Provisional text

OPINION OF ADVOCATE GENERAL

WAHL

delivered on 30 January 2018(1)

Joined Cases C?660/16 and C?661/16

Finanzamt Dachau

v

Achim Kollroß (C?660/16)

and

Finanzamt Göppingen

v

Erich Wirtl (C?661/16)

(Requests for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Taxation — Common system of value added tax — Directive 2006/112/EC — Article 65 — Payment made on account — Deduction — Uncertainty regarding the chargeable event — Articles 184 to 186 — Adjustment of deductions — Reimbursement of the VAT unduly paid — National procedures)

1. As Benjamin Franklin famously wrote in a letter to Jean-Baptiste Leroy in 1789, ‘in this world nothing can be said to be certain, except death and taxes’.

2. In the present proceedings the referring court — two different chambers of the Bundesfinanzhof (Federal Finance Court, Germany) —asks the Court, in essence, to clarify the circumstances in which a future supply of goods or services should, for the purposes of the rules on value added tax (‘VAT’) laid down in Directive 2006/112/EC, (2)be considered to be sufficiently *certain* to permit deduction of the VAT paid by the recipient on account, even when the supply ultimately does not take place because of fraud on the part of the supplier. The referring court also asks the Court to clarify the ensuing legal consequences in terms of adjustments of the deduction and refunds by the tax authorities.

I. Legal framework

A. **EU law**

3. Pursuant to Article 63 of the VAT Directive, ‘the chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied’.

4. Under Article 65 of the VAT Directive, where a payment is to be made on account before the goods or services are supplied, VAT is to become chargeable on receipt of the payment and on the amount received.

5. Pursuant to Article 167 of the VAT Directive, the right to deduct is to arise at the time the deductible tax becomes chargeable.

6. Under Article 184 of the VAT Directive, ‘the initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled’.

7. Article 185 of the VAT Directive provides:

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

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

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

8. Article 186 of the VAT Directive requires Member States to lay down detailed rules for applying Articles 184 and 185 of that directive.

B. **National law**

9. According to Paragraph 15 of the Umsatzsteuergesetz (Law on turnover tax) (‘the UStG’):

‘(1) The trader may deduct the following as input tax:

1. the tax lawfully payable on goods and services provided to his business by another trader. Deduction of the input tax is subject to the condition that the trader holds an invoice drawn up in accordance with Paragraphs 14 and 14a. Where the separately stated amount of tax is attributable to a payment preceding the performance of such transactions, it is already deductible if the invoice has been presented and payment made;

...’

10. Pursuant to Paragraph 13(1), point 1(a), of the UStG, tax is to become chargeable on the supply of goods and services, ‘when the tax is calculated according to the agreed consideration (first sentence of Paragraph 16(1)), upon the expiry of the provisional VAT return period during which the supplies were made. The same shall apply to partial supplies. ... Where the consideration or part thereof is received before the supply or partial supply has been made, the tax shall to that extent become chargeable upon the expiry of the provisional VAT return period during which the consideration or part thereof has been received’.

11. Paragraph 17 of the UStG provides:

‘(1) When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1), point 1, has changed, the trader who made the supply shall adjust the amount of tax payable accordingly. The trader who received the supply shall also adjust the amount of input tax deductible in that regard. ...

(2) Subparagraph 1 shall apply *mutatis mutandis* where

1. the agreed consideration for a taxable supply of goods or services or a taxable intra-Community acquisition has become unrecoverable. Where the consideration is received retrospectively, the amount of the tax and the deduction of tax shall be adjusted again;

2. consideration has been paid for an agreed supply of goods or services but the goods or services have not been supplied;

...’

II. **Facts, procedures and the questions referred**

A. **Case C?660/16**

12. On 10 April 2010, Mr Achim Kollroß ordered a combined heat and power unit from the undertaking G. That undertaking confirmed the order on 12 April 2010 and issued an advance invoice in the amount of EUR 30 000, plus VAT in the amount of EUR 5 700. Mr Kollroß made the required payment on account to G on 19 April 2010. The delivery date of the unit had not then been set.

