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Provisional text

OPINION OF ADVOCATE GENERAL

SAUGMANDSGAARD ØE

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Case C?396/16

T — 2, družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme, d.o.o. (sedaj v ste?aju)

v

Republic of Slovenia

(Request for a preliminary ruling from the Vrhovno sodiš?e (Supreme Court, Slovenia))

(Reference for a preliminary ruling — Directive 2006/112/EC — Common system of value added tax (VAT) — Article 184 — Adjustment of deductions of input VAT paid — Article 185(1) — Change in the factors used to determine the amount to be deducted — Article 185(2) — Transactions remaining totally or partially unpaid — Definitive approval of an arrangement with creditors — Article 90 and the second subparagraph of Article 185(2) — Fiscal neutrality — Collection of all of the VAT due in the territory — Duty to ensure consistency in the application of systems for the adjustment of tax charges and deductions in the event of non-payment of the price)

I. Introduction

1. The Vrhovno sodiš?e (Supreme Court, Slovenia) has referred to the Court of Justice several questions for a preliminary ruling concerning the interpretation of Articles 184 to 186 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). (2)

2. The reference was made in the course of proceedings between T — 2, družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme, d.o.o. (sedaj v ste?aju) ('T?2') and the Republic of Slovenia, represented by the Ministrstvo za finance (Ministry of Finance, Slovenia) concerning the adjustment of deductions of the VAT on purchases of goods and services in respect of which T?2 has benefitted from an arrangement with creditors.

3. In accordance with the definitive approval of the arrangement with creditors, the amount which T?2 owed its suppliers under the transactions subject to VAT was reduced by 56%. The Ministry of Finance concluded that T?2 must adjust its deductions of VAT in proportion to the reduction from which it had benefitted, that is to say, reduce by 56% the VAT which it had initially

deducted in respect of the relevant invoices. T?2 has challenged that interpretation.

4. It is in that context that the referring court has submitted to the Court of Justice three questions for a preliminary ruling, in order to determine whether, having regard to the transposition into national law of Articles 184 and 185 of the VAT Directive, the tax authorities are entitled to demand a reduction in the VAT deductions made by an insolvent taxable person that has benefitted from a reduction of its liabilities to its creditors in proceedings for an arrangement with creditors.

5. In substance, I shall propose that the Court answer that the tax authorities are, in a dispute such as that in the main proceedings, entitled to demand a reduction in the VAT deductions made by an insolvent taxable person whose debts have been made the subject of a judgment on an arrangement with creditors, if and to the extent that that judgment entails a reduction in the taxable amount for VAT purposes.

II. **Legal context**

A. **EU law**

6. Article 73 of the VAT Directive provides:

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

7. Article 90 of the directive provides:

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

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

8. In accordance with Article 168(a) of the VAT Directive, every taxable person is entitled, in the Member State in which it carries out taxed transactions, to deduct from the VAT which it is liable to pay the amount of VAT due or paid in that Member State in respect of goods and services supplied by another taxable person, in so far as those goods and services are used for the purposes of those transactions.

9. Article 184 of the VAT Directive is worded as follows:

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

10. Article 185 of the directive provides:

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

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

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

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

11. Under Article 186 of the VAT Directive, Member States are required to lay down the detailed rules for applying Articles 184 and 185 of that directive.

B. **Slovenian law**

12. Article 39(3) and (4) of the Zakon o davku na dodano vrednost, Uradni list RS, n°13/11 (Law on VAT) ('the ZDDV-1') provides:

'3. A taxable person may adjust (reduce) the amount of VAT declared if, on the basis of a court decision that has acquired the force of *res judicata* in insolvency proceedings which have concluded or on the basis of a procedure for reaching an arrangement with creditors brought successfully to completion, it will not be reimbursed or fully reimbursed. The taxable person may make a similar adjustment where he receives a final judicial decision suspending the proceedings or another attestation from which it is clear that, in enforcement proceedings that have been concluded, it has not been reimbursed or fully reimbursed because the debtor has been removed from the register of companies or other registers or relevant documents. Where a taxable person subsequently receives full or partial payment in respect of the supply of goods or services in relation to which it has claimed an adjustment to the taxable amount in accordance with this paragraph, it shall declare VAT on the amount received.

4. Notwithstanding the preceding paragraph, the taxable person may adjust (reduce) the amount of VAT declared but not paid on all admitted debts which it has declared in a procedure for reaching an arrangement with creditors or insolvency proceedings.'

13. In accordance with Article 63(1) of the ZDDV-1, the taxable person is entitled to deduct from the VAT for which it is liable the VAT due or paid in respect of the purchase of goods or services, if it has used those goods and services or will use them for the purposes of its taxable transactions.

14. Article 68 of the ZDDV-1, which is entitled 'Adjustment of the deduction of VAT', is worded as follows:

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

2. A taxable person shall make an adjustment where, after the VAT deduction, 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.

3. By way of derogation from paragraph 2 of this article, the taxable person shall not adjust the initial deduction in the case of destruction or loss duly proved 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 7 of this law.'

15. Pursuant to Article 214(1) of the Zakon o finan?nem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju, Uradni list RS, No 126/07 (Law on financial transactions, insolvency proceedings and compulsory liquidation) ('the ZFPPIPP'), a final decision approving an arrangement with creditors removes the right of creditors to claim payment, in judicial proceedings or in other proceedings before a competent public authority, of:

– ordinary debts, within the meaning of Article 212(4) of the law, to the extent that they exceed the portion thereof determined in the procedure for the approval of the arrangement with creditors or prior to the expiry of the period for payment thereof fixed in the procedure for the approval of the arrangement with creditors, or

– interest on debts at a rate higher than that fixed in the procedure for the approval of the arrangement with creditors.

