Provisional text

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 6 February 2020(1)

Case C?276/18

KrakVet Marek Batko sp. K.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

(Request for a preliminary ruling from the F?városi Közigazgatási és Munkaügyi Bíróság (Budapest Administration and Labour Court, Hungary))

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Article 33 — Determination of where taxable transactions are carried out — Goods dispatched or transported by or on behalf of the supplier — Abusive practice — Regulation (EU) No 904/2010 — Articles 7, 13 and 28 to 30 — Administrative cooperation — Double taxation)

1. This request for a preliminary ruling from the F?városi Közigazgatási és Munkaügyi Bíróság (Budapest Administration and Labour Court, Hungary) concerns the interpretation of various provisions of Directive 2006/112/EC ('the VAT Directive') (2) and Regulation (EU) No 904/2010 ('the VAT Anti-Fraud Regulation'). (3) When are goods properly to be classified as having been 'dispatched or transported by or on behalf of the supplier' within the meaning of Article 33 of the VAT Directive? When is a trader's established practice under that provision to be regarded as abusive? And what, in this context, is the administrative cooperation required of tax authorities in different Member States in determining where taxable transactions are carried out, so as to avoid double taxation, under Articles 7, 13 and 28 to 30 of the VAT Anti-Fraud Regulation?

2. The referring court has submitted five questions concerning those issues. The Court has asked me in this Opinion to consider only the fourth and fifth questions referred. Those concern, respectively, the meaning of the phrase 'goods dispatched or transported by or on behalf of the supplier' in Article 33(1) of the VAT Directive and the concept of abusive practice.

Legal framework

EU law

The VAT Directive

3. The VAT Directive establishes a comprehensive framework for the uniform application of VAT throughout the European Union.

4. Recital 9 indicates that 'it is vital to provide for a transitional period to allow national laws in specified fields to be gradually adapted'.

5. Recital 10 explains that 'during this transitional period, intra-Community (4) transactions carried out by taxable persons other than exempt taxable persons should be taxed in the Member State of destination, in accordance with the rates and conditions set by that Member State'.

6. Recital 11 adds that 'it is also appropriate that, during that transitional period … certain intra-Community distance selling (5) … should also be taxed in the Member State of destination, in accordance with the rates and conditions set by that Member State, in so far as such transactions would, in the absence of special provisions, be likely to cause significant distortion of competition between Member States'.

7. Recital 17 recalls that 'determination of the place where taxable transactions are carried out may engender conflicts concerning jurisdiction as between Member States … Although the place where a supply of services is carried out should in principle be fixed as the place where the supplier has established his place of business, it should be defined as being in the Member State of the customer, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods'.

8. Recitals 61 and 62, read together, explain that 'it is essential to ensure uniform application of the VAT system'; that 'implementing measures are appropriate to realise that aim'; and that 'those measures should, in particular, address the problem of double taxation of cross-border transactions which can occur as the result of divergences between Member States in the application of the rules governing the place where taxable transactions are carried out'.

9. Within Title I ('Subject matter and scope'), Article 2 provides:

'1. The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;'

10. Article 9, which opens Title III ('Taxable persons') states that, '1. "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. …'

11. Title IV deals with 'Taxable transactions' and is divided into four chapters: 'Supply of goods' (Articles 14-19), 'Intra-Community acquisition of goods' (Articles 20-23), 'Supply of services' (Articles 24-29) and 'Importation of goods' (Article 30). Article 14(1) contains the definition of what, in the simplest circumstances, constitutes the supply of goods: '"Supply of goods" shall mean the

transfer of the right to dispose of tangible property as owner'. Article 20 sets out the corresponding basic definition of 'intra-Community acquisition of goods', namely 'the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began'.

12. Title V ('Place of taxable transactions') deals, under Chapter 1, Section 2, with the supply of goods with transport. Article 32 contains the general rule: 'Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins. …'

13. Article 33 provides:

'1. By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, where the following conditions are met:

(a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;

(b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier.

…'

14. Article 34 sets a minimum quantitative threshold for the application of Article 33. Thus, Article 34(1) provides that Article 33 shall not apply where 'the total value, exclusive of VAT, of such supplies effected under the conditions laid down in Article 33 within that Member State does not in any one calendar year exceed EUR 100 000 or the equivalent in national currency'. Under Article 34(2), 'the Member State within the territory of which the goods are located at the time when their dispatch or transport to the customer ends may limit the threshold referred to in paragraph 1 to EUR 35 000'.

15. Article 138 forms part of Title IX ('Exemptions'), Chapter 4 ('Exemptions for intra-Community transactions'), Section 1 ('Exemptions related to the supply of goods'). It provides that '1. Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began'.

16. Title XIV ('Miscellaneous') contains, under Chapter 2, a single article dealing with the advisory committee on value added tax ('the VAT Committee'). Article 398(1) sets up the VAT Committee, whilst Article 398(4) gives that committee competence 'in addition to the points forming the subject of consultation pursuant to this Directive [to] examine questions raised by its chairman, on his own initiative or at the request of the representative of a Member State, which concern the application of Community provisions on VAT'.

The VAT Anti-Fraud Regulation

17. The VAT Anti-Fraud Regulation addresses administrative cooperation between the

competent authorities in the Member States to combat fraud in relation to VAT.

18. Recital 5 explains that ‘the tax harmonisation measures taken to complete the internal market should include the establishment of a common system for cooperation between the Member States, in particular as concerns exchange of information, whereby the Member States’ competent authorities are to assist each other and to cooperate with the Commission in order to ensure the proper application of VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods’.

19. Recital 6 notes, however, that ‘administrative cooperation should not lead to an undue shift of administrative burdens between Member States’.

20. Recital 7 indicates that ‘for the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State’.

21. Recital 8 points out that ‘monitoring the correct application of VAT on cross-border transactions taxable in a Member State other than that where the supplier is established depends in many cases on information which is held by the Member State of establishment or which can be much more easily obtained by that Member State. Effective supervision of such transactions is therefore dependent on the Member State of establishment collecting, or being in a position to collect, that information’.

22. Recital 13 records that ‘in order to fight fraud effectively, it is necessary to provide for information exchange without prior request. To facilitate the exchange of information, the categories for which an automatic exchange needs to be established should be specified’.

23. Article 1(1), second subparagraph, states that the Regulation ‘lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud’.

24. Article 7 opens Chapter II (‘Exchange of information on request’). It provides:

‘1. At the request of the requesting authority, the requested authority shall communicate the information referred to in Article 1, including any information relating to a specific case or cases.

2. For the purpose of forwarding the information referred to in paragraph 1, the requested authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information.

3. Until 31 December 2014, the request referred to in paragraph 1 may contain a reasoned request for an administrative enquiry. If the requested authority takes the view that the administrative enquiry is not necessary, it shall immediately inform the requesting authority of the reasons thereof.

4. As from 1 January 2015, the request referred to in paragraph 1 may contain a reasoned request for a specific administrative enquiry. If the requested authority takes the view that no administrative enquiry is necessary, it shall immediately inform the requesting authority of the reasons thereof.

Notwithstanding the first subparagraph, an enquiry into the amounts declared by a taxable person in connection with the supplies of goods or services listed in Annex I, which are made by a taxable person established in the Member State of the requested authority and are taxable in the Member

State of the requesting authority, may be refused solely:

(a) on the grounds provided for in Article 54(1), assessed by the requested authority in conformity with a statement of best practices concerning the interaction of this paragraph and Article 54(1), to be adopted in accordance with the procedure provided for in Article 58(2);

(b) on the grounds provided for in paragraphs 2, 3, and 4 of Article 54; or

(c) on the grounds that the requested authority has already supplied the requesting authority with information on the same taxable person as a result of an administrative enquiry held less than two years previously.

Where the requested authority refuses an administrative enquiry referred to in the second subparagraph on the grounds set out in points (a) or (b), it shall nevertheless provide to the requesting authority the dates and values of any relevant supplies made by the taxable person in the Member State of the requesting authority over the previous two years.'

