OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 14 January 2016 (1)

Case C?546/14

Degano Trasporti S.a.s. di Ferrucio Degano & C., in liquidation

(Request for a preliminary ruling from the Tribunale di Udine (District Court, Udine, Italy))

(Value added tax — Directive 2006/112/EC — Trader in financial difficulties — Arrangement with creditors — Partial payment of a VAT debt to the Member State — Principle of sincere cooperation)

1. The Court has on various occasions made it clear that EU law requires Member States to take all legislative and administrative measures appropriate for ensuring collection of all the value added tax ('VAT') due on their territory. The measure of latitude which they enjoy in that regard is limited by the obligation, first, to ensure effective collection of the Union's own resources and, second, not to create significant differences in the manner in which taxable persons are treated, either within a Member State or throughout the Member States (principle of fiscal neutrality). In the present request for a preliminary ruling, the Tribunale di Udine (District Court, Udine; 'the referring court') seeks guidance, in essence, on whether those principles preclude a Member State from accepting only partial payment of a VAT debt by a trader in financial difficulties, in the course of an arrangement with creditors based on the liquidation of its assets.

Legislation

EU law

2. Article 4(3) TEU provides:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

3. The preamble to the VAT Directive (2) contains in particular the following recitals:

'(4) The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of

competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.

…

(7) The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition …

(8) … the budget of the European Communities is to be financed, without prejudice to other revenue, wholly from the Communities' own resources. Those resources are to include those accruing from VAT and obtained through the application of a uniform rate of tax to bases of assessment determined in a uniform manner and in accordance with Community rules.'

4. Pursuant to Article 2(1) of the VAT Directive, the transactions subject to VAT include the supply of goods or services for consideration within the territory of a Member State by a taxable person acting as such or the importation of goods.

5. Article 206 provides:

'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. Member States may, however, set a different date for payment of that amount or may require interim payments to be made.'

6. Pursuant to Article 212, Member States may release taxable persons from payment of the VAT due where the amount is insignificant.

7. Pursuant to the first subparagraph of Article 273, 'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers'.

8. Under Article 2(1)(b) of Decision 2007/436, (3) the Union's own resources include, inter alia, revenue from 'the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases determined according to Community rules'. Under Article 2(4), that uniform rate is fixed at 0.30%.

Italian law

9. Article 160 of Royal Decree No 267 of 16 March 1942, as amended (Regio Decreto del 16 marzo 1942, n. 267; 'the Bankruptcy Law'), sets up an arrangement procedure (*concordato preventivo*) for insolvent traders or traders in financial difficulties, as an alternative to a declaration of bankruptcy. In such a procedure, the trader's assets are disposed of to provide full payment of preferential creditors and partial payment of unsecured creditors. However, the arrangement may provide that debts owed to certain categories of preferential creditors may not be satisfied in their entirety, provided that an independent expert attests that those creditors would not receive better treatment if the trader went bankrupt.

10. Proposals for such arrangements must be submitted to creditors by application to the competent Tribunale (District Court). Pursuant to Article 162 of the Bankruptcy Law, that court must first verify that the legal conditions for entering into an arrangement are met. Next, the

creditors to whom the debtor does not offer full and prompt payment are called upon to vote on the proposal. The proposal must, under Article 177, be approved by as many creditors admitted to vote as together represent the majority of the total amount of their claims. In that case, Article 180 provides that the court is to validate the arrangement so approved after ruling on any opposition by dissenting creditors. Arrangements are binding on all the creditors once validated by the court.

11. The order for reference indicates that any disputes between individual creditors and the debtor on the existence or the amount of a claim are not resolved within the insolvency proceedings, but through normal judicial procedures. It appears, however, that, under Article 173 of the Bankruptcy Law, an application for an arrangement must be dismissed where the applicant has deliberately concealed assets or failed to declare one or more debts.

12. Pursuant to Article 182ter of the Bankruptcy Law, traders may — in parallel with their proposal for an arrangement — propose a 'tax settlement' to the tax authorities and the social security institutions. Such a proposal, which is also subject to the condition that no greater satisfaction can be expected in case of bankruptcy, has to be accepted by each tax authority and/or social security institution concerned. A tax settlement may not however concern taxes forming part of the Union's own resources and may not provide for partial payment, but only for deferred payment, of a VAT claim, which is a preferential claim (of the 19th rank in order of priority) under Italian law.