16. Article 214(2) of the ZFPPIPP provides that once a decision in proceedings for the approval of an arrangement with creditors has acquired the force of *res judicata*, creditors are no longer entitled to claim payment, in judicial proceedings or in other proceedings before a competent public authority, of subordinated debts, within the meaning of Article 212(4) of that law.

17. In accordance with Article 214(3) of the ZFPPIPP, where a debtor voluntarily pays a higher proportion of a debt than that referred to in paragraphs 1 or 2 of Article 214, it is not entitled to claim reimbursement under the provisions on unjust enrichment.

III. **The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling**

18. T?2 is a company established in Ljubljana (Slovenia) which supplies electronic communications equipment and services. On the date of the order for reference, 5 July 2016, it was insolvent.

19. T?2 has been the subject of a procedure for reaching an arrangement with creditors, which is a special procedure designed to alleviate the liabilities of insolvent debtors. The arrangement with creditors was approved, with regard to T?2, on 28 November 2011, by decision of the Okrožno sodiš?e v Mariboru (Regional Court, Maribor, Slovenia). Pursuant to that decision, T?2 was required to pay its creditors an amount corresponding to 44% of its debts, without interest, within a period of nine years from the date on which the decision became final, which happened on 24 February 2012.

20. At the request of the tax authorities, T?2 drew up a list of its suppliers' invoices which it had failed to pay which came within the terms of the arrangement with creditors and on the basis of which it had deducted VAT as input tax. On the basis of those invoices, the tax authorities concluded that T?2 must adjust its deduction of input VAT by an amount corresponding to the reduction of its debts resulting from the arrangement with creditors, that is to say, reduce by 56% the VAT initially deducted.

21. Consequently, on 27 May 2013, the tax authorities adopted a decision requiring T?2 to pay VAT in the sum of EUR 7 362 080.27, calculated on the basis of a taxable amount of EUR 36 810 401.35 subject to tax at 20%.

22. T?2 brought a complaint against that decision before the Ministry of Finance acting as administrative authority of second instance. The Ministry of Finance dismissed the complaint as unfounded by decision of 29 October 2013.

23. T?2 brought an appeal against that decision before the Upravno sodiš?e (Administrative Court, Slovenia), which dismissed the appeal as unfounded by judgment of 18 November 2014.

24. T?2 then brought an appeal on a point of law against that judgment before the referring court.

25. The referring court emphasises that the ZDDV-1, and Article 68 thereof in particular, does not expressly provide that the definitive approval of an arrangement with creditors constitutes a factor which requires a taxable person to adjust its deduction of input VAT.

26. That court nevertheless considers that the approval of an arrangement with creditors might constitute a 'change … in the factors used to determine the amount to be deducted', within the meaning of Article 68(2) of the ZDDV-1. In this connection, it states that, under Article 63(1) of the ZDDV-1, the amount of the deduction depends on the amount of VAT which the taxable person owes suppliers under their invoices.

27. Again according to the referring court, the definitive approval of an arrangement with creditors affects the taxpayer's liabilities, including its liability to pay its suppliers VAT. Indeed, in accordance with the ZFPPIPP, the liabilities of an insolvent debtor continue to exist, but its creditors cannot enforce the debts during the period of validity of the arrangement with creditors. Admittedly, such an arrangement with creditors can be annulled, pursuant to Article 219 of the ZFPPIPP, if it subsequently transpires that the insolvent debtor is able to meet its liabilities to its creditors. Nevertheless, the referring court considers that, from an economic point of view, the approval of an arrangement with creditors means that the insolvent debtor will never fully meet its existing liabilities and may never be compelled to do so, and that consequently such approval results not only in the non-payment of the debts in question, but also in the reduction of those debts.

28. The referring court points out that it may, in this regard, take into account Article 39 of the ZDDV-1, which implements Article 90 of the VAT Directive and expressly mentions procedures for an arrangement with creditors regarding the recipients of invoices as a ground for adjusting the amount of VAT payable by the issuers of those invoices.

29. The referring court considers that the approval of an arrangement with creditors could also come within the concept of 'transactions remaining totally or partially unpaid' referred to in Article 185(2) of the VAT Directive. It nevertheless emphasises that Article 68(3) of the ZDDV-1 does not expressly mention 'transactions remaining totally or partially unpaid' and that that omission is the subject of conflicting interpretations on the part of T?2 and the Ministry of Finance. The question which arises in this connection is whether the option allowed the Member States under the second subparagraph of Article 185(2) of the VAT Directive may be validly implemented in the manner prescribed by Article 68 of the ZDDV-1.

30. The referring court also wishes to know whether the circumstances listed in the first subparagraph of Article 185(2) of the VAT Directive (unpaid transactions, destruction, loss, theft and the making of gifts or the giving of samples) come within the concept of 'changes in the factors' within the meaning of Article 185(1) of the directive, or whether they are independent circumstances. The interpretation of Article 68 of the ZDDV-1 will, it states, depend on the answer to that question. Indeed, only if failure to pay comes within the concept of 'changes in the factors'

will the ZDDV-1 require the deduction to be altered, in such a situation.

31. It is that context that the Vrhovno sodiš?e Republike Slovenije (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Should the reduction of the obligations on the basis of an arrangement with creditors, as in the main proceedings, which has been approved by judicial decree and has acquired the force of *res judicata* be treated as a change in the factors used to determine the amount of input VAT to be deducted, within the meaning of Article 185(1) of the VAT Directive, or should it be treated as a different situation, in which the deduction is higher or lower than that to which the taxable person was entitled, within the meaning of Article 184 of the VAT Directive?