25. Article 13 opens Chapter III ('Exchange of information without prior request'). Article 13(1) stipulates, 'the competent authority of each Member State shall, without prior request, forward the information referred to in Article 1 to the competent authority of any other Member State concerned, in the following cases: (a) where taxation is deemed to take place in the Member State of destination and the information provided by the Member State of origin is necessary for the effectiveness of the control system of the Member State of destination. …'

26. Article 14 contains detailed arrangements for the automatic exchange of information. Article 15 then deals with spontaneous exchange of information and states: 'The competent authorities … shall, by spontaneous exchange, forward … any information referred to in Article 13(1) which has not been forwarded under the automatic exchange referred to in Article 14 of which they are aware and which they consider may be useful to those competent authorities.'

27. Article 28 (the sole provision in Chapter VII: 'Presence in administrative offices and participation in administrative enquiries') lays down careful arrangements enabling officials from a competent authority of a Member State requesting information to be present as observers whilst the officials in another Member State carry out administrative enquiries and to have access to the information so obtained.

28. Article 29 (the opening provision in Chapter VIII, 'Simultaneous controls') states that 'Member States may agree to conduct simultaneous controls whenever they consider such controls to be more effective than controls carried out by only one Member State'.

29. Article 30 then lays does the necessary arrangements governing the conduct of such controls.

Implementing Regulation (EU) No 282/2011

30. Recital 17 of Council Implementing Regulation (EU) No 282/2011 (6) explains that 'in the case of intra-Community acquisition of goods, the right of the Member State of acquisition to tax the acquisition should remain unaffected by the VAT treatment of the transaction in the Member States of departure'.

31. Article 16, first paragraph, provides that ‘where an intra-Community acquisition of goods within the meaning of Article 20 of [the VAT Directive] has taken place, the Member State in which the dispatch or transport ends shall exercise its power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began’.

32. Under Article 16, second paragraph, ‘any request by a supplier of goods for a correction in the VAT invoiced by him and reported by him to the Member State where the dispatch or transport of the goods began shall be treated by that Member State in accordance with its own domestic rules’.

Working paper of the VAT Committee

33. On 5 May 2015 the VAT Committee issued Working Paper No 855 on the application of VAT provisions in relation to distance selling (‘the Working Paper’). (7)

34. Section 2 of the Working Paper explains that the tax administrations in Belgium and the United Kingdom had ‘noticed that some business arrangements have been put in place in view of splitting the supply of the goods from their transport and delivery with a view to avoid accounting [for] and paying VAT in the Member State of destination of the goods’.

35. In Section 3 of the Working Paper, the Commission argued that the text of Article 33(1) of the VAT Directive was capable of bearing either a literal or a broader interpretation, inasmuch as it could be read as covering only situations in which the supplier was directly involved in arranging the transportation, or as also encompassing situations in which the supplier’s involvement was merely indirect.

36. The Commission argued that the literal interpretation ‘has the advantage of being very straightforward when looking strictly at the legal situation and at the contractual relationships but it also implies that it would be quite easy to circumvent’. The Commission suggested that such circumvention ‘could be dealt with in the light of the “abuse of law” test’ as established by the Court in *Halifax*, (8) which would include consideration of ‘whether the arrangements lead to a result against the purpose of the VAT Directive rules; and whether the arrangements have as their main purpose to lead to that result, and any other “economic” reasons are non-existent or residual’. The Commission further referred in that regard to the Court’s ruling in *Part Service.* (9)

37. As regards the broader interpretation, the Commission argued that ‘for the application of the distance selling rules, not only the contractual arrangements between the supplier, the transporter and the customer have to be taken into account but also, and more importantly, the economic reality’. Further, the Commission argued that in a statement to the minutes agreed when Directive 91/680/EEC (10) (which introduced provisions on distance selling) was adopted, (11) the Council and the Commission made clear that ‘the special arrangements for distance selling will apply in all cases where the goods are dispatched or transported, either indirectly or directly, by the supplier or on his behalf’.

38. Against that background, the Working Paper invited delegations ‘to express their views on the questions raised by the United Kingdom and Belgium, and on the observations made by the Commission services. They are in particular requested to give their opinion on the two approaches examined’.

Guidelines of the VAT Committee

39. At its 104th meeting held on 4-5 June 2015, (12) the VAT Committee adopted guidelines on

distance selling, (13) which state that ‘the VAT Committee almost unanimously (14) agrees that, for the purposes of Article 33 of the VAT Directive, goods shall be considered to have been “dispatched or transported by or on behalf of the supplier” in any cases where the supplier intervenes directly or indirectly in the transport or dispatch of the goods’.

40. The guidelines go on to state that ‘the VAT Committee unanimously agrees that the supplier shall be regarded as having intervened indirectly in the transport or dispatch of the goods in any of the following cases: … iii) where the supplier invoices and collects the transport fees from the customer and further remits them to a third party that will arrange the dispatch or transport of the goods’.

41. Finally, the guidelines state that ‘the VAT Committee further agrees almost unanimously that in other cases of intervention, in particular where the supplier actively promotes the delivery services of a third party to the customer, puts the customer and the third party in contact and provides to the third party the information needed for the delivery of the goods, he shall likewise be regarded as having intervened indirectly in the transport or dispatch of the goods’.

Directive 2017/2455

42. On 1 December 2016, the Commission submitted a proposal to amend the VAT Directive. (15) The Explanatory Memorandum attached thereto states, in Section 5, Article 2(2), that ‘the proposal also clarifies Article 33(1) in line with the guidelines of the VAT Committee’.

43. That proposal led to the adoption of Directive 2017/2455. Recital 9 to that directive explains, in relation to the intra-Community distance sales of goods, that ‘to provide legal certainty to such businesses, the definition of those supplies of goods should clearly state that it applies also where the goods are transported or dispatched on behalf of the supplier including where the supplier intervenes indirectly in the transport or dispatch of the goods.’

44. Article 2 provides that: ‘With effect from 1 January 2021, [the VAT Directive] is amended as follows: (1) in Article 14, the following paragraph is added: “4. For the purposes of this Directive, the following definitions shall apply: (1) ‘intra-Community distance sales of goods’ means supplies of goods dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods, from a Member State other than that in which dispatch or transport of the goods to the customer ends, where the following conditions are met: (a) the supply of goods is carried out … for any other non-taxable person”. […]’

45. Article 2(3) provides that Article 33 of the VAT Directive is replaced by the following: ‘By way of derogation from Article 32: (a) the place of supply of intra-Community distance sales of goods shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends. […]’

National law

Law on VAT

46. Article 2(a) of the Általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax, ‘the Law on VAT’) (16) provides that it covers ‘the supply of goods or services for consideration within the national territory by a taxable person acting as such’.

47. Article 25 states that ‘when the goods are not shipped or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place’.

48. Article 29(1) provides that ‘by way of derogation from Articles 26 and 28, where the goods are shipped or transported by or on behalf of a supplier and the supply results in the goods arriving in a Member State of the Community other than the Member State from which they were shipped or transported, the place of supply of the goods shall be deemed to be the place where the goods are located at the time of the arrival of the shipment or transport addressed to the purchaser, where the following conditions are met: (a) the supply of goods (aa) is carried out for a taxable person or a non-taxable legal person whose intra-Community acquisitions of goods are not subject to VAT under Article 20, paragraph 1(a) and (d), or; (ab) for a taxable or non-taxable person or body. […]’

49. Article 82(1) provides that ‘the amount of the tax shall be 27% of the tax base’.

Law on Taxation

50. Article 2(1) of the Adózás rendjér?l szóló 2003. évi XCII. törvény (Law XCII of 2003 on the rules governing taxation, ‘the Law on Taxation’) (17) provides that ‘all rights in legal relationships for tax purposes shall be exercised in accordance with their purpose. Under the tax laws, the conclusion of contracts or the carrying out of other transactions whose purpose is to circumvent the provisions of the tax laws may not be classified as exercise of rights in accordance with their purpose’.