13. The unit ordered was never supplied. Insolvency proceedings were instituted in respect of G’s assets under the Insolvenzordnung (Insolvency Code) and were closed on the ground of a lack of assets. The persons acting for G were convicted of 88 counts of fraudulent trading practices and conspiracy to defraud and of intentional bankruptcy to the detriment of purchasers of combined heat and power units, but not of tax evasion.

14. In respect of the year 2010, Mr Kollroß claimed a deduction of input tax for his payment on account to G. The Finanzamt Dachau (Tax Office, Dachau), however, issued a notice of assessment setting the VAT at zero. Mr Kollroß unsuccessfully lodged an objection against that notice.

15. Subsequently, Mr Kollroß challenged that notice before the Finanzgericht (Finance Court). That action was successful. The Finanzgericht took the view that, first, Mr Kollroß was entitled to deduct input tax on the payment on account in accordance with the third sentence of point 1 of Paragraph 15(1) of the UStG. Second, it considered that Mr Kollroß was not obliged to adjust the deduction of input tax in accordance with Paragraph 17(1), second phrase, and (2), point 2, of the UStG.

16. The Tax Office in Dachau brought an appeal against that judgment before the Bundesfinanzhof (Federal Finance Court). Entertaining doubts as to the correct interpretation of EU law, that court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are the requirements as to the certainty that a supply will take place, as a condition of the deduction of input tax on a payment on account within the meaning of the judgment of the Court of Justice of the European Union in Case C?107/13 *Firin* [(“*Firin*”)] to be determined purely objectively or from the point of view of the person having made the payment on account in the light of the circumstances apparent to him?

(2) Are the Member States, taking into account the fact that the chargeability of tax and the right to deduct arise at the same time, in accordance with Article 167 of [the VAT Directive], and the regulatory powers which they enjoy under Article 185(2) [, second subparagraph,] and Article 186 of [that directive], entitled to make the adjustment of both the tax and the deduction of input tax subject to a refund of the payment on account?

(3) Must the competent tax office with regard to a person who has made a payment on account refund the value added tax to that person where the latter cannot recover the payment on account from the recipient of that payment? If so, must this take place as part of the tax assessment procedure or is a separate equitable procedure sufficient for this purpose?’

B. **Case C?661/16**

17. On 3 August 2010, Mr Erich Wirtl ordered a combined heat and power unit from the undertaking G for the price of EUR 30 000 plus VAT in the amount of EUR 5 700. The unit was to be supplied 14 weeks from receipt of payment. Mr Wirtl paid the purchase price in advance.

18. The unit was, however, never supplied. Insolvency proceedings were instituted in respect of G’s assets under the Insolvency Code and were closed on the ground of a lack of assets. The persons acting for G were convicted of 88 counts of fraudulent trading practices and conspiracy to defraud and of intentional bankruptcy to the detriment of purchasers of combined heat and power units, but not of tax evasion.

19. In respect of the year 2010, Mr Wirtl claimed a deduction of input tax on his payment to G. The Finanzamt Göppingen (Tax Office, Göppingen), however, decided not to accept that deduction. Mr Wirtl unsuccessfully lodged an objection against that decision.

20. Subsequently, Mr Wirtl challenged that decision before the Finanzgericht (Finance Court). That action was successful. The Finanzgericht took the view that, first, Mr Wirtl was entitled to deduct input tax on the payment on account in accordance with the third sentence of point 1 of Paragraph 15(1) of the UStG. Second, it considered that Mr Wirtl was not obliged to adjust the deduction of input tax in accordance with Paragraph 17(1), second phrase, and (2), point 2, of the UStG.

21. The Tax Office in Göppingen brought an appeal against that judgment before the Bundesfinanzhof (Federal Finance Court). Entertaining doubts as to the correct interpretation of EU law, that court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In accordance with the judgment of the Court of Justice [in *Firin*, paragraph 39], is the deduction of input tax on a payment on account excluded where the occurrence of the chargeable event is uncertain at the time when the payment on account is made? Is that exclusion to be determined by reference to the objective situation or by reference to the point of view of the person having made the payment on account in the light of the circumstances objectively apparent to him?

(2) Is the judgment of the Court of Justice in [*Firin*, paragraph 58,] to be interpreted as meaning that, under EU law, an adjustment of the deduction, by a person having made a payment on account for a supply of goods, of the input tax indicated on the invoice issued to that person for that payment is not conditional upon the refund of the payment on account which has been made, where that supply does not ultimately take place?