2. Should the reduction of the obligations on the basis of an arrangement with creditors, as in the main proceedings, which has been approved by judicial decree and has acquired the force of *res judicata* be regarded as a (partial) non-payment of a transaction, within the meaning of the first subparagraph of Article 185(2) of the VAT Directive?

3. Must a Member State, taking into account the requirements of clarity and certainty in legal situations imposed by the EU legislature and having regard for Article 186 of the VAT Directive, lay down, for the purpose of requiring adjustment of the deduction in the event of failure to make complete or partial payment, as permitted by the second subparagraph of Article 185(2) of that directive, detailed rules, in national law, to cover cases of non-payment, or may it include, in those rules, an arrangement with creditors approved by judicial decree which has acquired the force of *res judicata* (should this come within the concept of non-payment)?’

IV. **Procedure before the Court**

32. The request for a preliminary ruling, dated 5 July 2016, was lodged at the Court Registry on 15 July 2016.

33. Written observations have been submitted by T?2, the Slovenian Government and the European Commission.

34. On the conclusion of the written part of the procedure, the Court considered that it had sufficient information to rule without holding a hearing, in accordance with Article 76(2) of the Rules of Procedure of the Court of Justice.

V. **Analysis**

35. The questions referred by the national court seek to establish whether, having regard to the transposition into national law of Articles 184 and 185 of the VAT Directive, tax authorities are entitled to demand a reduction in the deduction of VAT made by a taxable person that has benefitted from a reduction in its liabilities to its creditors in the context of a procedure for reaching an arrangement with creditors.

36. Before beginning my analysis of the questions referred by the national court, I would like to outline briefly the characteristics of the system for adjustment established by Articles 184 and 185 of the VAT Directive (section A below).

37. I shall then examine the three questions referred by the national court. In substance, I shall propose the answer that the tax authorities are, in a dispute such as that in the main proceedings, entitled to demand a reduction in the VAT deductions made by an insolvent taxable person whose debts have been made the subject of a judgment on an arrangement with creditors, if and to the

extent that that judgment entails a reduction in the taxable amount under the national provisions transposing Article 90 of the VAT Directive (sections B to D below).

38. Lastly, I shall set out the reasons for which I consider that national legislatures may not create a mismatch between the adjustment of tax charges (Article 90 of the VAT Directive) and the adjustment of deductions (Article 185 of the VAT Directive) in the case of non-payment of the price. That will provide further support for the answer which I shall propose for the third question (section E below).

A. The system for the adjustment of deductions established by Articles 184 and 185 of the VAT Directive

39. I would reiterate that taxable persons are, under Article 168(a) of the VAT Directive, entitled to deduct the amount of VAT due or paid in respect of goods and services supplied by another taxable person in so far as those goods and services are used for the purposes of its own taxed transactions.

40. The Court has clarified in this regard that, according to the structure of the system introduced by the VAT Directive, input taxes on goods or services used by a taxable person for its taxable transactions may be deducted. The deduction of input taxes is linked to the collection of output taxes. Where goods or services acquired by a taxable person are used for the purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected and no input tax deducted. However, where goods or services are used for the purposes of transactions that are taxable as outputs, deduction of the input tax on them is required in order to avoid double taxation. (3)

41. It is clear from settled case-law that the adjustment mechanism provided for in Articles 184 to 186 of the VAT Directive is an integral part of the rules on the deduction of VAT established by that directive. That mechanism is intended to enhance the precision of deductions so as to ensure the neutrality of VAT, with the result that transactions carried out at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies subject to VAT. That mechanism thus aims to establish a close and direct relationship between the right to deduct input VAT paid and the use of the goods or services concerned for taxable output transactions. (4)

42. The Court has already had occasion to emphasise that Articles 184 to 186 of the VAT Directive lay down the conditions under which tax authorities may require adjustments to be made by taxable persons. (5)

43. Article 184 establishes the fundamental principle that the initial deduction ‘shall be’ adjusted where it is higher or lower than that to which the taxable person was entitled. In other words, Article 184 obliges the Member States to make provision for adjustment where it transpires that the amount of VAT initially deducted is higher or lower than the amount which the taxable person was entitled to deduct.

44. Article 185(1) of the VAT Directive further defines that obligation, providing that 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. (6)

45. According to the case-law, it is clear from reading those two provisions together that, first, where an adjustment proves to be necessary because of a change in one of the factors used to determine the amount to be deducted, the amount of that adjustment must be calculated in such a way that the final deduction corresponds to that to which the taxable person would have been

entitled if that change had been initially taken into account. Secondly, the calculation of that amount entails taking into account the same factors as those initially taken into consideration, with the exception of the factor that has changed. (7)

46. Nevertheless, the first subparagraph of Article 185(2) of the VAT Directive lays down a derogation from that obligation, providing that '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. The Member States are therefore prohibited from requiring an adjustment to be made in the cases listed.

47. However, the second subparagraph of Article 185(2) of the VAT Directive then establishes a derogation from that derogation, providing that Member States 'may require' adjustments to be made in the case of transactions remaining totally or partially unpaid or in the case of theft. That provision therefore offers the Member States the option of requiring an adjustment to be made, and thus of reverting to the general rule established in Articles 184 and 185(1) of the directive in so far as the two cases mentioned are concerned.

48. The questions referred by the national court seek, in substance, to establish, first, whether the reduction of the liabilities of a taxable person resulting from an arrangement with creditors falls within the scope of Article 185(1) of the VAT Directive (the general rule), next, whether such a reduction may fall within the scope of the first subparagraph of Article 185(2) of the directive, as 'transactions remaining totally or partially unpaid' (the derogation) and, lastly, whether the option offered by the second subparagraph of Article 185(2) has been correctly implemented in national legislation (the derogation from the derogation).