51. Article 86(1) provides that: ‘The tax authority, in order to prevent erosion of tax revenues and improper requests for budget support and tax refunds, shall regularly check taxpayers and other persons involved in the tax system. The purpose of the checks is to establish whether the obligations imposed by the tax laws and other legislation have been complied with or infringed. When carrying out a check, the tax authority shall disclose and demonstrate the facts, circumstances or information to be used as the basis for a finding of infringement or of abuse of rights and for the administrative procedure initiated as result of that infringement or abuse of rights.’

52. Article 95(1) states that: ‘The tax authority shall carry out the check by examining the documents, supporting documents, accounting ledgers and registers required in order to determine the amounts which serve as the basis for tax or budget support, including the electronic data, software, and computer systems used by the taxpayer as well as calculations and other facts, information and circumstances relating to the maintenance of accounts and accounting records and the processing of supporting documents.’

53. Article 108(1) provides that ‘estimation is a form of evidence that plausibly establishes the actual, statutory basis for taxes and budget support’.

54. Article 170(1) states that ‘if the tax payment is insufficient, this shall give rise to a tax penalty. The amount of the penalty, save as otherwise provided for in this law, shall be 50% of the unpaid amount. The amount of the penalty shall be 200% of the unpaid amount if the difference compared with the amount to be paid is connected with the concealment of income, or the falsification or destruction of evidence, accounting ledgers or registers’.

55. Article 172(1) stipulates that ‘except as provided for in subparagraph 2, a fine of up to [200 000 Hungarian Forints (HUF)] may be imposed in the case of individuals, and of up to HUF 500 000 in the case of other taxable persons, if they fail to comply with the obligation to register (initial

registration and communication of any changes), provide data or open a current account, or with the obligation to submit tax returns'. (18)

Facts, procedure and the questions referred

56. In the description that follows, I have consolidated the information available from the order for reference, the written observations and the detailed answers to the Court's questions at the hearing. I emphasise, however, that only the first of these constitute established facts.

57. KrakVet Marek Batko sp. K. ('KrakVet') is a company registered and established in Poland. It has no establishment, office or warehouse in Hungary. KrakVet sells products for animals, mainly food for dogs and cats in the neighbouring Member States, notably through its various 'zoofast' websites. It has numerous clients in Hungary who effect their purchases through www.zoofast.hu.

58. The case before the referring court concerns events that took place during the 2012 fiscal year. At that time, KrakVet offered on its website an option enabling customers to have goods that they purchased transported from KrakVet's premises in Poland to their chosen delivery address under a contract to be agreed between the customer and Krzysztof Batko Global Trade ('KBGT'). Alternatively, the customer could make use of the services of any other transporter. KrakVet did not itself offer to perform transportation.

59. For purchases below HUF 8 990 (approximately EUR 30.79), (19) transportation with KBGT cost HUF 1 600 (approximately EUR 5.54). For purchases above that threshold, KBGT transportation was available for only HUF 70 (approximately EUR 0.24) — that was achieved by KrakVet providing a HUF 1 530 discount on the price of the goods purchased.

60. Like KrakVet, KBGT is also a company registered and established in Poland. The owner of KBGT, Krzysztof Batko, is the brother of the owner of KrakVet, Marek Batko. KBGT itself undertook the transportation from Poland to Hungary. It subcontracted the onward transportation within Hungary to the customer's delivery address to two courier companies ('the Hungarian courier companies'): Sprinter Futárszolgálat Kft. ('Sprinter') and GLS General Logistics Systems Hungary Kft. ('GLS Hungary').

61. Customers made a single payment to cover both the goods and the transportation costs. That payment was made, with roughly equal frequency, either to Sprinter and GLS Hungary upon delivery of the goods, or by bank transfer into an account at CIB Bank Zrt. in Hungary ('the CIB bank account') in the name of the owner of KBGT.

62. The Hungarian courier companies would transfer the payments upon delivery that they had received into the CIB bank account. KBGT would then arrange for transfers of funds to be made from the CIB bank account to KrakVet. The Court was told during the hearing that when monies were transferred to KrakVet, KBGT would withhold its 'share'. Whether that 'share' was the contractual transportation costs or some other amount has not been explained.

63. KrakVet submitted a 'binding inquiry' to the Polish tax authorities, who replied that VAT was due in Poland. According to KrakVet, such a reply to a 'binding inquiry' is binding for the company making the inquiry, for the Polish tax authorities and for the Polish courts. On the basis of that enquiry and the reply that it received, KrakVet paid VAT in Poland at a rate of 8%, instead of paying VAT in Hungary at the rate of 27%.

64. In 2013, the Nemzeti Adó- és Vámhivatal Kiemelt Adózók Adóigazgatósága Különös Hatásköri Ellen?rzési F?osztálya (Hungarian tax authorities) carried out an inspection of KrakVet

concerning the 2012 fiscal year and in that context assigned KrakVet a Hungarian tax number on 14 August 2013. The Hungarian tax authorities also carried out related checks on the operations of the Hungarian courier companies.

65. In 2014, the Polish tax authorities also carried out an inspection of KrakVet for the 2012 fiscal year. Having done so, they confirmed the reply they had earlier given to the ‘binding inquiry’. On 23 November 2015, KrakVet submitted an informal translation of documents that it had received from the Polish tax authorities to the Hungarian tax authorities.

66. On 28 January 2016, KrakVet furthermore submitted a copy of its general conditions to the Hungarian tax authorities and proposed that the general director should vouch for the authenticity of that version, since the 2012 website version was no longer available. (20)

67. The Hungarian tax authorities requested further information concerning KrakVet from the Polish tax authorities. They were informed that while KBGT packed and labelled the goods to be transported at the KrakVet warehouse, the goods were at that stage the property of KrakVet.

68. On the basis of that material, the Hungarian tax authorities concluded that during the 2012 fiscal year, Sprinter had made deliveries on behalf of KBGT and for KrakVet to the value of HUF 217 087 988 (approximately EUR 751 039.57), with receipt of goods at Sprinter’s central warehouse in Budapest. Likewise, the Hungarian tax authorities concluded that over the same period GLS Hungary, on behalf of GLS General Logistics Systems Slovakia s.r.o., had provided package delivery services to the value of HUF 64 011 046 (EUR 211 453.19), for which it had been reimbursed on behalf of KrakVet and KBGT.

69. The Hungarian tax authorities notified their conclusions to KrakVet on 25 May 2016. The latter submitted its observations on those conclusions on 8 June 2016.

70. On 16 August 2016, the Hungarian tax authorities determined that KrakVet had exceeded the quantitative threshold of EUR 35 000 laid down in Article 34 of the VAT Directive (21) and that it should therefore have made VAT payments in Hungary totalling HUF 58 910 000 (approximately EUR 190 087). (22) The Hungarian tax authorities thereupon imposed a penalty of HUF 117 820 000 (approximately EUR 380 175), as well as interest at HUF 10 535 000 (approximately EUR 36 446), and a fine of HUF 500 000 (approximately EUR 1 730) in respect of the missing VAT declaration.

71. KrakVet appealed against the decision of the Hungarian tax authorities to the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (National Appeal Board for Tax and Customs, Hungary [‘the Appeal Board’]). By decision of 23 January 2017, the Appeal Board upheld the decision of the Hungarian tax authorities. KrakVet thereupon appealed to the F?városi Közigazgatási és Munkaügyi Bíróság (Budapest Administration and Labour Court), which has referred the following five questions to the Court.

‘(1) Must the objectives of [the VAT Directive], in particular the requirements for the prevention of jurisdictional conflicts between Member States and double taxation, referred to in recitals 17 and 62 thereof, and [the VAT anti-fraud Regulations], in particular recitals 5, 7 and 8 and Articles 7, 13 and 28 to 30 thereof, be interpreted as precluding a practice of the tax authorities of a Member State which, by attributing to a transaction a qualification that differs both from the legal interpretation of the same transaction and the same facts that was carried out by the tax authorities of another Member State and from the response to the binding inquiry provided by those authorities on the basis of that interpretation, as well as from the confirmatory conclusion of both that those authorities reached in the tax inspection they carried out, gives rise to the double taxation of the taxable person?