(3) In the event that the previous question is answered in the affirmative, does Article 186 of the VAT Directive, which allows the Member States to lay down detailed rules for the adjustment provided for in Article 185 of that directive, authorise the Federal Republic of Germany, as a Member State, to provide in its national law that the taxable amount may be reduced only if the payment on account is refunded, and that the VAT debt and the deduction of input tax are, accordingly, to be adjusted at the same time and under the same conditions?’

C. **Procedure before the Court**

22. By decision of the President of the Court of 19 January 2017, Cases C?660/16 and C?661/16 were joined for the purposes of the written procedure and the judgment.

23. Written observations have been submitted by Mr Kollroß, the German Government and the European Commission.

III. **Analysis**

A. **The first questions referred in Cases C?660/16 and C?661/16**

24. By its first question in both cases, the referring court asks the Court, in essence, how to determine, for the purposes of Article 65 of the VAT Directive, whether a supply of goods for which a payment has been made on account was uncertain in the case of fraud on the part of the supplier. In particular, the referring court wishes to know whether, when the goods are ultimately not supplied as a result of such a fraud, the taxable person has the right to deduct the amount of VAT paid.

25. Before dealing with the specific issues raised by those questions, it seems useful to call to mind the key provisions applicable, as consistently interpreted by the Court.

26. According to settled case-law, the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The principle of fiscal neutrality underpinning the common system of VAT ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way. (3)

27. Under Article 167 of the VAT Directive, the right to deduct arises when the deductible tax

becomes chargeable. The general rule is that VAT is to become chargeable when the goods or the services are supplied (Article 63 of the VAT Directive). However, where payments are made on account, Article 65 of that directive states that VAT is to become chargeable upon receipt of the payment and on the amount received.

28. The Court has consistently held that, in order for VAT to be chargeable (and therefore also deductible) where a payment has been made on account, all the relevant information concerning the future chargeable event must already be known. (4) The Court has also held that Article 65 of the VAT Directive cannot apply where it is uncertain whether the chargeable event will take place. (5)

29. In that regard, the present proceedings raise two separate but related issues. The referring court asks, first, how that uncertainty is to be assessed and, second, whether in that respect it is of any relevance that the date of delivery of the goods purchased was not indicated in the contract between the recipient and the supplier.

30. As far as the first of those issues is concerned, the referring court indicates that, in situations such as those at issue in the main proceedings, that uncertainty could be assessed either on the basis of the information available to the recipient or on the basis of the information available to the supplier. In other words, the referring court wonders whether the supplier's intent to commit fraud, of which the recipient was not aware, should be considered relevant when determining the certainty (or, rather, the uncertainty) that the chargeable event will take place.

31. To my mind, the supplier's fraudulent intent should not have any bearing on the recipient's right to deduct the VAT paid on account, *unless* the latter was, or should have been, aware of that fraudulent intent.

32. That conclusion seems to follow from the Court's case-law, and especially from *Bonik* (6) and *FIRIN*. (7) In those cases, the Court emphasised that EU law cannot be relied upon by individuals for abusive or fraudulent ends, and that the prevention of tax evasion, avoidance and abuse is an objective expressly recognised and encouraged by the VAT Directive. Accordingly, the Court held that national authorities should refuse the right to deduct when that right is relied on for fraudulent or abusive ends. (8) That is the case, in particular, where tax fraud is committed by the taxable person himself. (9) By contrast, it is incompatible with the provisions of the VAT Directive to refuse that right to a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply. (10)

33. Applying those principles to the cases at hand, the fact that the suppliers never had the intention of delivering the goods purchased by the recipients cannot, in itself, justify the national authorities refusing to accept the deductions claimed by those recipients. Those authorities may only refuse deductions if they establish, to the requisite legal standard, that the recipients knew, or should have known, that the supplier had, from the outset, no intention of abiding by its contracts. (11)

34. Indeed, when, as in *FIRIN*, (12) both supplier and recipient are (or should be) aware that no supply will take place, one could question whether a genuine contract of supply exists at all, at least for the purposes of the VAT rules. More generally, Article 65 of the VAT Directive cannot apply where, when the payment on account is made, realistic doubts exist as to whether, in the ordinary course of events, the taxable supply would be duly made. (13)