B. **The concept of 'change … in the factors used to determine the amount to be deducted', within the meaning of Article 185(1) of the VAT Directive (first question)**

49. By its first question, the referring court asks the Court of Justice if a reduction in the liabilities of an insolvent debtor resulting from an arrangement with creditors, such as that at issue in the main proceedings, amounts to a 'change … in the factors used to determine the amount to be deducted', within the meaning of Article 185(1) of the VAT Directive, or if it is to be treated as a different situation coming under Article 184 of the directive.

50. I would repeat that Article 185(1) of the VAT Directive further defines the fundamental principle established in Article 184 of the directive that the initial deduction must be adjusted where it is higher or lower than that to which the taxable person was entitled.

51. In my view, the answer to this question cannot be inferred from the judgment of 4 October 2012 in *PIGI*, (8) to which T?2 referred in its written observations. Admittedly, in that judgment the Court held that theft (a case referred to in Article 185(2) of the directive), like non-payment of the price, constituted a 'change … in the factors' taken into consideration, within the meaning of Article 185(1) of the directive.

52. However, the Court based that conclusion on the fact that theft makes it impossible to use the property which was stolen for taxable output transaction. (9) By contrast with theft, a judgment on an arrangement with creditors does not affect the use that may be made of the goods in question for the purpose of taxable output transactions.

53. On the other hand, a judgment on an arrangement with creditors is capable of altering another factor that will have been taken into account in determining the amount of the initial deduction, (10) namely the taxable amount of the transaction in question.

54. The amount that a taxable person is entitled to deduct is, under Article 168(a) of the VAT Directive, the amount of 'VAT due or paid' in respect of the goods or services supplied by another taxable person. Thus, as the referring court, the Slovenian Government and the Commission have emphasised, the directive establishes a link between the *taxation* of transactions, inasmuch as the VAT due must be paid to the tax authorities by the supplier, acting as a 'collector' of that tax, (11) and the *deduction* which the purchaser may make, in order to ensure the neutrality of the TVA regime.

55. As the referring court has stated, a judgment on an arrangement with creditors has the effect of enabling the purchaser not to pay the supplier the price originally agreed upon, (12) and yet it is that price that, in accordance with Article 73 of the VAT Directive, has served as the basis for determining the amount of the *tax charge*. Since, pursuant to Article 168(a) of the directive, the amount of the *deduction* depends on the amount of 'VAT due or paid', the price has indirectly served as the basis for determining the amount of the deduction to which the purchaser is entitled.

56. With the aim of aligning the tax charge and the initial deduction with the price that is actually paid by the purchaser to the supplier, Articles 90, 184 and 185 of the VAT Directive establish two adjustment mechanisms for cases where the agreed price is not paid. The first concerns the taxable amount and the second concerns deduction. Those two adjustment mechanisms are necessarily linked because, as I mentioned in point 54 above, the amount of the deduction depends on the amount of the tax charge and, consequently, on the taxable amount. (13)

57. Under Article 90(1) of the VAT Directive, in the event of total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount must be reduced accordingly, under conditions which are to be determined by the Member States. According to settled case-law, that provision embodies a fundamental principle of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not charge an amount of VAT exceeding the tax collected by the taxable person. (14)

58. However, Article 90(2) of the directive permits the Member States to derogate from paragraph 1 in the case of total or partial non-payment. While the questions referred for a preliminary ruling in the present case do not ask about the conditions under which that option may be exercised, (15) the very existence of the possibility of derogating implies that the effect of non-payment on the taxable amount must be determined by national law, the interpretation of which falls within the jurisdiction of the national courts.

59. To be more specific, in the circumstances of the case in the main proceedings, it falls to the referring court to determine whether the judgment on the arrangement with creditors had the effect of bringing about a reduction in the taxable amount, pursuant to the national provisions which transpose Article 90 of the VAT Directive. (16)

60. If that is indeed the case, the judgment on the arrangement with creditors will have had the effect of altering one of the factors used to determine the amount to be deducted, within the meaning of Article 185(1) of the directive, namely the taxable amount.

61. Indeed, a reduction in the taxable amount pursuant to the national provisions transposing Article 90 of the VAT Directive will have the effect of reducing the amount of the tax charge on the

transaction in question. Having regard to the link between the charging of tax and deduction which is established by Article 168(a) of the directive, (17) a reduction in the taxable amount will also bring about a reduction in the amount that may be deducted.

62. Consequently, a judgment on an arrangement with creditors brings about a ‘change … in the factors’ taken into account, within the meaning of Article 185(1) of the VAT Directive, to the extent that the taxable amount will thereby be reduced pursuant to the national provisions transposing Article 90 of the directive.

63. Indeed, in my view, the only relevant effect of a judgment on an arrangement with creditors, such as that at issue in the main proceedings, in so far as concerns the right of an insolvent taxable person to make a deduction, is the possible reduction of the taxable amount of the transactions in question. (18) In particular, as I stated in point 52 above, such a judgment does not affect the use that may be made of the goods and services covered by the arrangement with creditors.

64. Therefore, if the taxable amount is not in fact reduced pursuant to the national provisions transposing Article 90 of the VAT Directive, an arrangement with creditors will not bring about a ‘change … in the factors’ taken into account, within the meaning of Article 185(1) of the directive.

65. Given the possibility of derogating which is afforded by Article 90(2) of the VAT Directive, it is for the national courts to determine whether or not that is the case, in the circumstances of the case in the main proceedings.