13. According to the order for reference, the Corte di Cassazione (Court of Cassation) has decided that a trader who proposes an arrangement with creditors under Article 160 of the Bankruptcy Law is not required to submit a separate proposal for tax settlement when he has tax debts, but may include them in the general proposal made to all creditors. In that case, the State takes part in the vote to approve the arrangement if the proposal does not offer full payment of its tax claims. The State may also bring an action before the relevant court opposing a majority approval obtained notwithstanding its dissent.

14. However, again according to the case-law of the Corte di Cassazione (Court of Cassation), the prohibition on proposing partial payment of VAT debts under the tax settlement procedure is also applicable in the context of arrangement proposals. It appears from the order for reference that the Corte di Cassazione has justified that position inter alia on the basis of this Court's interpretation (4) of Article 4(3) TEU and of the present VAT Directive's predecessor, the Sixth Directive. (5) The referring court appears to have doubts as to whether that position of the Corte di Cassazione is indeed justified by this Court's interpretation.

Factual background, procedure and question referred

15. Degano Trasporti S.a.s. di Ferruccio Degano & C. ('Degano') submitted a proposal for an arrangement to the referring court on 22 May 2014, as a result of financial difficulties which prevented it from pursuing its commercial activities. Under the proposal, certain preferential creditors would be paid in full but there would be partial payment only for some lower-ranking preferential creditors and unsecured creditors, and for the State with regard to Degano's VAT debt.

16. The referring court wonders whether the proposal should be rejected as inadmissible on the ground that it does not provide for full payment of Degano's VAT debt. It doubts however whether the Member States' obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due, as set out in the Court's case-law, in fact precludes an arrangement in which only part of a VAT debt is satisfied, provided that the debt would not be better satisfied in bankruptcy proceedings. It therefore requests a preliminary ruling on the following question:

‘On a proper construction, do the principles and rules contained in Article 4(3) TEU and [the VAT Directive], as already interpreted in the judgments of the Court of Justice in *Commission* v *Italy*, C?132/06, EU:C:2008:412, *Commission* v *Italy*, C?174/07, EU:C:2008:704 and *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, also preclude a national rule (and, therefore, in respect of the case in the main proceedings, an interpretation of Articles 162 and 182ter of the Bankruptcy Law) under which a proposal for an arrangement with creditors with the liquidation of the debtor’s assets, which provides for only partial payment of the State’s claim in respect of VAT, is permissible where there is no tax settlement and where, in respect of that claim, a larger payment in the event of bankruptcy is not foreseeable on the basis of an assessment by an independent expert and following the formal review of the court?’

17. Written observations have been submitted by Degano, by the Italian and Spanish Governments and by the European Commission. No hearing was held.

Admissibility

18. The Commission observes that the referring court appears to doubt whether its request for a preliminary ruling is admissible. That request was made in interlocutory proceedings to determine the admissibility of Degano’s application for an arrangement. The referring court moreover explains that the proceedings are not adversarial unless and until such time as dissenting creditors oppose an arrangement approved by creditors accounting for the majority of the claims of the creditors admitted to the vote.

19. In my view, the request for a preliminary ruling is clearly admissible.

20. It is settled case-law that a national court may refer a question to the Court if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. (6) That may include interlocutory proceedings, as the choice of the most appropriate time to refer a question for a preliminary ruling lies within the exclusive jurisdiction of the national court. (7) Consequently, the fact that the proceedings before the referring court in the present case are currently at a preliminary or interlocutory stage does not preclude that court from choosing to request a preliminary ruling at that point.

21. Moreover, whilst the Court has no jurisdiction to rule on questions raised in proceedings where the national court is exercising administrative authority without performing a judicial function, (8) that is not the situation here.

22. In the main proceedings, the referring court is called upon to assess what it describes as the ‘legal feasibility’ of the arrangement. It must therefore verify that the legal conditions for entering into an arrangement are met. That preliminary step is a prerequisite to a vote on the arrangement and to the adoption by the referring court, provided that any opposition by dissenting creditors has been dismissed, of a final decision validating the arrangement and making it binding on all creditors. Whether that step is adversarial in nature has no bearing on the judicial function which the referring court thus assumes. (9)

23. Finally, the present reference arises out of the referring court's doubts as to whether the case-law of the Corte di Cassazione (Court of Cassation) — to the effect that an arrangement within the meaning of Article 160 of the Bankruptcy Law may never provide for partial payment of a VAT debt — is correct in so far as it is based on this Court's interpretation of Article 4(3) TEU and the Sixth Directive. Although the referring court is bound by the rulings of the Corte di Cassazione interpreting Article 160 of the Bankruptcy Law, that does not deprive it of its power to refer to the Court questions of interpretation of EU law involving such rulings. (10)

Assessment

Preliminary observations

24. It is not disputed that Degano is in financial difficulties for the purposes of Article 160 of the Bankruptcy Law or that the arrangement constitutes an alternative to a declaration of bankruptcy. It is also common ground that the arrangement in question involves liquidation of the totality of Degano's assets.