35. Conversely, when the recipient was unaware and could not have been aware of the supplier's fraudulent or abusive intentions — and even more so where, as in the situations at issue

in the main proceedings, it would seem that the supplier has duly paid the VAT received by the State — there is no objective reason for refusing him the initial right to deduct. Such a refusal would, on the one hand, go beyond what is necessary to preserve the public exchequer's rights (14) and, on the other hand, place an excessive burden on buyers. In the usual course of business, it is not uncommon for a supplier to require its customers to make a payment on account before the goods or services are delivered. As the referring court notes in its order for reference in Case C?660/16, it would seem excessive to place all the risks connected with a possible failure to deliver the goods and services purchased on recipients who, even if all due care was taken, could not possibly be aware of their suppliers' ill intentions.

36. Next, it is necessary to determine whether the fact that a contract of supply does not include the date of delivery of the goods purchased means that not all the relevant information concerning the future chargeable event is known and, consequently, that deduction should be refused.

37. In that regard, I take the view that the mere fact that there is no date of delivery cannot be regarded as creating uncertainty as concerns the coming into existence of the chargeable event. Again, it is not unusual, in the course of business, for parties to agree on a supply of goods or services without being in a position to determine the precise date on which that supply will take place. As long as the buyer has no concrete grounds for questioning the supplier's capacity and willingness to fulfil its obligations, there is no reason to consider that, at the time of payment on account, the supply is uncertain.

38. Obviously, as has been pointed out in the introduction to this Opinion, anything that is supposed to happen in the future is to some extent uncertain. However, that logic cannot be applied in this context as it would render Article 65 of the VAT Directive meaningless. I also fail to see why the mere indication of a specific date in a contract would make the future supply more certain (or, conversely, less uncertain).

39. In *BUPA Hospitals*, the Court held that Article 65 of the VAT Directive did not apply to a situation where the parties were entitled to terminate the contract unilaterally at any time and the payments were made on account for supply of goods the identity and quantity of which was yet to be determined. (15) However, that situation must be distinguished from the circumstances at issue in the main proceedings: in *BUPA Hospitals*, at the time when the payment was made, it was uncertain *whether* the transaction would be carried out at all. By contrast, in the cases under consideration, at least from the recipients' perspective, only the time of the supply was yet to be determined.

40. In the light of the foregoing, the answer to the first questions in Cases C?660/16 and C?661/16 should be that Article 65 of the VAT Directive must be interpreted as meaning that a taxable person who has made a payment on account for goods or services ultimately not supplied cannot be refused the right to deduct if he was not, and could not have been, aware of the supplier's intention not to honour the contract. The mere fact that the date of delivery was not indicated in the contract does not render the fulfilment of that contract uncertain for the purposes of that provision.

B. **The second question referred in Case C?660/16 and the second and third questions referred in Case C?661/16**

41. By its second question in Case C?660/16 and its second and third questions in Case C?661/16, the referring court asks, in essence, whether, in circumstances such as those at issue in the main proceedings, Articles 184 to 186 of the VAT Directive preclude national rules that require an adjustment of deductions but make such an adjustment conditional upon the refund of

the payment on account.

42. It should be recalled at the outset that the deduction system established by the VAT Directive is meant to relieve the operator entirely of the burden of the VAT paid or payable in the course of all his economic activities. The common system of VAT seeks to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT. (16)

43. It follows that the decisive criterion for the deduction of input VAT is the actual or intended use of the goods and services concerned. That use determines the extent of the initial deduction to which the taxable person is entitled and the extent of any adjustments which must be made under the conditions laid down in Articles 185 to 187 of the VAT Directive. (17)

44. The adjustment provided for in those rules is an integral part of the VAT deduction scheme established by that legislation. Those rules are intended to make deductions more precise so as to ensure the neutrality of VAT. Through those rules, the VAT Directive aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods and services concerned for taxable transactions. (18)

45. As regards the point in time when the obligation to adjust an input VAT deduction arises, Article 185(1) of the VAT Directive establishes the principle that such an adjustment must be made, inter alia, when the factors taken into consideration in order to determine the deducted amount have changed after the VAT return has been made. (19)

46. Thus, the first issue to address in this context is whether circumstances such as those at issue in the main proceedings are, in principle, among those governed by Article 185 of the VAT Directive. It seems to me that this is indeed the case.