66. For the sake of completeness, I would state that the foregoing considerations apply equally with regard to Article 184 of the VAT Directive. That is to say, only if a judgment on an arrangement with creditors entails a reduction in the taxable amount will the initial deduction be higher than that to which the taxable person was entitled, and consequently subject to the requirement of adjustment.

67. It follows from the foregoing that Article 185(1) of the VAT Directive is to be interpreted as meaning that a reduction in the liabilities of an insolvent debtor resulting from a procedure for reaching an arrangement with creditors, such as that at issue in the main proceedings, constitutes a ‘change … in the factors used to determine the amount to be deducted’, within the meaning of that provision if and to the extent that it leads to a reduction in the taxable amount under the national provisions transposing Article 90 of that directive.

C. **The concept of ‘transactions remaining totally or partially unpaid’ referred to in Article 185(2) of the VAT Directive (second question)**

68. By its second question, the referring court asks the Court of Justice whether a reduction in the liabilities of an insolvent debtor resulting from a procedure for reaching an arrangement with creditors, such as that mentioned in the main proceedings, gives rise to ‘transactions remaining totally or partially unpaid’, within the meaning of Article 185(2) of the VAT Directive.

69. I would immediately clarify that this question only arises if such a reduction falls within the scope of Article 185(1) of the directive. Indeed, paragraph 2 of Article 185, according to its own terms, goes no further than establishing a derogation from paragraph 1 thereof. I have already stated, in response to the first question, that such a reduction falls within the scope of Article 185(1) of the directive if and to the extent that it leads to a reduction in the taxable amount under the national provisions transposing Article 90 of the directive.

70. Assuming that that condition is fulfilled, I am convinced that the transactions covered by the

procedure for reaching an arrangement with creditors come within the concept of ‘transactions remaining totally or partially unpaid’ within the meaning of Article 185(2) of the VAT Directive, as T?2 contends.

71. Indeed, the practical effect of an arrangement with creditors is to bring about the total or partial non-payment of the transactions covered by it. Regarding this, the referring court considers that, from an economic point of view, the approval of an arrangement with creditors means that the insolvent debtor will never fully meet its existing liabilities and that consequently such approval results not only in the non-payment of the debts in question, but also in the reduction of those debts. (19)

72. Consequently, subject to fulfilment of the condition which I have mentioned, the transactions covered by a judgment on an arrangement with creditors must be regarded as ‘transactions remaining totally or partially unpaid’ within the meaning of Article 185(2) of the VAT Directive.

73. In light of the foregoing, I consider that Article 185(2) of the VAT Directive is to be interpreted as meaning that a reduction in the liabilities of an insolvent debtor resulting from a procedure for reaching an arrangement with creditors, such as that mentioned in the main proceedings, gives rise to ‘transactions remaining totally or partially unpaid’, within the meaning of that provision, provided that such a reduction falls within the scope of Article 185(1) of that directive.

D. **Implementation of the option offered by the second subparagraph of Article 185(2) of the VAT Directive (third question)**

74. By its third question, the referring court asks whether, having regard to the requirements of clarity and certainty in legal situations imposed by the European Union legislature and having regard to Article 186 of the VAT Directive, the second subparagraph of Article 185(2) of that directive is to be interpreted as meaning that, in order to exercise the option provided for in that provision, Member States must make express provision for an adjustment obligation in the case of non-payment and/or in the case of the definitive approval of an arrangement with creditors.

75. It is clear from the request for a preliminary ruling that this third question concerns the wording of Article 68(3) of the ZDDV-1, which transposes Article 185(2) of the VAT Directive. Indeed, Article 68(3) of the ZDDV-1 does not expressly lay down an adjustment obligation in the case of ‘transactions remaining totally or partially unpaid’. It merely omits that situation from the list of derogations from the adjustment obligation.

76. Consequently, the referring court asks, in substance, whether the second subparagraph of Article 185(2) of the VAT Directive must be interpreted as meaning that, in order to exercise the option provided for in that provision, Member States must make express provision for an adjustment obligation in the case of ‘transactions remaining totally or partially unpaid’ or if they may merely omit that case from the list of derogations transposing the first subparagraph of Article 185(2) of the directive.

77. I would again reiterate that this question only arises in the event that a reduction in the liabilities of an insolvent debtor resulting from a procedure for reaching an arrangement with creditors falls within the scope of Article 185(1) of the VAT Directive, that is to say, if such a reduction actually entails a reduction in the taxable amount. (20)

78. According to settled case-law, the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific

legislation; a general legal context may be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner. (21)

79. In addition, each Member State is bound to implement the provisions of directives in a manner that fully meets the requirements of clarity and certainty in legal situations imposed by the European Union legislature, in the interests of the persons concerned established in the Member States. To that end, the provisions of a directive must be implemented with unquestionable legal certainty and with the requisite specificity, precision and clarity. (22)

80. While it is for the referring court to assess whether those conditions have been fulfilled in the main proceedings, the Court may nevertheless, in order to give the national court a useful answer, provide it with all the guidance that it deems necessary. (23)

81. It is important to emphasise in this connection that the second subparagraph of Article 185(2) of the VAT Directive provides, as a *derogation from a derogation*, for reversion to the general rule established in Article 185(1) of the directive (the requirement to make an adjustment). (24)

82. In those circumstances, it does not appear to me to be contrary to the requirements of clarity and certainty in legal situations, within the meaning of the case-law mentioned in point 79 above, for a Member State to implement this option in an implicit fashion, by narrowing the scope of the *derogation* transposing the first subparagraph of Article 185(2) of the VAT Directive (the prohibition on adjustment), in the way that Article 68(3) of the ZDDV-1 does.