25. Furthermore, neither the existence nor the amount of Degano's VAT debt vis-à-vis the Italian State appear to be in dispute in the main proceedings. As the referring court has explained, any such disputes are settled outside the procedure for an arrangement.

Duties of the Member States according to case-law

26. The Court has observed on several occasions that it follows from the common system of VAT and from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory. In that regard, Member States are required to check taxable persons' returns, accounts and other relevant documents, and to calculate and collect the tax due. (11)

27. While the Member States are required, under the common system of VAT, to ensure compliance with the obligations to which taxable persons are subject, they enjoy in that respect a certain measure of latitude, inter alia, as to how they use the means at their disposal. (12)

28. The Court has made clear however that that latitude is limited by the obligation of the Member States to ensure effective collection of the Union's own resources. (13) Given that those resources include, under Article 2(1) of Decision 2007/436, revenue from the application of a uniform rate to the harmonised VAT assessment bases, the Court has held that there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second. (14)

29. Moreover, no significant differences may be created in the manner in which taxable persons are treated, either within a Member State or throughout the Member States. The VAT Directive must be interpreted in accordance with the principle of fiscal neutrality inherent in the common system of VAT, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT. (15) Any action by Member States concerning VAT collection must comply with that principle, which aims to permit fair competition in the internal market. (16)

30. It is against that background that the Court held, in the two *Commission* v *Italy* cases cited, that a general and indiscriminate waiver of verification of the taxable transactions effected during a series of tax periods violated Articles 2 and 22 of the Sixth Directive and what is now Article 4(3)

TEU. (17) As I explained in my Opinion in *Belvedere Costruzioni*, (18) the provisions of Italian law at issue in those cases essentially granted broad immunity from assessment or investigation by tax authorities in respect of amounts of VAT which had not been declared in good time, in exchange for a payment varying from half the amount subsequently declared to a purely token amount of tax. For the Court, in the *Commission* v *Italy* cases, the effect of the considerable imbalance between the amounts actually due and the amounts paid by taxable persons wishing to take advantage of the tax amnesty in question was tantamount to a tax exemption and those significant variations in the treatment of taxable persons in Italy distorted fiscal neutrality. (19)

31. By contrast, the Court decided in *Belvedere Costruzioni* that neither Article 4(3) TEU nor Articles 2 and 22 of the Sixth Directive precluded the application in VAT matters of an exceptional provision of national law under which proceedings pending before a higher court were automatically terminated where they originated in an application brought at first instance more than 10 years before the date of the entry into force of that provision and the tax authorities had been unsuccessful at first and second instance. (20) The provision in issue in that case had the automatic effect that the decision of the court of second instance — a decision unfavourable to the tax authorities — became final and that the debt claimed by the tax authorities was thus extinguished. The Court's reasoning in finding the provision compatible with EU law was based on its exceptional and limited nature, on the lack of any overall discriminatory effect and on the need to give judgment within a reasonable time. (21)

The arrangement procedure in issue in the main proceedings

32. The Commission submits that the arrangement proposed in the main proceedings falls foul of the principles set out in the *Commission* v *Italy* cases. In essence, it argues, both the rules governing the EU's own resources and the VAT Directive, in conjunction with the principle of sincere cooperation in Article 4(3) TEU, impose an absolute obligation on each Member State to collect all the VAT due on its territory. A Member State may waive a VAT debt only in the specific situation envisaged in Article 212 of the VAT Directive, that is to say where the amount due is insignificant. It may not allow a taxable person in financial difficulties to pay only part of a VAT debt in an arrangement with creditors involving the liquidation of its assets. As a consequence, the Commission maintains — going beyond the scope of the question referred — that it is indispensable that VAT debts not only be granted preferential treatment by law but also, within the category of preferential debts, rank first in insolvency proceedings, in both formal and substantive terms.