47. In *PIGI*, the Court ruled that a taxable person who was a victim of theft of goods for which he had deducted input VAT was, in principle, required to adjust his deduction under Article 185(1) of the VAT Directive. However, the Court pointed out that, by way of derogation, the first subparagraph of Article 185(2) provides that no adjustment is to be made, inter alia, in the event of ‘theft of property duly proved’ and that, under the second subparagraph of that provision, that derogation is to be optional. Accordingly, the Court stated that Member States may provide for adjustments of input VAT deductions in any cases of theft of property giving rise to entitlement to VAT deduction. (20)

48. In a similar vein, in *FIRIN*, the Court decided that in circumstances where it is apparent that the supply of goods for which a taxable person has made a payment on account will ultimately not be executed, the tax authority may require adjustment to be made to the VAT deducted by that taxable person. That is so regardless of whether or not the VAT payable by the supplier has itself been adjusted. (21)

49. The same principles should thus apply in the present proceedings. The fact that the goods purchased and for which an advance payment was made were ultimately not delivered constitutes, for the purposes of Articles 184 to 186 of the VAT Directive, a change in the factors used to determine the amount to be deducted that occurred after the VAT return had been made. The goods purchased could never be used by the taxable person for the taxable output transactions. (22) Consequently, an adjustment of the deduction is, in principle, required, in accordance with the rule set out in Article 185(1) of the VAT Directive.

50. That said, the next issue to determine is whether the derogation from that principle set out in Article 185(2) of the VAT Directive is applicable to circumstances such as those at issue in the

main proceedings. In that respect, I take the view that, when the failed delivery of the goods purchased is due to a *fraud* perpetrated by the supplier to the detriment of the recipient, that derogation is applicable.

51. Indeed, I believe that such a fraud should be regarded as a ‘theft of property’, a situation in respect of which that provision states that adjustment is to be optional. To be more precise, an adjustment is not required unless a Member State decides otherwise. I see two main reasons for this. First, the *ratio* of Article 185(2) of the VAT Directive seems to support that position and, second, in *PIGI* the Court has already dismissed a formalistic interpretation of the concept of ‘theft’.

52. First, Article 185(2) of the VAT Directive concerns situations regarding which the EU legislature has considered that, in spite of the fact that they ought, in principle, to entail an adjustment of deductions, such an adjustment should not or may not in fact be required. In particular, the exception made with regard to ‘destruction, loss or theft’ appears to cover situations in which a taxable person has paid input VAT for goods purchased in order to be used for output VAT transactions but which, for reasons beyond that person’s control, cannot ultimately be used for that purpose.

53. In such situations, the taxable person’s expenditure in respect of the destroyed, lost or stolen goods is, broadly speaking, related to his economic activity. The fact that those goods were ultimately not used for the purposes of taxable transactions is purely accidental. It is thus fair that the taxable person who has paid input VAT on those goods may continue to enjoy a deduction. If the taxable person were obliged to forgo the deduction, he would suffer an additional loss. The aim of protecting the taxable person from an unfair loss should be contrasted with the examples given in Article 185(1) of the VAT Directive of when adjustment *should* be made, that is, ‘where purchases are cancelled or price reductions are obtained’. Those are situations in which, failing any adjustment, the taxable person would obtain an unfair advantage.

54. Second, in *PIGI*, the Court has made it clear that the concept of ‘theft’ for the purposes of Article 185(2) of the VAT Directive should be interpreted in a non-technical sense and encompass, for example, criminal activities that produce a shortfall in the goods that cannot be used for taxable output transactions. (23)

55. Although the exact boundaries between ‘theft’ and ‘fraud’ may vary from Member State to Member State, those two concepts seem to me to share several important characteristics: both are criminal offences against property resulting in an unlawful advantage for the perpetrator and an unjust loss for the victim. The main difference appears to relate to the manner in which the property is unlawfully taken from the victim: without the owner’s consent in the case of theft, and through deliberate deception in the case of fraud. However, I fail to see how this difference in the conduct of the offender is relevant for the purposes of Articles 184 to 186 of the VAT Directive.