(2) If the answer to the first question is that such a practice is not contrary to EU law, can the tax authorities of a Member State, taking into account [the VAT Directive], and EU law, unilaterally determine the tax obligation, without taking into consideration that the tax authorities of another Member State have already confirmed, on various occasions, first at the request of the taxable person and later in its decisions as a result of an inspection, the lawfulness of that taxable person’s actions?

Or should the tax authorities of both Member States cooperate to reach an agreement, in the interests of the principle of fiscal neutrality and the prevention of double taxation, so that the taxable person has to pay [VAT] in only one of those countries?

(3) If the response to the second question is that the tax authorities of a Member State can change the qualification of a tax unilaterally, should the provisions of the [VAT Directive] be interpreted as meaning that the tax authorities of a second Member State are obliged to return to the taxable person required to pay VAT the tax determined by those authorities in response to a binding inquiry and paid in relation to a period closed with an inspection, so that both the prevention of double taxation and the principle of fiscal neutrality are guaranteed?

(4) How should the expression in the first sentence of Article 33(1) of [the VAT Directive], according to which the transport is carried out “by or on behalf of the supplier”, be interpreted? Does this expression include the case in which the taxable person offers as a seller, in an online shopping platform, the possibility for the buyer to enter into a contract with a logistics company, with which the seller collaborates for operations other than the sale, when the buyer can also freely choose a carrier other than the one proposed, and the transport contract is concluded by the buyer and the carrier, without the intervention of the seller?

Is it relevant, for interpretative purposes — especially taking into account the principle of legal certainty — that by the year 2021 the Member States must amend legislation transposing the aforementioned provision of [the VAT Directive as amended by Directive 2017/2455], so that Article 33(1) of that directive must also be applied in case of indirect collaboration in the choice of carrier?

(5) Should EU law, specifically [the VAT Directive], be interpreted as meaning that the facts mentioned below, taken as a whole or separately, are relevant to examine whether, among the independent companies that carry out a delivery, expedition or transport of goods the taxable person has arranged, to circumvent Article 33 of the [VAT Directive] and thereby infringe the law, legal relationships that seek to take advantage of the fact that the VAT is lower in the other Member State:

(5.1) the logistics company carrying out the transport is linked to the taxable person and provides other services, independent of transport,

(5.2) at the same time, the customer may at any time depart from the option proposed by the taxable person, which is to order the transport to the logistics company with which it maintains a contractual link, being able to entrust the transport to another carrier or personally collect the goods?'

72. Written observations were submitted by KrakVet, the Czech Republic, Hungary, Italy, the Republic of Poland and the European Commission. At the hearing, KrakVet, Ireland, Hungary, the United Kingdom and the Commission presented oral submissions.

73. As indicated at the beginning of this Opinion, I shall confine myself to consideration of the fourth and fifth questions referred.

The fourth and fifth questions referred

74. The fourth and fifth questions raise three issues concerning the interpretation of Article 33(1) of the VAT Directive. First, what was meant by the phrase 'goods dispatched or transported by or on behalf of the supplier', in Article 33(1) of the VAT Directive before its amendment by Directive 2017/2455? (I shall refer to this as 'the original version of Article 33(1)'.) Second, did the amendment made to that provision by Directive 2017/2455, which generated the new version of Article 33(1), alter or merely confirm the previous legal situation? Third, should the type of operation described in the order for reference, having regard to the *original* version of Article 33(1), be regarded as an abusive practice?

75. As a preliminary point, I should explore whether there is any relevant difference between the terms 'dispatched' and 'transported'. The EU legislature clearly chose to use two verbs rather than one. It is equally clear that 'dispatch' of goods precedes their 'transportation'. That is, however, the point at which — at least in the original version of Article 33(1) — clarity disappears. (23)

76. On a very broad reading, *any* act taken '*by*' the supplier to start the process of getting goods ordered by a customer in another Member State moving towards their destination (their 'dispatch') would be sufficient to trigger Article 33(1). Does putting a parcel in the post count? What about receiving a phone call from the customer's chosen transporter and instructing him to go to a particular address at a particular time to collect the consignment? It seems unlikely that such a broad reading of Article 33(1) was intended; and such a reading would create confusion, given that the *general rule* contained in Article 32 uses exactly the same words 'by the supplier' (see points 80 to 82 below). But where is the line to be drawn?

77. I suggest that a common-sense approach translated into legal language would lead to a reading along the lines of: 'If the supplier, at his initiative and choice, takes most or all of the essential steps necessary to prepare the goods for transportation, makes the arrangements for the goods to be collected and start their journey and relinquishes possession of and control over the goods, there has been dispatch *by* the supplier.'

78. Transportation '*by*' the supplier is perhaps less problematic, in that its natural meaning is that the supplier either himself or through his agent physically carries out the transport operation, or owns or controls the legal entity that does so.

Goods dispatched or transported by or on behalf of the supplier

79. Article 2(1) of the VAT Directive provides that the VAT is due in the Member State where supply takes place. The goods there supplied thereby become subject to the rates of VAT applied by that Member State.

80. Article 32(1) states the general rule: 'Where goods are dispatched or transported *by the supplier*, or *by the customer*, or *by a third person*, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins …' (emphasis added). No distinction is drawn between the various actors who might be responsible for dispatch or transport.

81. However, Article 33(1) contains a derogation to that general rule. It provides that in certain specific circumstances where goods are 'dispatched or transported *by or on behalf of the supplier*' (emphasis added) between Member States, the place of supply is 'deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends'. Those specific circumstances include where '(a) the supply of goods is carried out for a taxable person, or a non-taxable legal person … or for any other non-taxable person'.

82. It will be seen that Article 32 (the general rule) and Article 33 (the derogation therefrom) employ very similar wording to arrive at opposite results. Article 32 has 'goods dispatched or transported by the supplier …'. Article 33 inserts into that phrase the additional words (here italicised): 'goods […] dispatched or transported by *or on behalf of* the supplier …'. It is as though Article 32 contained the (invisible) words 'on behalf of the customer'. Then, the difference between the two provisions becomes clear. (24)

83. On that basis, it seems to me that the distinction being drawn may be illustrated thus. If a customer based in Hungary orders goods over the internet from a company based in Poland, it does not in principle matter whether the customer himself travels to the warehouse in Poland to collect those goods or whether someone else (the supplier or a third party) deals with the logistics on his behalf. In all three cases, *provided what is happening is being done on behalf of the customer*, supply takes place in Poland and VAT is due there at the rates charged by Polish authorities. If, however, the actions are being taken *on behalf of the supplier*, the supply takes place at the place of destination (Hungary) and VAT is due there at the rates charged by the Hungarian authorities.

84. Article 138(1) states explicitly what the VAT consequences are when the customer is a taxable person or a non-taxable legal person. In both cases, the Member State of origin 'shall exempt the supply of goods dispatched or transported to a destination outside [its] territory but within the Community, by or on behalf of the vendor or the person acquiring the goods …'. (I note that *no distinction is drawn* here between cases where dispatch or transport takes place 'by or on behalf of the vendor' and cases where those operations take place on behalf of 'the person acquiring the goods'.) Since, under Article 33, the place of supply is deemed to be where the goods are located when dispatch or transport ends, VAT is then due in the Member State of destination. There is, however, no equivalent clear statement requiring the Member State of origin, *ceteris paribus*, to exempt the intra-Community supply of goods from (its) VAT when that supply is made to '*any other non-taxable person*'.

85. Recitals 9 to 11 indicate that taxation in the Member State of destination (as given substantive expression by, inter alia, Articles 33 and 138) was intended to apply only during the 'transitional period'. Those articles have nevertheless remained part of the EU VAT legislation and, where applicable, place the focus on taxation at the place of consumption. (25) That said, it should

be borne in mind that they are *not* meant to represent the default position. The general rule governing the place of supply where goods are dispatched or transported (be that by the supplier, by the consumer or by a third party) remains that contained in Article 32 of the VAT Directive. According to that rule, the place of supply 'shall be deemed to be the place where the goods are located at the time where dispatch or transport of the goods to the customer begins'.