33. I shall deal first with that latter contention, which is unacceptably rigid in my view.

34. First of all, the argument that VAT debts must take precedence over all other debts in order to protect the EU's financial interests finds no support in the principles that I have set out. (22) It is true that the Member States' latitude in ensuring compliance with the obligations to which taxable persons are subject is limited by the duty to ensure effective collection of the EU's own resources, including VAT. The common system of VAT however does not require Member States to grant VAT debts preferential treatment over all other categories of debt.

35. In my Opinion in *Belvedere Costruzioni*, I took the view that the requirement of effective collection cannot be absolute. (23) The Court accepted that proposition on the basis, first, that the obligation to ensure effective collection of EU resources cannot run counter to compliance with the principle that judgment should be given within a reasonable time (24) and, second, that the provision in issue constituted not a general waiver of the collection of VAT for a certain period but an exceptional provision which, because of its specific and limited character as a result of its conditions of application, did not create significant differences in the way in which taxable persons are treated as a whole, and did not therefore infringe the principle of fiscal neutrality. (25)

36. In certain circumstances, therefore, a Member State may reasonably consider it legitimate to waive full payment of a VAT debt, provided that such circumstances are exceptional, specific and limited and that the Member State does not thereby create significant differences in the way in which taxable persons are treated as a whole and does not therefore infringe the principle of fiscal neutrality.

37. Against that background, Member States should enjoy a degree of flexibility as regards collection of VAT debts when — as in the main proceedings — the taxable person is in financial difficulties. That situation is specific because the taxable person's assets are insufficient to satisfy all creditors. In those circumstances, as there are no harmonising rules in EU law concerning the ranking of VAT debts, Member States must be free to consider that other categories of debt (such as wages or social security contributions — or, in the case of individual taxable persons, maintenance payments) deserve higher protection.

38. Furthermore, a procedure such as that in issue in the main proceedings is consistent with the Member States' obligation to ensure effective collection of EU resources, as it contains at least three safeguards such as to protect VAT debts.

39. First, the arrangement proposal must be dismissed, inter alia, where the applicant has deliberately concealed any assets or failed to declare one or more debts (including thus VAT debts).

40. Second, although, according to the referring court, the arrangement may provide that a VAT debt is not satisfied in its entirety, that is possible only where an independent expert attests that the tax authorities would not receive better treatment in the event of bankruptcy. Consequently, whilst there may be situations in which an arrangement with creditors results in payment of a greater portion of the VAT debt than in the event of bankruptcy, the converse cannot be true. That being so, a provision of national law cannot be considered incompatible with the obligation to ensure effective collection of EU resources simply because it opts for one, rather than another, means of achieving the maximum level of collection.

41. Third, even if the application proposing the arrangement is admissible, the arrangement itself is subject to a vote by all creditors for whom the application does not envisage full and immediate payment (including the State where the proposal does not provide for full payment of a VAT debt). It must be approved by as many creditors admitted to vote as together represent the majority of the total amount of their claims. Dissenting creditors may then challenge the arrangement before the court. (26) The arrangement procedure thus enables the State to take all steps which it deems necessary to ensure collection of a maximum amount of VAT debt in the circumstances. That may imply, for example, voting against the arrangement (or opposing it before the court) if the State disagrees with the conclusions of the independent expert.

42. Finally, because of its specific and limited character as a result of its strict conditions of application, the arrangement procedure clearly does not create significant differences in the way in

which taxable persons are treated and is thus consistent with the principle of fiscal neutrality. Unlike the national provisions in issue in the two *Commission* v *Italy* cases, the arrangement procedure does not involve a general and indiscriminate renunciation of the tax authorities' right to obtain payment of VAT debts. The sacrifice of part of a VAT debt which it may involve must be viewed in the light of the objective of giving taxable persons in financial difficulties a second chance through collective restructuring of all their debts.

43. Although it appears that, in Degano's case, the arrangement involves liquidation of all its assets, the Court has not been informed of the precise details. Other arrangements may involve the debtor's continuing existence as a going concern. In such cases, as the Spanish Government points out, the objective concerned is consistent with the Commission's recommendation to the Member States to remove the barriers to effective restructuring of viable companies in financial difficulties, thereby promoting entrepreneurship, investment and employment and contributing to reducing the obstacles to the smooth functioning of the internal market. (27)

44. However, I would stress that the view I have reached concerns the interpretation of EU law alone. The referring court appears to have doubts as to the interpretation of certain provisions of the Bankruptcy Law by the Corte di Cassazione (Court of Cassation). I express no view as to other possible reasons of national law which may have guided the Corte di Cassazione in its decisions.