83. Article 68(3) of the ZDDV-1 (which transposes Article 185(2) of the VAT Directive) provides that, by way of derogation from the adjustment obligation laid down in Article 68(2), taxable persons do not adjust the initial deduction in the case of destruction or loss duly proved 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 7 of that law.

84. Thus, the Slovenian legislature copied the wording of the first subparagraph of Article 185(2) of the VAT Directive except that it omitted the two cases referred to in the second subparagraph of Article 185(2), that is to say, ‘transactions remaining totally or partially unpaid’ and ‘theft duly proved’.

85. Admittedly, Article 68 of the ZDDV-1 does not expressly state that ‘transactions remaining totally or partially unpaid’ and ‘theft duly proved’ give rise to mandatory adjustment. Yet the fact remains that those two cases do not figure in the wording of the derogation laid down in Article 68(3) of the ZDDV-1, and so any normally diligent taxable person will be able to infer that they fall within the scope of the adjustment obligation laid down in Article 68(2) of the ZDDV-1. (25)

86. I find confirmation for that approach in the judgment in *Almos Agrárkülkereskedelmi*, which concerned the transposition of Article 90 of the VAT Directive. (26)Indeed, the Court accepted that a national provision which, in setting out the situations in which the taxable amount is reduced, in accordance with Article 90(1) of the directive, does not refer to the situation of non-payment of the transaction price must be regarded as the result of the exercise by the Member State of the power of derogation granted it under Article 90(2) of the directive. (27)

87. In the same way, it must be accepted that a national provision such as Article 68(3) of the ZDDV-1, which, in setting out the situations in which the deduction is not adjusted, in accordance with the first subparagraph of Article 185(2) of the VAT Directive, does not refer to the situation of non-payment of the transaction price must be regarded as the result of the exercise by the Member State of the power of derogation granted it under the second subparagraph of Article

185(2) of the directive.

88. In the same vein, the Court held in its judgment in *PIGI* that national legislation could validly impose an adjustment obligation in the case of theft, under that last provision, without expressly referring to that case, but merely referring to a ‘shortfall [being] established’ as a ground for adjustment. (28)

89. The referring court wonders whether the judgment in *SALIX Grundstücks-Vermietungsgesellschaft* could be relied upon to refute that interpretation. According to T?2, that judgment supports the argument that the option afforded by the second subparagraph of Article 185(2) of the VAT Directive must be implemented by means of a provision which expressly imposes an adjustment obligation in the case of ‘transactions remaining totally or partially unpaid’.

90. I note that, in that judgment, the Court held that Member States must adopt an express legal provision if they wish to make use of the option provided for in Article 13(2) of the VAT Directive (which replaced the fourth subparagraph of Article 4(5) of the Sixth Directive) to treat certain activities of bodies governed by public law as ‘activities of public authorities’. (29)

91. However, in my view, the solution arrived at by the Court in that judgment does not apply in the circumstances of the present case, since the option afforded by the second subparagraph of Article 185(2) of the VAT Directive is of a different kind from that provided for in Article 13(2) of that directive.

92. As I have already explained, (30) the second subparagraph of Article 185(2) of the VAT Directive provides for a derogation from a derogation and, therefore, for reversion to the general rule established in Article 185(1) thereof.

93. By contrast, Article 13(2) of the VAT Directive provides for a simple derogation, under which the Member States may extend the special rules laid down in Article 13(1) of the directive to activities which are not carried out by public authorities. In other words, that provision enables the Member States to create a legal fiction according to which activities which are not carried out by public authorities are treated as ‘activities of public authorities’.

94. I think it can hardly be disputed that such an extension of the scope of Article 13(1) of the VAT Directive to activities which are not activities carried out by public authorities must be the subject of express implementation on the part of the Member States, as indeed the Court emphasised in the judgment mentioned. (31)

95. In light of that, I consider that the second subparagraph of Article 185(2) of the VAT Directive is to be interpreted as meaning that Member States may implement the option provided for in that provision without making express provision for an adjustment obligation in the case of ‘transactions remaining totally or partially unpaid’ and merely omitting that case from the list of derogations transposing the first subparagraph of Article 185(2) of the directive.

96. Irrespectively of the manner in which that option is implemented, which is the sole subject of the third question referred by the national court, I wish to set out the reasons for which European Union law requires national laws to provide for the adjustment of deductions where the taxable amount is reduced as a result of non-payment of the agreed price.

97. Having regard to the obligation to interpret national law in conformity with European Union law, these remarks will provide further support for the answer which I propose for this question.

E. **No mismatch between the adjustment of tax (Article 90 of the VAT Directive) and the adjustment of deductions (Article 185 of the VAT Directive) in the case of non-payment of**

the price

98. For reasons which I shall set out below, I consider that national legislatures may not, when implementing the options afforded by Articles 90 and 185 of the VAT Directive, create a mismatch between the adjustment of tax charges and the adjustment of deductions in the case of non-payment of the price.

99. It is clear from Article 90(1) of the VAT Directive that Member States must, in principle, provide for the reduction of the taxable amount in the case of non-payment of the price. (32) I have set out the reasons for which such a reduction of the taxable amount constitutes a ‘change’ within the meaning of Article 185(1) of the directive. (33)

100. The question which arises in that situation is whether the Slovenian legislature is obliged to provide for the reduction of the deductions to which a purchaser is entitled, or if it may exclude such reduction pursuant to Article 185(2) of the VAT Directive.

101. In my view, national law which provides for the reduction of the taxable amount in the case of non-payment of the price and at the same excluding any corresponding reduction of the deduction made by the purchaser would be contrary to the principle of fiscal neutrality.