86. In the present case, KrakVet's customers were consumers located in Hungary (that is, non-taxable persons), who made purchases through KrakVet's website. KBGT covered transportation between the warehouse in Poland and the Hungarian border. Onward transportation within Hungary was carried out by the Hungarian courier companies.

87. It is, I think, fair to suggest that KrakVet's customers were and are interested primarily in purchasing pet food. The transport service required to move the pet food from KrakVet's warehouse in Poland to the customers' delivery address in Hungary is an essential part of the transaction but unlikely, as such, to be the main focus of the customers' interest. Probably, the essential components determining their choice of transportation method will have been convenience and cost. (26)

88. Against that background, KrakVet, Italy and Poland argue, the original version of Article 33(1) (that is, the version in force both at the material time and as of today) should be interpreted purely on the basis of its current wording, (27) in order to respect the principles of legal certainty and the protection of legitimate expectations. (28) The Czech Republic, Ireland, Hungary, the United Kingdom and the Commission submit that Article 33(1) should be interpreted as already covering the situation in which the supplier intervenes indirectly in the transportation arrangements. They argue that their preferred reading respects the economic reality, (29) since the possibility in circumstances such as those of the present case that the customer might choose another transporter from the one proposed to him on the website by the supplier of the goods is at best remote and probably indeed purely hypothetical.

89. As it has already done in its Working Paper, (30) the Commission also refers to the statement in the minutes of the Council for the session adopting Directive 91/680, to the effect that special arrangements for distance selling were to apply in all cases where the goods are dispatched or transported, indirectly or directly, by the supplier or on his behalf. (I interject to explain that Directive 91/680 — one of the series of directives amending the Sixth VAT Directive (31) — introduced inter alia an elaborate new Article 28b (entitled 'Place of transaction'), consisting of five subsections. The first paragraph under 'A. Place of the intra-Community acquisition of goods' stated that, '1. The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring the goods ends.' The first paragraph under 'B. Place of the supply of goods' contained the precursor of the original version of Article 33(1) of the VAT Directive. (32))

90. That said, the argument advanced by the Commission may swiftly be disposed of. The Court clearly held in *Antonissen* that 'such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance'. (33)

91. Reference has also been made to the Guidelines issued by the VAT Committee, which state that ‘goods shall be considered to have been “dispatched or transported by or on behalf of the supplier” in any cases where the supplier intervenes directly or indirectly in the transport or dispatch of the goods’. However, the VAT Committee adopted that position three years after the transactions giving rise to the present case; and the Guidelines themselves explicitly state, at the bottom of every page, that they have no binding force. (34)

92. Against that background and applying the normal principles of construction to the text of the original version of Article 33(1), I can find no basis for concluding — as the Czech Republic, Ireland, Hungary, the United Kingdom and the Commission contend — that that provision also covers cases where the supplier intervenes *indirectly*, in response to an instruction given by the customer, to dispatch or transport goods to a non-taxable person located in another Member State.

93. The Court has also been invited to consider, however, whether the amendments made by Directive 2017/2455, which generated an additional fourth subparagraph to be added to Article 14, together with the new version of Article 33(1), altered or merely confirmed the previous legal situation. Were the 2017 amendments to be considered to be mere ‘clarifications’ of the previous legal situation, that might affect the interpretation to be given to the referring court to apply in the present case.

The amendments to the VAT Directive

94. Article 2(1) of Directive 2017/2455 specifies that a new fourth subparagraph was being ‘added’ to Article 14 of the VAT Directive. The addition provided a *new definition* of ‘intra-Community distance sales of goods’. Under that new definition, the concept covers certain specific situations of ‘supplies of goods dispatched or transported by or on behalf of the supplier, *including where the supplier intervenes indirectly in the transport or dispatch of the goods*, from a Member State other than that in which dispatch or transport of the goods to the customer ends’ (emphasis added). Amongst the situations covered is where ‘(a) the supply of goods is carried out … for any other non-taxable person’.

95. Neither the recitals nor the substantive provisions of Directive 2017/2455 go further in explaining the intended scope of the (new) concept of ‘indirect intervention’ by the supplier or the reasons that lay behind its introduction. The Commission’s explanatory memorandum contents itself with a non-specific reference to the ‘guidelines of the VAT Committee’. Here, it is appropriate to recall that whereas the guidelines of the VAT Committee, dated 4-5 June 2015, do elaborate somewhat on what that committee considered would constitute ‘indirect intervention’ by the supplier, (35) the Working Paper that preceded those guidelines, dated 5 May 2015, left entirely open for discussion whether that concept was to be given a literal or broad interpretation. And the detail of the guidelines has not found its way across into the new text.

96. The Czech Republic has referred the Court to the judgment in *Welmory*. (36) There, the Court held that it was apparent from the recitals of the regulation there at issue that ‘the EU legislature wished to clarify certain concepts necessary for determining criteria relating to the place of taxable transactions, while taking account of the relevant case-law of the Court’ and that ‘to that extent, even though that regulation was not yet in force at the material time, it should nonetheless be taken into account’. As I have just indicated, however, there is no equivalent guidance to be derived here from the recitals to Directive 2017/2455 and the ‘relevant case-law of the Court’ has yet to be written, in the present proceedings. (It will be clear from what I have said that I do not consider that the amendments necessarily resolve the underlying issue. Fortunately, however, neither the Court nor I need to express ourselves definitively here on that point.)

97. In a similar vein, the United Kingdom has relied on *Mensing* (37) where the Court held that 'according to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'.

98. That principle does indeed encapsulate settled case-law and is uncontroversial. When we apply it to the present situation, however, we find that the opening words of Article 2(1) of Directive 2017/2455 *explicitly* state that the new definition in Article 14(4) and the replacement of the existing text of Article 33 of the VAT Directive by the new Article 33(a) are to operate 'with effect from 1 January 2021': that is, *their legal effect is to be postponed* by two years compared to various other amendments introduced by that directive.

99. That deliberate postponement of legal effect is, I find, impossible to reconcile with the statement in the explanatory memorandum that the proposal merely 'clarifies Article 33(1)'. If the proposal did no more than clarify what had always been the true legal meaning of Article 33(1), it would make no sense to postpone its application. As a matter of logic, the conclusion must therefore be that what was being introduced was indeed an amendment; and that it does *not* represent the interpretation that should in any event have been given to the existing text.

100. It is important also to bear in mind that the discussion reflected in the Working Paper took place three years *after* the transactions concerned by the present case. (38) The principle of legal certainty must naturally be borne in mind when interpreting Article 33(1) of the VAT Directive. (39) Indeed, the recitals for Directive 2017/2455 expressly refers to that principle, stating that the concept of 'by or on behalf of the supplier' is to be defined in the VAT Directive, so as to include also indirect intervention by the latter precisely in order to provide legal certainty. Implying the words 'directly or indirectly' into the original text of Article 33(1) of the VAT Directive when they are not to be found there runs directly counter to that principle.

101. I therefore conclude that until the amendments introduced by Directive 2017/2455 take legal effect on 1 January 2021, Article 33(1) of the VAT Directive is to be given its literal interpretation. It is therefore *not* to be read in the light of the new definition of 'intra-Community distance sales of goods' which contains the words 'including where the supplier intervenes "indirectly" in the transport or dispatch of the goods', or as though it had already been replaced by Article 33(a), which refers to that new definition.

Literal interpretation: 'goods … dispatched or transported by or on behalf of the supplier'

102. I have already suggested, at points 76 to 78 above, working definitions of (respectively) 'dispatch' by the supplier and 'transport' by the supplier. Let me now add to those a working definition of 'on behalf of'. I suggest that goods are dispatched or transported 'on behalf of the supplier' if the supplier, rather than the customer, effectively takes the decisions governing how those goods are to be dispatched or transported.

