for the taxable person which is contrary to the principle of fiscal neutrality.

37. Indeed, ‘VAT burden’ must be understood as referring only to a definitive burden, namely, a situation in which the taxable person must pay VAT without the right to deduct. The fact of having to bear the VAT burden provisionally is only a financial or cash flow burden which has only a temporary effect on the financial situation of the operator concerned and does not infringe the principle of fiscal neutrality.

38. The Republic of Hungary points out, in that regard, that the common VAT system, by providing that VAT becomes chargeable after the transaction has been carried out irrespective of whether the consideration has been paid, in Articles 62 and 63 of Directive 2006/112, or that the refund of an excess of deductible input VAT is to be made, at the earliest, after the end of the tax period in question, requires taxable persons to pay the amount of the tax provisionally.

39. Consequently, the condition at issue only determines the moment the refund becomes possible, but does not call it into question.

40. Moreover, that condition does not cause the taxable person to run a financial risk, since he has not yet paid his debt. The burden is borne, in fact, only by the seller, but that is the result of the European Union rules, in particular Articles 62 and 63 of Directive 2006/112. Since the imposition of that burden complies with the principle of fiscal neutrality, the alleged burden

imposed on the purchaser of the goods or the recipient of the services by the national legislation cannot be regarded as unacceptable

41. The condition of payment, laid down by Paragraph 186(2) of the Hungarian Law on VAT, for obtaining the refund of a VAT excess, is intended to neutralise the advantage enjoyed by the purchaser of the goods or recipient of the services who could, if it were not for that condition, pay his suppliers from the tax refunded by the State and would be in a more favourable position than a taxable person who has paid his suppliers before the VAT excess has been refunded. However, under the Commission's interpretation the State initially bears the tax debt arising from the transaction and grants an interest-free loan to taxable persons, particularly where the tax period of the provider of the services is longer than that of the recipient.

42. The aim of Paragraph 186(2) of the Hungarian Law on VAT is to prevent a taxable person benefiting from the opportunity of obtaining a refund of the tax on a transaction which he has not paid for, and perhaps will never pay for, in order to improve his cash flow situation. If the supplier or service-provider has not paid the VAT for which he is liable, either because he declares it during another tax period, or because, more generally, he cannot pay the tax payable on the due date, the purchaser's right to a refund is, in actual fact, a State loan debited to his budget.

43. In the second place, the Republic of Hungary maintains that the Commission's interpretation of the principle of fiscal neutrality unjustifiably limits the discretion conferred on the Member States by Article 183 of Directive 2006/112. According to that Member State, to accept that any VAT rule affecting in any way the financial situation, cash flow or commercial decisions of undertakings infringes the principle of tax neutrality would have the effect of rendering Article 183 of Directive 2006/112 meaningless.

44. Moreover, the Republic of Hungary claims that its legislation is not comparable to that at issue in *Commission* v *Italy*, since the Hungarian legislation does not affect a taxable person's opportunity to recover the full amount of VAT by a payment in liquid funds and within a reasonable period of time, if a reasonable period of time has been established for payment of the transaction. Furthermore, by using, in paragraph 34 of that judgment, the words 'within a reasonable period of time', the Court recognised that the Member States have a certain freedom to manoeuvre when fixing the refund period. Consequently, national refund rules may unavoidably place the financial burden on the taxable person temporarily without infringing the principle of fiscal neutrality.

45. As regards the lack of a temporal limit on carrying a VAT excess forward to the following tax period, the Republic of Hungary points out that neither the text nor the preamble of Directive 2006/112 states that a VAT excess can be carried forward only once.

46. Moreover, whether or not the condition imposed by the national legislation at issue for obtaining a refund is satisfied depends on the decision of the taxable person concerned. If he has paid for the goods or the provision of services, the question of carrying forward to a subsequent tax period does not arise.

47. Finally, the Republic of Hungary points out that, in commercial practice, a deferral of payment of 90 to 120 days may be considered normal. In those circumstances, the repeated carrying forward of the refund can only affect taxable persons who submit a monthly tax return. Taxable persons who submit a quarterly tax return have, for the most part, probably paid, during the following tax period, the price and the VAT on their input transactions, so a refund is not excluded under Paragraph 186(2) of the Hungarian Law on VAT.