102. Indeed, according to settled case-law, that principle requires that the amount of tax deducted must exactly correspond to the amount of input tax due or paid. (34) That would not be the case if the purchaser were required to pay an amount of VAT that was calculated on the basis of a reduced taxable amount (the price actually paid) and yet preserved the right to deduct an amount of VAT calculated on a non-reduced basis (the price originally agreed upon).

103. Moreover, since such a mismatch would lead to a reduction in VAT receipts in the Member State concerned, it would also be inconsistent with the obligation upon the Member States to ensure the collection of all the VAT due on their territory (35) and the effective collection of the EU’s own resources. (36)

104. I would emphasise in this connection that the Court has held that the reduction of VAT claims in the context of a procedure for reaching an arrangement with creditors may, subject to certain conditions, be consistent with the principles which I have mentioned. (37) However, the Court has not, to my knowledge, had occasion to rule on a possible mismatch between the adjustment of tax charges and the adjustment of deductions in the case of non-payment of the price, in particular, following a judgment on an arrangement with creditors.

105. I infer from the above that the principle of fiscal neutrality and the obligation upon the Member States to ensure the collection of all the VAT due on their territory and the effective collection of the EU’s own resources must be interpreted as meaning that, where a national legislature provides for the reduction of the taxable amount in the case of non-payment of the price, pursuant to Article 90(1) of the VAT Directive, it is obliged to provide for a corresponding reduction in the deduction, pursuant to the second subparagraph of Article 185(2) of that directive.

106. In practice, the supplier will declare to the tax authorities an adjusted (reduced) amount of VAT and the purchaser’s entitlement to make a deduction will be adjusted (reduced) in proportion, the two amounts being calculated on the basis of the price actually paid, not on the price originally agreed on.

107. Having regard to the obligation to interpret national law in conformity with EU law, (38) that interpretation corroborates the answer which I propose for the third question. Indeed, it follows from that obligation that the referring court is bound to interpret Article 68 of the ZDDV-1 so far as

possible in such a way as to impose an obligation to adjust the deduction made where a judgment on an arrangement with creditors results in a reduction in the taxable amount. The answer which I have proposed for the third question signifies, in practice, that Article 68 of the ZDDV-1 validly implements the option to impose an obligation to adjust the deduction made in the case of the reduction of the taxable amount following non-payment of the price, in accordance with the second subparagraph of Article 185(2) of the VAT Directive.

VI. **Conclusion**

108. In light of the foregoing, I propose that the Court of Justice answer the questions referred by the Vrhovno sodiš?e (Supreme Court, Slovenia) as follows:

(1) Article 185(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax is to be interpreted as meaning that a reduction in the liabilities of an insolvent debtor resulting from a procedure for reaching an arrangement with creditors, such as that at issue in the main proceedings, constitutes a ‘change … in the factors used to determine the amount to be deducted’, within the meaning of that provision if and to the extent that it leads to a reduction in the taxable amount under the national provisions transposing Article 90 of that directive.

(2) Article 185(2) of Directive 2006/112 is to be interpreted as meaning that a reduction in the liabilities of an insolvent debtor resulting from a procedure for reaching an arrangement with creditors, such as that mentioned in the main proceedings, gives rise to ‘transactions remaining totally or partially unpaid’, within the meaning of that provision, provided that such a reduction falls within the scope of Article 185(1) of the directive.

(3) The second subparagraph of Article 185(2) of Directive 2006/112 is to be interpreted as meaning that Member States may implement the option provided for in that provision without making express provision for an adjustment obligation in the case of ‘transactions remaining totally or partially unpaid’ and merely omitting that case from the list of derogations transposing the first subparagraph of Article 185(2) of the directive.

1 Original language: French.

2 OJ 2006 L 347, p. 1.

3 Judgment of 16 June 2016, *Mateusiak* (C?229/15, EU:C:2016:454, paragraph 24).

4 Judgments of 4 October 2012, *PIGI* (C?550/11, EU:C:2012:614, paragraphs 24 and 25), of 10 October 2013, *Pactor Vastgoed* (C?622/11, EU:C:2013:649, paragraph 34), of 13 March 2014, *FIRIN* (C?107/13, EU:C:2014:151, paragraph 50), of 9 June 2016, *Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft* (C?332/14, EU:C:2016:417, paragraph 43) and of 16 June 2016, *Mateusiak* (C?229/15, EU:C:2016:454, paragraph 28).

5 Judgment of 13 March 2014, *FIRIN* (C?107/13, EU:C:2014:151, paragraph 48).

6 Judgment of 16 June 2016, *Mateusiak* (C?229/15, EU:C:2016:454, paragraph 29).

7 Judgment of 16 June 2016, *Kreissparkasse Wiedenbrück* (C?186/15, EU:C:2016:452, paragraph 47).

8 C?550/11, EU:C:2012:614.

9 Judgment of 4 October 2012, *PIGI* (C?550/11, EU:C:2012:614, paragraph 27).

10 Pursuant to Articles 63 and 167 of the VAT Directive, VAT becomes chargeable and the right of deduction arises when the goods or services are supplied. As Advocate General Kokott has explained, the supplier becomes liable to pay the VAT as soon as the transaction takes place, whether or not the purchaser has paid. See the Opinion in *Di Maura* (C?246/16, EU:C:2017:440, points 1, 2 and 24). The purchaser's right of deduction arises at the same time, whether the transaction has been settled.