56. In addition, it seems to me that, at least from a practical and economic perspective, there is no major difference between certain types of theft and fraud: for example, between goods purchased and paid for but not delivered because they are stolen during transport, and the equivalent goods that are not delivered because of fraud on the part of the supplier. In both situations, I see grounds of fairness and neutrality that plead in favour of allowing the taxable person to continue enjoying deductions on input VAT.

57. Therefore, cases of fraud committed by suppliers at the expense of their customers, such as those at issue in the main proceedings, should, in my view, be deemed to be cases of ‘theft’ under Article 185(2) of the VAT Directive. That said, the second subparagraph of that provision makes that exception optional: although an adjustment is, as a rule, not required, Member States may still decide otherwise and thus require an adjustment in cases of theft.

58. My understanding is that, under the relevant German rules, as interpreted by the domestic courts, in the case of fraud, an adjustment is necessary only when the taxable person who is the victim has received a refund from the supplier.

59. If that is so, such national rules are, to my mind, compatible with Articles 184 to 186 of the VAT Directive: the German authorities have decided to avail themselves of the possibility offered by the second subparagraph of Article 185(2) of that directive of requiring deductions to be adjusted in the case of theft of the property concerned.

60. The fact that they have decided to make limited use of that option — deciding that an adjustment is conditional upon the refund by the supplier to the recipient of the amounts previously paid — appears to fall within the discretion granted to Member States by the VAT Directive in Articles 185(2) and 186 thereof. Furthermore, that condition is, in my view, reasonable. It avoids a situation where taxable persons might actually benefit from the unjust enrichment that would ensue from maintaining the deduction while at the same time receiving a refund of the monies previously paid. In the same way, where no refund takes place, it ensures that a taxable person who agrees to make a payment on account does not have to bear excessive risks in circumstances where that person is not and cannot be aware of the fraudulent intent of his supplier. (24)

61. In the light of the foregoing, I propose to answer the second question in Case C?660/16 and the second and third questions in Case C?661/16 to the effect that Articles 184 to 186 of the VAT Directive do not preclude national rules that, in circumstances such as those at issue in the main proceedings, require an adjustment of deductions and make that adjustment conditional upon the refund of the payment on account.

C. **The third question referred in Case C?660/16**

62. By its third question in Case C?660/16, the referring court asks, in essence, first, whether the provisions of the VAT Directive and the principle of effectiveness require Member States to permit a taxable person to bring an action against the tax authorities for reimbursement of VAT unduly invoiced on a payment on account that the supplier has paid to the public treasury, when reimbursement of the VAT from the supplier is impossible. If so, the referring court wishes to know, second, whether the taxable person may bring his claims in the context of the ordinary tax assessment procedure, or whether he is required to act under a separate equitable procedure.

63. In my view, if the Court agrees with me as regards the answers to be given to the other questions submitted by the referring court, there is no need to answer this question in the context of the present proceedings. Indeed, where taxable persons do not succeed in obtaining refunds of payments on account (together with the corresponding VAT) from their suppliers, they are not required to adjust deductions and may thus continue to benefit from the deduction of the VAT paid to those suppliers.

64. However, in case the Court disagrees with me on the answers to be given to the other questions submitted by the referring court, I would like to share my thoughts on the issue raised by this question.

65. The doubts of the referring court are prompted by the judgment of the Court in *Reemtsma Cigarettenfabriken.* (25)

66. In that case, the referring court had submitted a number of questions to the Court concerning the interpretation of the provisions of the Eighth Directive (26) in the light of the principles of neutrality, effectiveness, and non-discrimination. In its judgment the Court stated, inter alia, that those provisions and principles did not preclude national legislation according to which only the supplier may seek reimbursement of sums unduly paid as VAT to the tax authorities and the recipient of the services may bring a civil law action against that supplier for recovery of sums paid but not due.

67. However, the Court also added that, where reimbursement of the VAT would become impossible or excessively difficult, the Member States must provide for the instruments necessary to enable that recipient to recover the unduly invoiced tax, if need be from the tax authorities directly, in order to respect the principle of effectiveness. (27)

68. The present proceedings thus raise the question of whether the principles developed by the Court in *ReemtsmaCigarettenfabriken* should also be applied in a situation similar to those at issue in the main proceedings, which are governed by the provisions of the VAT Directive rather than the Eighth Directive.