103. It is for the national court, as sole judge of fact, to determine whether — on the basis of the facts already set out in the order for reference and any other material that the parties choose to place before it — the goods concerned by the present proceedings were in reality 'dispatched or transported by or on behalf of the supplier'. In reaching its conclusion, the national court should bear in mind that 'consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT'. (40)

104. In that connection, the following (non-exhaustive) elements appear to me to be directly or indirectly relevant: (i) the range of potential transport options offered by the supplier to customers

on its website; (ii) the degree of connexity (if any) between the supplier and the companies proposing each of those options; (iii) whether purchase of the goods and purchase of the transport services were governed by a single contract or by separate contracts; (iv) when the obligation to pay for the goods arose; (v) when and where the property and risk in the property passed; (vi) what arrangements were in place for making payment for the goods and for the transport services used. At the end of the day, the national court will have to decide — on the basis of all the material available to it — whether KrakVet (or a company owned or controlled by it) in practice took the decisions governing dispatch or transportation of the goods, or whether those decisions were made by KrakVet's individual customers.

105. In the present case, not all of the known elements of fact point in the same direction and not enough is known about the relevant elements of the story. (41) I emphasise that only the contents of the order for reference will constitute findings of fact. Other material presented to the Court (whether in the written observations, or orally during the hearing) constitute elements that the national court may wish to explore further and put to proof when this matter returns before it.

106. First, it appears that KrakVet proposed on its website a single possible transport company, whilst leaving potential customers free to make independent arrangements. It did not offer links to enable customers to contact a series of possible transport companies. (I interject to observe that the order for reference in *KrakVet II* (42) makes it clear that there, various different transport companies *were* proposed via the website and customers would conclude separate contracts for the goods themselves and for transportation of those goods.) KrakVet itself did not offer transport services. Second, the owner of KrakVet and the owner of KBGT are brothers; (43) thus, there are close family ties between the two companies. Third, it seems that there may have been separate contracts governing the purchase of goods and the provision of transport services. Fourth, no findings of fact have been made to determine precisely when the obligation to pay for the goods arose. Fifth, the same is true of the question of when (and where) property in the goods and the risk in case of damage to, or partial or total loss of, the goods passed from supplier to customer. (I pause to observe that at the hearing KrakVet stated that its products were sold 'ex works'. Thus, if the products shipped were damaged, destroyed, lost or stolen en route, the customer would still be liable to pay for them.) Sixth, where the goods were transported by KBGT, customers appear to have paid for both goods and transportation together — that payment was then transferred by the Hungarian courier company in question into the CIB bank account in the name of the owner of KBGT and was later shared between KrakVet and KBGT. Whilst for purchases below HUF 8 990 transportation with KBGT cost HUF 1 600, above that threshold KBGT transportation was available for HUF 70 (an amount that appears to be so low as to be purely symbolic) — that was financed by KrakVet providing a HUF 1 530 discount on the price of the goods purchased.

107. On the basis of those elements and any other material presented to it, the referring court will have to decide whether the decisions governing dispatch or transportation of the goods were in reality taken by KrakVet (or a company owned or controlled by it) or by KrakVet's individual Hungarian customers.

108. I propose that the Court should give the following answer to the fourth question referred:

Article 33(1) of the VAT Directive, is to be interpreted as covering only situations where goods are dispatched or transported by or on behalf of the supplier. It does not address situations where the supplier intervenes only indirectly in the dispatch or transport of the goods.

If the supplier, at his initiative and choice, takes most or all of the essential steps necessary to prepare the goods for transportation, makes the arrangements for the goods to be collected and start their journey and relinquishes possession of and control over the goods, there has been ‘dispatch’ by the supplier.

If the supplier either himself or through his agent physically carries out the transport operation, or owns or controls the legal entity that does so, there has been ‘transportation’ by the supplier.

Goods are dispatched or transported ‘on behalf of’ the supplier if the supplier, rather than the customer, effectively takes the decision governing how those goods are to be dispatched or transported.

Abusive practice

109. By its fifth question, the referring court highlights two factual elements in the case before it: (1) that KBGT is ‘linked’ to KrakVet (by which I take the national court to be referring to the fact that the owners of the two companies are brothers) and provides other services independent of transport (as I understand it, packing of goods for dispatch); but (2) the customer is free to choose other options for transporting the goods he is purchasing. The referring court asks whether those two specific facts are relevant to determining whether KrakVet’s conduct constitutes an abusive practice for the purposes of EU VAT law, thus justifying the imposition of severe financial sanctions on KrakVet.

110. Should the referring court reach the conclusion that dispatch and/or transportation was performed ‘on behalf of’ the supplier, KrakVet, rather than on behalf of the individual customer, it will indeed then need to consider whether the payment of VAT in the Member State of origin (Poland), rather than the Member State of destination (Hungary) should be regarded not only as incorrect but also as an abuse. I recall that in *Part Service* (44) the Court explained that ‘it is for the national court to determine, in light of the ruling on the interpretation of Community law provided by the present judgment, whether, for the purposes of the application of VAT, transactions such as those at issue in the dispute in the main proceedings can be considered to constitute an abusive practice’. Thus, in order to answer the fifth question, it is in my view necessary to look more widely at the circumstances of the case.

111. As I shall explain below, a key element here is that KrakVet sought *guidance from the competent Polish authorities*, in the form of a ‘binding inquiry’ as to whether VAT was due in the Member State of origin or the Member State of destination. (45) In the proceedings before this Court, no one has contested KrakVet’s submission that the answer to that enquiry was legally binding upon both KrakVet and the Polish VAT authorities. KrakVet was informed, by the competent Polish authorities, that VAT was payable to Poland — in other words, that the general rule in Article 32 of the VAT Directive, rather than the derogation in Article 33 thereof, was applicable. It is undisputed that KrakVet duly accounted for and paid VAT in Poland during the relevant period. The Polish authorities carried out an inspection of KrakVet in 2014. Having done so, they confirmed the reply they had earlier given to KrakVet.

112. KrakVet and Poland argue, citing *WebMindLicenses*, (46) that a taxable person is entitled to take advantage of the differences between national VAT rates. They point out that taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens, (47) and to choose the business structures that they find most suitable for their activities. (48)

113. Italy argues that taxable persons are not entitled to rely on the norms of EU law in an abusive manner, (49) whilst the Czech Republic, Ireland, Hungary and the Commission argue that the business practice of KrakVet constitutes an abuse, as it seeks to draw advantages from the difference between VAT rates of Member States that distort competition. (50) The United Kingdom did not address this issue.

114. I recall that in *Halifax*, (51) the Court made it clear that 'where the taxable person chooses one of two transactions, the [VAT] Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, as the Advocate General observed in point 85 of his Opinion, taxpayers may choose to structure their business so as to limit their tax liability'. (52) Therefore, 'in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the [VAT] Directive and the national legislation transposing it, result in the *accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions*. Second, it must also be apparent from a number of objective factors that the *essential aim of the transactions concerned is to obtain a tax advantage*' (emphasis added). Those conditions ('the Halifax criteria') are cumulative. (53) In *Part Service* (54) the Court explained that 'there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the *principal aim* of the transaction or transactions at issue' (emphasis added). This case-law is also referred to in the Working Paper of the VAT Committee.

115. In the present case, it is clear that the principal transaction is the sale of pet food. That is KrakVet's business; and that is what KrakVet's customers are interested in purchasing. The purchase of the necessary transport services to get the pet food from KrakVet's warehouse in Poland to the customer's delivery address in Hungary is incidental (or ancillary) to that principal transaction. The present circumstances do not, therefore, resemble the kind of wholly artificial arrangement whereby a company structures its business with the sole purpose of minimising its tax liability — the classic case of VAT abuse.

116. It is nevertheless also clear that a significant financial advantage accrued to KrakVet resulting from the difference between the rates of VAT in Poland (8%) and Hungary (27%). That is so, irrespective of whether the advantage takes the form of increased profits or an enhanced market share derived from being able to offer lower prices to the final consumer.

117. In what follows, I make the *assumption* that when this matter returns to the referring court, that court ends by concluding that the transactions in question fall within Article 33 of the VAT Directive, rather than Article 32 thereof.

118. In that event, VAT would have been due in Hungary on those transactions, which were of a value that greatly exceeded the quantitative threshold in Article 34. An error of law would have been made by the taxpayer (KrakVet), and indeed by the Polish VAT authorities in the reply that they had given to KrakVet's binding inquiry.