IV – **My assessment**

48. The Commission asks the Court to declare that the Hungarian legislation infringes Directive 2006/112 because, first, the refund of a VAT excess is conditional on the tax having actually been paid and, secondly, in accordance with that condition, the refund of the excess corresponding to that part of the VAT which has not yet been paid may be carried forward indefinitely and not only to the following period.

49. It should be stated at the outset that the second complaint raised by the Commission is not the consequence of the application of the condition laid down by the Hungarian legislation at issue, which is covered by the first complaint. The lawfulness of carrying forward the refund of that part of the VAT not yet paid until it is paid by the taxable person, and therefore, beyond the following tax period, therefore depends on whether the condition laid down by the Republic of Hungary, that only VAT which has been paid may be refunded, is compatible with European Union law.

50. Consequently, the question which it is important to decide in this action is whether a Member State may limit the refund of a VAT excess to that part of the tax which has already been paid by the taxable person.

51. The Republic of Hungary maintains that the power to lay down such a condition is conferred on it by Article 183 of Directive 2006/112, which provides that, in the event of a VAT excess, the Member States may either carry it forward to the following period, or refund it in accordance with conditions which they shall determine.

52. It is therefore a matter of deciding whether the phrase ‘in accordance with conditions which they shall determine’, contained in Article 183 of Directive 2006/112, gives a Member State the power to limit the refund of a VAT excess to that part of the tax which has been paid by the taxable person.

53. The Commission maintains that that provision does not permit a Member State to lay down such a condition on the grounds that it is contrary to the principle of neutrality of the common VAT system for taxable persons and to the meaning and scope of that provision.

54. I am not convinced by the Commission’s argument based on the principle of fiscal neutrality. On the other hand, I do support its position with regard to the meaning and scope of Article 183 of Directive 2006/112.

A – *The principle of fiscal neutrality*

55. Unlike the Commission, I am not convinced that the limitation on the refund of a VAT excess to that part of the tax which has been paid by the taxable person is actually contrary to the principle of VAT neutrality which, as the institution points out, is a fundamental principle underlying the common system of VAT. (7)

56. There is a dual content to that principle. It requires, first, that economic operators in comparable situations, and also similar goods and services, which are thus in competition with each other, are treated in the same way in respect of VAT, in order to avoid any distortion of competition. From that point of view, the principle of fiscal neutrality is an expression, in the context of VAT, of the general principle of equal treatment. (8)

57. The principle of fiscal neutrality requires, secondly, that the taxable person is entirely relieved of the burden of the VAT payable on the goods and services which he has acquired in order to carry out his taxed activities. (9) It is implemented, in the common VAT system, by the deduction system, the scope of which has been interpreted in the light of that principle.

58. Thus, according to the case-law, the principle of fiscal neutrality precludes the deduction system having the consequence that the amount of VAT for which the person concerned is declared liable to pay the authorities exceeds the amount of the tax which he has recovered or which he is owed by his customers. (10) It also precludes a national measure which would make the taxable person liable for the VAT which he has paid in the context of his economic activity without giving him the possibility of deducting it. (11) In other words, the principle of fiscal neutrality requires that the deduction rules make it possible to cancel out all the input VAT which the taxable person has paid to produce his taxed goods or services. Ultimately, it is a question of preventing the taxable person having to pay residual tax

59. However, I cannot find, in the case-law, a precedent in which the Court has held that the principle of fiscal neutrality precludes a taxable person advancing the VAT and thus provisionally bearing the cash flow burden which such an advance implies.

60. In my view, such a principle cannot be inferred from the judgment in *Commission* v *Italy*, cited by the Commission. In that judgment, the Court dealt with legislation of a Member State under which excess VAT was to be refunded to a certain number of taxable persons for the year 1992 in the form of Government bonds issued from 1 January 1994 and maturing five or ten years after issue.