69. I have doubts as to whether those principles may immediately and easily be transposed to the cases at hand.

70. It should be pointed out at the outset that the VAT Directive does not expressly provide a mechanism for the tax authorities to reimburse VAT directly to the recipient in case the supplier becomes insolvent. The payment of the VAT on account to the supplier by the recipient and the payment of that VAT to the tax authorities by the supplier are, in principle, separate transactions. Thus, the ordinary course of events is that the recipient should seek reimbursement from the supplier, which in turn may seek reimbursement from the tax office. The VAT Directive thus does not require, either expressly or implicitly, Member States to provide for a direct claim by the recipient against the tax office.

71. In that regard, it should be borne in mind that, in the absence of EU rules regarding applications for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which such applications may be made; those conditions must observe the principles of equivalence and effectiveness, that is to say, they must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the EU legal order. (28)

72. This means that national rules need not provide a form of action that generally permits recipients in situations such as those at issue in the main proceedings to bring an action directly against the tax office.

73. That said, my reading of *ReemtsmaCigarettenfabriken* is that the Court considered the procedure discussed therein — a very exceptional one indeed — as required only because of the specific situation at issue: that of a taxable person who has erroneously paid VAT (that is, he has paid VAT on an exempt transaction) and who is established in a Member State other than that in

which the VAT was paid. The aim of that judgment was, obviously, to avoid an unjust enrichment of the public treasury in a situation where there had been a mistake in invoicing VAT and, because of the cross-border nature of the transaction, the usual reimbursement procedures might be cumbersome and ineffective.

74. It is not clear to me that the situations at issue in the main proceedings require such an *extrema ratio* solution. It is, however, for the referring court to assess whether, in a given situation, domestic law does not provide an adequate means for taxable persons who are in a situation similar to those at issue in the main proceedings to obtain a refund of the VAT unduly paid from the supplier and, if so, whether a mechanism such as that envisaged in *Reemtsma Cigarettenfabriken* is required in order to comply with the principle of effectiveness.

75. The next aspect of the third question referred in Case C?660/16 is as follows: should the referring court consider that, in order to comply with the principle of effectiveness, a direct form of action by the recipient against the tax office is necessary, would a procedure such as the equitable procedure under German law be sufficient to ensure compliance with that principle?

76. In other words, the referring court asks whether domestic law should allow taxable persons such as Mr Kollroß and Mr Wirtl to bring their claims within the context of the ordinary tax assessment procedure.

77. As I had the opportunity to stress in my Opinion in *Geissel and Butin*, (29) that is an issue which would also be for the referring court to decide. The Court does not have sufficiently detailed information on the special equitable procedure (and on the differences between that procedure and the ordinary tax assessment procedure) to be able to rule on whether national procedural rules such as those at issue in the main proceedings comply with the principle of effectiveness.

78. In that regard, it must be borne in mind that, according to settled case-law, the question whether a national procedural provision renders the exercise of rights arising under EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken of the basic principles which lie at the basis of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure. (30) It is, in principle, for the referring court to determine whether the national measures in question are compatible with those principles, having regard to all the circumstances of the case.

79. When national law provides for a special or distinct procedure (such as, if my understanding is correct, the equitable procedure under German law), referring courts should, in my view, consider in particular whether the length, complexity and costs associated with that procedure create disproportionate difficulties for the taxable person. (31) However, in the cases at hand, the exceptional nature of the applicants' claims should also be borne in mind. Thus, should the referring court take the view that a procedure such as that considered by the Court in *Reemtsma Cigarettenfabriken* is necessary, the use of a national procedure based on equity does not seem unreasonable to me.

IV. **Conclusion**

80. In conclusion, I propose that the Court answer the questions referred for a preliminary ruling by the Bundesfinanzhof (Federal Finance Court, Germany) as follows:

– Article 65 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a taxable person who has made a payment

on account for goods or services ultimately not supplied cannot be refused the right to deduct if he was not, and could not have been, aware of the supplier's intention not to honour the contract of supply. The mere fact that the date of delivery was not indicated in the contract does not render the fulfilment of that contract uncertain for the purposes of that provision.