119. The first and second questions referred ask whether the Member State of destination is bound by the VAT assessment made by the Member State of origin. It seems to me that in making such an assessment the Member State of origin must necessarily — perhaps, implicitly — have considered en route whether the proposed arrangements constituted abusive conduct and have concluded that they did *not*, but were legitimately covered by Article 32 of the VAT Directive. Since this Opinion is confined to an examination of the fourth and fifth questions referred, I shall leave open what the answer to the first and second questions should be. In what follows, I proceed upon the basis that the Member State of destination *is* free to consider whether to sanction of conduct in question as an abuse of rights within the meaning of the *Halifax* criteria.

120. I begin by noting that the VAT Anti-Fraud Regulation does not contain provisions dealing with replies to 'binding inquiries' from suppliers. It likewise does not address how the tax authorities of one Member State should consider such replies given with binding effect by the tax authorities of another Member State, or the outcome of inspections performed by those tax authorities.

121. That regulation, however, repeatedly emphasises the importance of cooperation between the tax authorities of Member States. That cooperation, regarded as essential for the correct application of VAT legislation and the avoidance of fraud, is evidenced, inter alia, in recitals 7 and 13, in Article 1(1), (which sets out the general scope of cooperation), Article 7(3), (which allows the Member State of destination to request the Member State of origin to open an 'administrative enquiry'), Article 13(1), (which obliges the Member State of origin to provide information without any prior request) and the arrangements for joint control contained in Articles 29 and 30. The VAT Anti-Fraud Regulation may therefore be regarded as a practical implementation of the duty of sincere cooperation enshrined in Article 4(3) TEU, whereby 'the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. (55)

122. It seems to me that it would run directly counter to that principle if it were open to the competent authorities in another Member State, *in addition* to applying any permitted corrections in terms of VAT due and interest due thereon, also to sanction severely as an abuse of rights (within the meaning of the *Halifax* criteria) the very conduct that had expressly been endorsed as legitimate in a legally binding assessment made by their colleagues in the Member State in which the taxpayer was registered for VAT.

123. I also entertain grave doubts as to whether such a result would be compatible with the principle of protection of legitimate expectations.

124. The Court held in *Kreuzmayr* (56) that the principle of protection of legitimate expectations 'extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him'. In my view, a reply to a 'binding inquiry' — a reply that, for good measure, was legally binding upon both the taxpayer and the competent authorities — constitutes just such a precise assurance.

125. I emphasise at once that KrakVet could *not* have entertained a legitimate expectation that the reply to its binding inquiry to the Polish VAT authorities represented an unassailable and correct statement of the true legal position. There was always the possibility that the competent authorities of another Member State would take a different view and that — as has indeed happened here — the matter would be litigated before the national courts and that this Court would be asked to give an authoritative ruling.

126. It seems to me, however, that KrakVet *was* entitled to proceed upon the basis that, if it then conducted its business in strict accordance with the proposal that it had put forward to those authorities in its enquiry, it would not be exposed to the risk of severe sanctions for abuse of rights

in the event that that legally binding reply proved ultimately to be incorrect as a matter of law.

127. ‘Abuse of rights’ is a serious matter. Where proven, it rightly attracts serious sanctions. It should not be devalued and distorted by being extended to apply to a situation in which the taxpayer has prudently sought guidance as to the correct VAT classification of his proposed course of action, not from a private commercial advisor, but from the competent authorities of the Member State where he is registered for payment of that tax.

128. In case the Court should disagree with me on that point of principle, I make the following two additional comments.

129. First, it seems to me that — at the very least — the competent authorities in the Member State of destination (Hungary) would be obliged to provide KrakVet with a detailed statement of reasons explaining why, *notwithstanding* the reply that KrakVet had received to its binding inquiry to the Polish VAT authorities, they considered that the conduct it had engaged in on the basis of that reply constituted an abuse of rights. (57)

130. Secondly, I recall that in *Farkas,* (58) the Court held that ‘in the absence of harmonisation of EU legislation in the field of sanctions applicable where conditions laid down by arrangements under [the VAT] legislation are not complied with, Member States remain empowered to choose the sanctions which seem to them to be appropriate. Nevertheless, the Member States must exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principle of proportionality’. It follows that the fact that KrakVet acted in reliance upon the Polish VAT authorities’ reply to its ‘binding inquiry’ would be a factor in determining whether any sanction should be imposed on KrakVet by the Hungarian tax authorities and, if so, the appropriate level of that sanction.

131. I therefore propose that the Court should answer the fifth question referred as follows:

Where a taxpayer inquires of the competent authorities in the Member State in which he is registered for VAT as to the correct legal classification for VAT purposes of an intended course of action (setting out in detail the arrangements that he proposes to put in place), is given a response that is legally binding upon him and upon those tax authorities, and then conducts business in strict accordance with his inquiry (which is for the national court to verify), the competent authorities in another Member State are precluded by the principle of sincere cooperation enshrined in Article 4(3) TEU and the principle of protection of legitimate expectations from treating his actions as an abuse of rights under the test laid down in Case C?255/02 *Halifax*, and sanctioning that conduct accordingly.

Conclusion

132. Without prejudice to the answers that the Court gives to the first, second and third questions referred for a preliminary ruling by the F?városi Közigazgatási és Munkaügyi Bíróság (Budapest Administration and Labour Court, Hungary), I propose that the Court should give the following answer to the fourth and fifth questions referred:

Question 4:

Article 33(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, is to be interpreted as covering only situations where goods are dispatched or transported by or on behalf of the supplier. It does not address situations where the supplier intervenes only indirectly in the dispatch or transport of the goods.

If the supplier, at his initiative and choice, takes most or all of the essential steps necessary to prepare the goods for transportation, makes the arrangements for the goods to be collected and start their journey and relinquishes possession of and control over the goods, there has been ‘dispatch’ by the supplier.

If the supplier either himself or through his agent physically carries out the transport operation, or owns or controls the legal entity that does so, there has been ‘transportation’ by the supplier.

Goods are dispatched or transported ‘on behalf of’ the supplier if the supplier, rather than the customer, effectively takes the decisions governing how those goods are to be dispatched or transported.

Question 5:

Where a taxpayer inquires of the competent authorities in the Member State in which he is registered for value added tax (VAT) as to the correct legal classification for VAT purposes of an intended course of action (setting out in detail the arrangements that he proposes to put in place) is given a response that is legally binding upon him and upon those tax authorities, and then conducts his business in strict accordance with the proposal that he put forward to those authorities in his inquiry (which is for the national court to verify), the competent authorities in another Member State are precluded by the principle of sincere cooperation enshrined in Article 4(3) TEU and the principle of protection of legitimate expectations from treating his actions as an abuse of rights under the test laid down in Case C?255/02, *Halifax* and sanctioning that conduct accordingly.

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). At the material time, that directive had been amended by Council Directive 2006/138/EC of 19 December 2006 (OJ 2006 L 384, p. 92); Council Directive 2007/75/EC of 20 December 2007 (OJ 2007 L 346, p. 13); Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11); Council Directive 2008/117/EC of 16 December 2008 (OJ 2009 L 14 p. 7); Council Directive 2009/47/EC of 5 May 2009 (OJ 2009 L 116, p. 18); Council Directive 2009/69/EC of 25 June 2009 (OJ 2009 L 175, p. 12); Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14); Council Directive 2010/23/EU of 16 March 2010 (OJ 2010 L 72, p. 1); Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1); and Council Directive 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1). A consolidated version of the text is available at EUR-Lex as CELEX document 02006L0112-20130101.

3 Council Regulation of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1). At the material time, no amendments had been made to that regulation.

4 The term ‘intra-Community’ (rather than, for example, ‘intra-Union’ or ‘intra-EU’) has been maintained in the EU VAT legislation. See van Doesum, A., van Kesteren, H., van Norden, G.-J., *Fundamentals of EU VAT Law*, Wolters Kluwer, Alphen aan den Rijn, 2016, p. 436.

5 ‘Distance selling’ within the context of the VAT rules was first defined in Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies or services and distance sales of goods (OJ 2017 L 348, p. 7). See further point 44 et seq. (below).