61. It was against this background that the Court held that, although the Member States have a certain freedom to manoeuvre in determining the conditions for the refund of excess VAT, (12) the conditions they determine cannot undermine the principle of fiscal neutrality by making the taxable person bear, in whole or in part, the burden of the VAT, so they must enable the taxable person, in appropriate conditions, to recover the entirety of the credit arising from that excess VAT. The Court inferred that this implies that the refund is carried out within a reasonable period of time by a payment in liquid funds or equivalent means, and that, in any case, the method of refund adopted must not entail any financial risk for the taxable person. (13)

62. In *Commission* v *Italy*, the Court therefore simply declared the conditions for a refund at issue unlawful on the ground that they did not constitute a payment in liquid funds within a reasonable time. (14)

63. Moreover, if we examine the general scheme of the common VAT system, we find, as the Hungarian Government points out, that it requires the taxable person to advance that tax, not only the VAT on the goods and services he acquires to carry out his taxed activities but also, to a certain extent, the VAT for which he is liable to the Treasury.

64. Indeed, as I have pointed out, under the common system, VAT is levied at each stage of production or distribution, so that, in principle, the taxable person has to pay it to his suppliers and subsequently deduct it from the VAT he owes to the Treasury.

65. Similarly, under Articles 63, 206 and 250 of Directive 2006/112, the taxable person is liable, on submission of each VAT return, not only for the tax he has actually recovered from his customers, but also for the tax they still owe him in respect of deliveries of goods or services he has already supplied. We must remember that, under Article 63, VAT becomes chargeable when the goods or the services are supplied.

66. Since, in the majority of cases, the debt owed by taxable persons to the Treasury exceeds the amount they are entitled to deduct, taxable persons may therefore be obliged to bear the cash flow burden corresponding to that part of the VAT which has become chargeable and which they have not yet received.

67. Moreover, if, in accordance with the option provided for in Article 183 of Directive 2006/112, a Member State were to decide to carry the excess VAT forward to the following period, the length of which, under Article 252 of the directive, may be up to one year, the taxable person would have to wait during the whole of that period for the refund not only of the tax for which he is still liable but also of that which he has already paid.

68. In such a situation, the taxable person would have to advance payment of the VAT and bear the cash flow burden which that advance involves and, depending on the length of the tax period set by the Member State, the weight of that burden on the taxable person's finances might be heavier than that caused by the Hungarian legislation, which provides for the refund of the tax already paid without carrying it forward.

69. Finally, the Commission points out that, if the taxable person were to cease his activities, owing to insolvency, without having paid for all his purchases, the excess VAT corresponding to the unpaid purchases would ultimately remain with the State.

70. I do not consider that this consequence is contrary to the principle of fiscal neutrality either. That principle precludes not that the State is enriched but that the input VAT paid by the taxable person for carrying out his taxed activities is ultimately payable by him. However, that is not the case as long as the taxable person has not paid the VAT.

71. The harm, in the event of the taxable person's insolvency, is suffered rather by his suppliers who, under the common VAT system, are required to pay to the State the tax owing even though they have not received it. However, the fact that the supplier of a taxable person who has ceased his activity owing to insolvency owes the Treasury a tax which he will be unable to recover is the result of the application of Articles 63, 206 and 250 of Directive 2006/112. Moreover, that situation is expressly provided for in Article 185 of Directive 2006/112, which concerns the possibility that the Member State may make adjustments in the event of transactions which remain wholly or partially unpaid.

72. It is therefore in the light of all these consideration that I find it difficult to support the Commission's argument that the Hungarian legislation, because it requires the taxable person to advance payment of the input tax, is contrary to the principle of fiscal neutrality.

73. Admittedly, as we shall see in the second part of my analysis, the provisions of Directive 2006/112 concerning the refund of excess VAT did not, in my view, authorise the Republic of Hungary to introduce the condition at issue.

74. However, it is not the specific conditions for application of the right to deduct which must determine the precise implications of the principle of fiscal neutrality. On the contrary, it is that principle which, if the provisions of Directive 2006/112 are silent or inadequate, must guide their

interpretation.

75. In the present case, it is not the principle of fiscal neutrality which, in my view, precludes the legislation at issue, but rather the provisions of Directive 2006/112, and, in particular, Article 183.