– Articles 184 to 186 of Directive 2006/112 do not preclude national rules that, in circumstances such as those at issue in the main proceedings, require an adjustment of deductions and make such an adjustment conditional upon the refund of the payment on account.

1 Original language: English.

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

3 Judgment of 14 February 1985, Rompelman, 268/83, EU:C:1985:74, paragraph 19.

4 See, inter alia, judgments of 21 February 2006, *BUPA Hospitals and Goldsborough Developments*, C?419/02, EU:C:2006:122, paragraph 48; of 16 December 2010, *Macdonald Resorts*, C?270/09, EU:C:2010:780, paragraph 31; and of 3 May 2012, *Lebara*, C?520/10, EU:C:2012:264, paragraph 26.

5 Judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 39.

6 Judgment of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774.

7 Judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151.

8 Judgments of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraphs 35 to 37, and of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 40.

9 Judgments of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraph 38, and of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 41.

10 Judgments of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraph 41, and of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 42.

11 Judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 44.

12 See judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, especially paragraph 22 et seq.: and the Opinion of Advocate General Kokott in the same case, EU:C:2013:872, point 28.

13 Opinion of Advocate General Kokott in *FIRIN*, C?107/13, EU:C:2013:872, point 26.

14 See judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 43 and the case-law cited.

15 Judgment of 21 February 2006, *BUPA Hospitals and Goldsborough Developments*, C?419/02, EU:C:2006:122.

16 See judgment of 18 October 2012, *TETS Haskovo*, C?234/11, EU:C:2012:644, paragraph 27 and the case-law cited.

17 See, to that effect, judgments of 18 October 2012, *TETS Haskovo*, C?234/11, EU:C:2012:644, paragraph 29, and of 4 October 2012, *PIGI*, C?550/11, EU:C:2012:614, paragraph 23.

18 See, to that effect, judgments of 18 October 2012, *TETS Haskovo*, C?234/11, EU:C:2012:644, paragraphs 30 and 31, and of 4 October 2012, *PIGI*, C?550/11, EU:C:2012:614, paragraphs 24 and 25.

19 See, to that effect, judgments of 18 October 2012, *TETS Haskovo*, C?234/11, EU:C:2012:644, paragraph 32, and of 4 October 2012, *PIGI*, C?550/11, EU:C:2012:614, paragraph 26.

20 Judgment of 4 October 2012, *PIGI*, C?550/11, EU:C:2012:614, paragraphs 27 to 29.

21 Judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraphs 52 and 53. In that regard, it may be helpful to point out that I disagree with the narrow reading of *FIRIN* put forward by the Commission, according to which the adjustment of deductions was required by the Court only because that case concerned a fraud in which both the supplier and the recipient had participated. This reading of *FIRIN* is manifestly untenable. Indeed, as is quite clear from both paragraph 47 of the judgment (and point 30 of the Advocate General's Opinion) in that case, the Court provided the interpretation sought by the referring court of Article 185 of the VAT Directive without reference to the facts at issue in the main proceedings. Indeed, since the fraud did not permit the recipient to deduct input VAT in the first place, it would have been pointless to examine whether an adjustment of deductions was necessary. This reading of *FIRIN* is further corroborated by the judgment of 18 July 2013, *Evita-K*, C?78/12, EU:C:2013:486, paragraphs 59 and 60.

22 See, by analogy, judgment of 4 October 2012, *PIGI*, C?550/11, EU:C:2012:614, paragraph 27.

23 Judgment of 4 October 2012, *PIGI*, C?550/11, EU:C:2012:614, paragraphs 29 to 37.

24 See supra point 35.

25 Judgment of 15 March 2007, *Reemtsma Cigarettenfabriken*, C?35/05, EU:C:2007:167.

26 Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11).

27 Judgment of 15 March 2007, *Reemtsma Cigarettenfabriken*, C?35/05, EU:C:2007:167, paragraphs 34 to 41.

28 See, for example, judgment of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 50.

29 See my Opinion in Joined Cases *Geissel and Butin*, C?374/16 and C?375/16, EU:C:2017:515, point 67 et seq.

30 Judgment of 12 February 2015, *Surgicare*, C?662/13, EU:C:2015:89, paragraph 28.

31 See my Opinion in Joined Cases *Geissel and Butin*, C?374/16 and C?375/16, EU:C:2017:515, point 73.