11 Judgment of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 21 and the case-law cited).

12 See point 27 of this Opinion.

13 This link between the two adjustment mechanisms was noted in H Stadie, *Umsatzsteuergesetz:* Kommentar (Otto Schmidt, Cologne, 2015, 3rd edition), p. 1198: 'Art. 185 Abs. 1 MwStSystRL bestimmt, dass der Vorsteuerabzug zu berichtigen ist, wenn sich die Faktoren, die bei der Festsetzung des Vorsteuerabzugs berücksichtigt werden, nach der Angabe der Erklärung geändert haben, insbesondere bei rückgängig gemachten Käufen oder erlangten Rabatten. Ein solcher Faktor i.S.d. Art. 168 Buchst. a MwStSystRL ist vor allem die vom leistenden Unternehmer geschuldete Steuer, die nach Art. 90 Abs. 1 MwStSystRL zu berichtigen ist.' (Free translation: Article 185(1) of the VAT Directive provides that the deduction must be adjusted if, after the VAT return has been made, the factors taken into account in the determination of the deduction have changed, in particular where purchases are cancelled or price reductions are obtained. Such a factor, within the meaning of Article 168(a) of the directive is, in particular, the tax due by the supplier, which must be adjusted in accordance with Article 90(1) of the directive).

14 Judgment of 15 May 2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328, paragraph 22 and the case-law cited).

15 See, on this point, judgments of 3 July 1997, *Goldsmiths* (C?330/95, EU:C:1997:339) and of 15 May 2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328) as well as the Opinion of Advocate General Kokott in *Di Maura* (C?246/16, EU:C:2017:440). In particular, the Court has held that this power to derogate is based on the notion that, in certain circumstances and because of the legal situation in the Member State concerned, non-payment of the consideration may be difficult to establish or may only be temporary. See the judgment of 3 July 1997, *Goldsmiths* (C?330/95, EU:C:1997:339, paragraph 18).

16 Unless I am mistaken, the relevant national provisions are contained in Article 39 of the ZDDV-1.

17 See points 54 and 55 of this Opinion.

18 I would clarify, in this connection, that a procedure for reaching an arrangement with creditors, such as that at issue in the main proceedings, has no bearing on the amount of VAT suppliers are liable to pay to the tax authorities under the commercial transactions covered by the arrangement with creditors. Indeed, the procedure concerns only the debts of the insolvent purchaser, T?2 in this case. Such debts may include the price of goods or services supplied, the VAT payable to suppliers and the VAT due to the tax authorities in respect of the insolvent taxable person's own supplies of goods or services. That last category, which concerns the payment of output VAT, rather than the deduction of input VAT as in the present case, was addressed in the

judgments of 7 April 2016, *Degano Trasporti* (C?546/14, EU:C:2016:206) and of 16 March 2017, *Identi* (C?493/15, EU:C:2017:219). See point 104 of this Opinion.

19 See point 27 of this Opinion.

20 See point 69 of this Opinion.

21 Judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft* (C?102/08, EU:C:2009:345, paragraph 40 and the case-law cited).

22 Judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft* (C?102/08, EU:C:2009:345, paragraph 42 and the case-law cited).

23 Judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft* (C?102/08, EU:C:2009:345, paragraph 44 and the case-law cited).

24 See points 46 and 47 of this Opinion.

25 For the reasons set out in points 59 to 62 of this Opinion, the total or partial non-payment of the price falls within the scope of Article 185(1) of the VAT Directive if such non-payment entails a reduction in the taxable amount. That provision is transposed by Article 68(2) of the ZDDV-1.

26 Judgment of 15 May 2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328).

27 Judgment of 15 May 2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328, paragraph 24).

28 Judgment of 4 October 2012, *PIGI* (C?550/11, EU:C:2012:614, paragraphs 31 to 35).

29 See, to that effect, the judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft* (C?102/08, EU:C:2009:345, paragraphs 51 and 52).

30 See points 81 and 82 of this Opinion.

31 Judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft* (C?102/08, EU:C:2009:345, paragraphs 58).

32 Unless I am mistaken, the Slovenian legislature has made provision for the reduction of the taxable amount in the case of non-payment of the price by enacting Article 39 of the ZDDV-1, a matter which it is for the referring court to verify. Admittedly, paragraphs 2 and 3 of that article, cited by the referring court, provide that ‘a taxable person may adjust (reduce) the amount of VAT declared …’. Nevertheless, it seems to me that that is a procedural provision, meaning that a supplier must request a reduction in the taxable amount if it does not receive the payment initially agreed upon.

33 See points 59 to 62 of this Opinion.

34 See, in particular, the judgment of 26 September 2013, *Commission* v *Spain* (C?189/11, EU:C:2013:587, paragraph 91).

35 See, inter alia, judgments of 26 February 2013, *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 25) of 7 April 2016, *Degano Trasporti* (C?546/14, EU:C:2016:206, paragraph [21] and the case-law cited) and of 16 March 2017, *Identi* (C?493/15, EU:C:2017:219, paragraph [18]).

36 See, inter alia, judgments of 26 February 2013, *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 26) of 7 April 2016, *Degano Trasporti* (C?546/14, EU:C:2016:206, paragraph 22) and of 16 March 2017, *Identi* (C?493/15, EU:C:2017:219, paragraph 19).

37 Judgment of 7 April 2016, *Degano Trasporti* (C?546/14, EU:C:2016:206, paragraphs 23 to 29). See also the judgment of 16 March 2017, *Identi* (C?493/15, EU:C:2017:219, paragraphs 20 to 24), which concerned an Italian procedure referred to as the ‘bankruptcy discharge procedure’.

38 The Court has consistently held that, when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently to comply with the third paragraph of Article 288 TFEU. See, in particular, judgments of 24 January 2012, *Dominguez* (C?282/10, EU:C:2012:33, paragraph 24 and the case-law cited) and, with regard to the VAT Directive, of 11 April 2013, *Rusedespred* (C?138/12, EU:C:2013:233, paragraph 37).