B – *The meaning and scope of Article 183 of Directive 2006/112*

76. In my view, the argument of the Republic of Hungary, that Article 183 of Directive 2006/112 authorised it to introduce the condition at issue, is incompatible, first, with the wording of that provision. The first paragraph of Article 183 provides, we recall, that '[w]here, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period'.

77. If we examine this provision, we find that this text gives the Member States only two possibilities, namely, to carry the excess forward to the following period or to refund it in accordance with conditions which it is for them to determine.

78. I would also point out that the phrase 'in accordance with conditions which they shall determine' relates only to the conditions for a refund, not to the determination of the amount of the deductions. This analysis is also borne out in the languages in which Article 18(4) of the Sixth Directive, the terms of which Article 183 of Directive 2006/112 reproduces, was adopted. (15)

79. The conditions which it is for the Member States to determine, in the light of Article 183 of Directive 2006/112 therefore relate only to the practical conditions for refund and not to the determination of the amount of the refund. It may be a question, for example, of the period of time given to the tax authorities for making the refund, (16) or of measures designed to prevent the risk of fraud, (17) or even of the imposition of a limitation period. (18)

80. However, the phrase 'in accordance with conditions which they shall determine' cannot very well be taken to mean that it permits the Member States to add a third possibility to the alternative stated, in the first paragraph of Article 183 of Directive 2006/112, which would provide that only VAT actually paid may be refunded.

81. This analysis is confirmed by several points in Directive 2006/112.

82. Thus, the second paragraph of Article 183 of the directive provides that the Member States may refuse to carry forward or refund if the amount of the excess is insignificant. *A contrario*, it may be inferred from that provision that the Community legislature did not intend to confer on the Member States the power to limit the refund to the VAT which had been paid.

83. We have seen that the first paragraph of Article 183 of Directive 2006/112 covers the situation in which the amount of the deductions exceeds that of the VAT without providing that those rights to deduct were to be reduced by the VAT which is chargeable but has not yet been paid. It is expressly stated in Article 168 of that directive that the taxable person's right to deduct input tax relates not only to the VAT which he has paid but also to the VAT due.

84. We find further confirmation in the provisions of Directive 2006/112 which deal specifically with the adjustments to deductions. In particular, Article 185 refers specifically to transactions remaining totally or partially unpaid.

85. This reference to unpaid transactions in Article 185, although no reservation is expressed in their regard in Article 183 of Directive 2006/112, also shows, *a contrario*, that the Community legislature did not intend to enable the Member States to exclude the refund of the tax when this

has not actually been paid.

86. It is true, as the Republic of Hungary points out, that this interpretation may have the consequence of requiring a Member State to provide funds to a taxable person free of charge, if his rights to deduct consist in tax which he has not yet paid. This consequence may seem illogical in the light of the rule that taxable persons are liable to the Treasury for VAT which is merely chargeable, which may require economic operators to advance VAT which they have not yet received.

87. It may also have the effect of creating a situation of inequality between economic operators according to their ability to obtain payment terms from their suppliers of goods or services, which may depend on their economic importance.

88. However, I do not believe that these arguments put forward by the Republic of Hungary justify accepting any other interpretation of Article 183 of Directive 2006/112.

89. Indeed, it has already been held that the Member States are required to apply the common VAT system even if they consider it to be a work in progress. It is stated in paragraphs 55 and 56 of the judgment in *Commission* v *Netherlands*, (19) that even if the interpretation put forward by certain Member States better served the aims of the Sixth Directive, such as fiscal neutrality, the Member States may not disregard the provisions expressly laid down in that directive. (20)

90. That is why I take the view that the Commission is right to maintain that Article 183 of Directive 2006/112 does not authorise a Member State to limit the refund of excess VAT to the tax which has actually been paid. I therefore propose that the Court declare this action for failure to fulfil obligations to be well?founded.

91. If the Court shares my views, the Republic of Hungary will have to bear the costs of these proceedings in accordance with Article 69(2) of the Rules of Procedure of the Court of Justice.