Conclusion

45. I am therefore of the opinion that the Court should answer the question raised by the Tribunale di Udine (District Court, Udine, Italy) to the following effect:

Neither Article 4(3) TEU nor Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax preclude national rules such as those in issue in the main proceedings, if those rules are to be interpreted as allowing an undertaking in financial difficulties to enter into an arrangement with creditors involving liquidation of its assets without offering full payment of the State's claim in respect of VAT, on condition that an independent expert concludes that no greater payment of that claim would be obtained in the event of bankruptcy and that the arrangement is validated by a court.

1 – Original language: English.

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

3 – Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17). Decision 2007/436 was repealed by Council Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union (OJ 2014 L 168, p. 105), which will apply retroactively from 1 January 2014 once approval of all the Member States has been obtained. However, the provisions cited are unchanged.

4 – See, in particular, judgments in *Commission* v *Italy*, C?132/06, EU:C:2008:412, *Commission* v *Italy*, C?174/07, EU:C:2008:704, and *Belvedere Costruzioni*, C?500/10, EU:C:2012:186.

5 – 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').

6 – See, most recently, judgment in *Torresi*, C?58/13 and C?59/13, EU:C:2014:2088, paragraph 19.

7 – See, for example, judgment in *X*, C?60/02, EU:C:2004:10, paragraphs 25, 26 and 28.

8 – See, inter alia, judgment in *Job Centre*, C?111/94, EU:C:1995:340, paragraph 11, and order in *Bengtsson*, C?344/09, EU:C:2011:174, paragraph 19.

9 – See, to that effect, judgments in *Corsica Ferries*, C?18/93, EU:C:1994:195, paragraph 12, and *Roda Golf & Beach Resort*, C?14/08, EU:C:2009:395, paragraph 33.

10 – See, inter alia, judgments in *Rheinmühlen-Düsseldorf*, 166/73, EU:C:1974:3, paragraph 4, and *Cartesio*, C?210/06, EU:C:2008:723, paragraph 93.

11 – See judgments in *Commission* v *Italy*, C?132/06, EU:C:2008:412, paragraph 37, and *Belvedere Costruzion*i, C?500/10, EU:C:2012:186, paragraph 20. See also judgments in *Commission* v *Italy*, C?174/07, EU:C:2008:704, paragraph 36, and *Cabinet Medical Veterinar Tomoiag? Andrei*, C?144/14, EU:C:2015:452, paragraph 25.

12 – Judgments in *Commission* v *Italy*, C?132/06, EU:C:2008:412, paragraph 38, and *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, paragraph 21.

13 – Judgments in *Commission* v *Italy*, C?132/06, EU:C:2008:412, paragraph 39, and *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, paragraph 22.

14 – See judgment in *Åkerberg Fransson*, C?617/10, EU:C:2013:105, paragraph 26. See also judgment in *Commission* v *Germany*, C?539/09, EU:C:2011:733, paragraph 72, and my Opinion in *Belvedere Costruzioni*, C?500/10, EU:C:2011:754, point 47.

15 – See judgments in *Commission* v *Italy*, C?132/06, EU:C:2008:412, paragraph 39, and *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, paragraph 22. See also order in *Nuova Invincibile*, C?82/14, EU:C:2015:510, paragraph 23.

16 – Judgment in *Commission* v *Italy*, C?132/06, EU:C:2008:412, paragraph 45. See also recitals 4 and 7 in the preamble to the VAT Directive.

17 – Judgments in *Commission* v *Italy*, C?132/06, EU:C:2008:412, and *Commission* v *Italy*, C?174/07, EU:C:2008:704. The provisions of the Sixth Directive in issue correspond to those of Articles 2(1), 206, 252(1) and 273 of the VAT Directive (Article 252(1) requires taxable persons to submit VAT returns).

18 – C?500/10, EU:C:2011:754, point 36.

19 – Judgment in *Commission* v *Italy*, C?132/06, EU:C:2008:412, paragraphs 43 and 44.

20 – Judgment in *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, paragraph 28.

21 – See further point 35 below.

22 – Points 26 to 31 above.

23 – Opinion in *Belvedere Costruzioni*, C?500/10, EU:C:2011:754, point 48.

24 – Judgment in *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, paragraphs 23 to 25.

25 – Judgment in *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, paragraphs 26 and 27.

26 – Articles 177 and 180 of the Bankruptcy Law.

27 – Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, C(2014) 1500 final, pp. 4 and 5.