V – **Conclusion**

92. In the light of the foregoing considerations, I propose that the Court should:

1. declare this action for failure to fulfil obligations well founded in so far as the European Commission alleges that the Republic of Hungary has failed to comply with its obligations under Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax:

– by requiring taxable persons whose tax declaration for a given tax period records an ‘excess’ within the meaning of Article 183 of Directive 2006/112 to carry forward that excess or a part of it to the following tax year where the taxable person has not paid the supplier the full amount for the purchase in question, and

– because, as a result of that requirement, certain taxable persons whose tax declarations regularly record such an ‘excess’ may be required more than once to carry forward the excess to the following tax year.

2. order the Republic of Hungary to pay the costs.

1 – Original language: French.

2 – Council Directive 2006/112 of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p.1).

3 – First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, *English Special Edition 1967 (I), p. 14*).

4 – Általános forgalmi adóról szóló 2007. évi CXXVII. törvény ('the Hungarian Law on VAT').

5 – Adózás rendjéröl szóló 2003. évi XCII. törvény.

6 – Case C?78/00 *Commission* v *Italy* [2001] ECR I?8195.

7 – See, inter alia, Case C?302/07 *J D Wetherspoon* [2009] ECR I?1467, paragraphs 34 and 57; Case C?174/08 *NCC Construction Danmark* [2009] ECR I?10567, paragraph 40 and the case?law cited, and Case C?438/09 *Dankowski* [2010] ECR I?0000, paragraph 37.

8 – See *NCC Construction Danmark*, paragraph 44, and Case C?41/09 *Commission* v *Netherlands* [2011] ECR I?0000, paragraph 66 and the case-law cited.

9 – Case C?465/03 *Kretztechnik* [2005] ECR I?4357, paragraph 34 and the case-law cited.

10 – Case C?317/94 *Elida Gibbs* [1996] ECR I?5339, paragraph 28, and *J D Wetherspoon*, paragraph 34 and the case-law cited.

11 – Case C?408/98 *Abbey National* [2001] ECR I?1361, paragraph 35 and the case-law cited.

12 – The applicable provisions as regards the refund of excess VAT are those of Article 18(4) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, 'the Sixth Directive'), the terms of which are reproduced by Article 183 of Directive 2006/112.

13 – *Commission* v *Italy*, paragraphs 33 and 34.

14 – Ibid., paragraph 36.

15 – See the versions in German ('Übersteigt der Betrag der abgezogenen Vorsteuer den Betrag der für einen Steuerzeitraum geschuldeten Mehrwertsteuer, können die Mitgliedstaaten den Überschuss entweder auf den folgenden Zeitraum vortragen lassen oder nach den von ihnen festgelegen Einzelheiten erstatten'); English ('Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period'); Italian ('Qualora, per un periodo d'imposta, l'importo delle detrazioni superi quello dell'IVA dovuta, gli Stati membri possono far riportare l'eccedenza al periodo successivo, o procedere al rimborso secondo modalità da essi stabilite'), and Dutch ('Indien voor een bepaald belastingtijdvak het bedrag van de aftrek groter is dan dat van de verschuldigde BTW, kunnen de lidstaten hetzij het overschot doen overbrengen naar het volgende tijdvak, hetzij het overschot teruggeven overeenkomstig de door hen vastgestelde regeling').

16 – See, to that effect, *Commission* v *Italy*, paragraphs 32 to 34, and Case C?25/07 *Sosnowska* [2008] ECR I?5129, paragraph 17.

17 – In Joined Cases C?286/94, C?340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I?7281, the Court ruled that Article 18(4) of the Sixth Directive does not preclude measures enabling the national fiscal authorities to retain, as a protective measure, refundable amounts of VAT where there are grounds for presumption of tax evasion or where those authorities claim that

there is a VAT debt owing to them which is not apparent from the taxable person's returns and which the taxable person contests (paragraphs 41 and 44).

18 – In Case C?472/08 *Alstom Power Hydro* [2010] ECR I?0000, the Court ruled that Article 18(4) of the Sixth Directive does not preclude legislation of a Member State which lays down a limitation period of three years in which to make an application for the refund of excess VAT collected by, though not due to, the tax authority (paragraph 22).

19 – Case C?338/98 *Commission* v *Netherlands* [2001] ECR I?8265.

20 – Case C?243/03 *Commission* v *France* [2005] ECR I?8411, paragraph 35.