6 Council Implementing Regulation of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1). At the material time, no amendments had been made to that regulation.

7 Document taxud.c.1(2015)2158321.

8 Judgment of 21 February 2006, *Halifax* (C?255/02, EU:C:2006:121, paragraph 61 et seq.).

9 Judgment of 21 February 2008, *Part Service* (C?425/06 EU:C:2008:108, paragraphs 31 and 45).

10 Council Directive of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1). See further point 89 below.

11 As to the legal value of such an agreed statement in the minutes of a Council meeting, see point 89 below.

12 Document C — taxud.c.1(2015)4820441 — 876.

13 As the VAT Committee itself explains at the beginning of its publication *Guidelines resulting from meetings of the VAT Committee up until 12 December 2019*, ‘because it is an advisory committee only and has not been attributed any legislative powers, the VAT Committee cannot take legally binding decisions. It can give guidance on the application of the Directive which is not, however, in any way binding on the European Commission nor on Member States.’ The full text is available at ec.europa.eu/taxation_customs/sites/taxation/files/guidelines-vat-committee-meetings_en.pdf. See further point 91 below.

14 ‘Almost unanimously’ in this context is used to describe an agreement of between 24 and 27 out of a possible 28 Member States. See *Guidelines resulting from meetings of the VAT committee up until 12 December 2019*.

15 Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods (COM[2016] 757 final).

16 In the version applicable at the material time.

17 In the version applicable at the material time.

18 Those amounts correspond approximately to EUR 645.35 and EUR 1 613.37 respectively.

19 I have used the average rate of exchange for 2012 from the European Central Bank to convert HUF into EUR.

20 It appears that the Hungarian tax authorities initiated an internet archive search for the website version, performed by their information technology division (Nemzeti Adó- és Vámhivatal Informatikai Ellen?rzési F?osztály), but the Court has not been told the outcome of that search.

21 See point 14 above.

22 The average rate of exchange for 16 August 2016 from the European Central Bank is used for these conversions form HUF to EUR.

23 I note, a little regretfully, that the amendments introduced by Article 2 of Directive 2017/2455 do not address this issue.

24 It is always easier to criticise someone else's drafting than to carry out the exercise successfully oneself. Ideally, one would probably also delete the words 'by or' in Article 33(1), to make the distinction between the rule and the exception crystal clear.

25 See further judgments of 8 December 2016, *A et B* (C?453/15, EU:C:2016:933, paragraph 25); of 29 June 2017, *L.?.* C?288/16 (EU:C:2017:502, paragraph 19); and of 8 November 2018, *Cartrans Spedition* (C?495/17, EU:C:2018:887, paragraph 34). All three cases, it should be noted, concerned the exemption in Article 146(1) of Directive 2006/112 and the supply of *services*.

26 The true cost of transportation of the goods ordered from warehouse to consumer must, I think, significantly have exceeded the amounts charged to customers who chose to use KBGT as the transporter (see point 61 above). After all, in addition to KBGT's own costs there would also have been the costs of the Hungarian courier companies for the segment of the journey that was in Hungary rather than in Poland. Exactly what the economics of the operation were is a matter that — fortunately — this Court does not have to explore. Suffice it to say that the difference in VAT rate (8% in Poland, 27% in Hungary) must have played a significant role in the profitability of the exercise for KrakVet and/or KBGT. That does *not* of itself render what was done either fraudulent or unlawful.

27 Judgments of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraphs 41 and 44); and of 29 March 2007, *Aktiebolaget NN* (C?111/05, EU:C:2007:195, paragraph 43).

28 Judgments of 19 December 2013, *BDV Hungary Trading* (C?563/12, EU:C:2013:854, paragraph 29), and of 6 July 2017, *Glencore Agriculture Hungary* (C?254/16, EU:C:2017:522, paragraph 36).

29 Judgments of 20 June 2013, *Newey* (C?653/11, EU:C:2013:409, paragraph 42), and of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia* (C?295/17, EU:C:2018:942, paragraphs 43 to 45).

30 See above in point 37.

31 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

32 '1. By way of derogation from Article 8(1)(a) and (2), the place of the supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that of arrival of the dispatch or transport shall be deemed to be the place where the goods are when dispatch or transport to the purchaser ends, where the following conditions are fulfilled: — the supply of goods is effected for a taxable person eligible for the derogation provided for in the second subparagraph of Article 28a(1)(a), for a non-taxable legal person who is eligible for the same derogation or for any other non-taxable person …' Article 32 of Directive 2006/112 corresponds in substance to Article 8(1)(a) of the Sixth VAT Directive.

33 Judgment of 26 February 1991 (C?292/89, EU:C:1991:80, paragraph 18).

34 'Guidelines issued by the VAT Committee are merely views of a consultative committee. They do not constitute an official interpretation of EU law and do not necessarily have the

agreement of the European Commission. They do not bind the European Commission or the Member States who are free not to follow them. Reproduction of this document is subject to mentioning this Caveat.'

35 See points 42 to 44 above.

36 Judgment of 16 October 2014 (C?605/12, EU:C:2014:2298, paragraphs 45 and 46).

37 Judgment of 29 November 2018 (C?264/17, EU:C:2018:968, paragraph 24).

38 See above in point 91.

39 Judgment of 19 December 2013, *BDV Hungary Trading* (C?563/12, EU:C:2013:854, paragraph 29).

40 Judgment of 20 June 2013, *Newey* (C?653/11, EU:C:2013:409, paragraph 42).

41 See points 58 to 62 above.

42 Case C?108/19, *KrakVet* (‘*KrakVet II*), a reference from Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania), pending.

43 In that regard, I note that Article 80(1) of Directive 2006/112 allows for close family ties to be taken into consideration in order to ensure that ‘the taxable amount is to be the open market value’.

44 Judgment of 21 February 2008, *Part Service* (C?425/06, EU:C:2008:108, paragraph 63).

45 See points 63 and 65 above.

46 Judgment of 17 December 2015 (C?419/14, EU:C:2015:832, paragraphs 27 and 40).

47 Judgment of 22 December 2010, *RBS Deutschland Holdings* (C?277/09, EU:C:2010:810, paragraph 53). See also the Opinion of Advocate General Bobek in *SEB bankas*, C?532/16, EU:C:2017:1019, where my colleague suggests that the competent tax authorities are required, in each individual case, to search for a fair balance between the need for uniform application of the law and the particular circumstances of the individual’s case, which might have given rise to legitimate expectation on the part of the taxpayer (in points 83 and 84 of his Opinion).

48 Judgment of 22 December 2010, *RBS Deutschland Holdings*, C?277/09, EU:C:2010:810, paragraph 53; and Opinion of Advocate General Bobek in *SEB bankas* (C?532/16, EU:C:2017:1019, point 83).

49 Citing judgments of 12 May 1998, *Kefalas and Others* (C?367/96, EU:C:1998:222, paragraph 20); of 23 March 2000, *Diamantis* (C?373/97, EU:C:2000:150, paragraph 33); and of 3 March 2005, *Fini H* (C?32/03, EU:C:2005:128, paragraph 32).

50 Citing judgments of 21 February 2006, *Halifax and Others* (C?255/02, EU:C:2006:121, paragraph 74); of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraphs 35 and 36); and of 22 November 2017, *Cussens* (C?251/16, EU:C:2017:881, paragraph 27).

51 Judgment of 21 February 2006, *Halifax and Others* (C?255/02, EU:C:2006:121, paragraphs 73 to 75).

52 Opinion of Advocate General Poiares Maduro in *Halifax and Others* (Joined Cases C?255/02, C?419/02 and C?223/03, EU:C:2005:200).

53 There has indeed been much academic discussion of these criteria. See Vanistendael, F., ‘Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?’, *EC Tax Review*, vol. 15, 2006, issue G, pp. 192-195; Pistone, P., ‘Abuse of Law in the Context of Indirect Taxation: From (before) Emsland-stärke 1 to Halifax (and beyond)’, *Prohibition of abuse of Law: A new German principle of EU Law?*, 1st edition, 2011, Hart Publishing, Studies of the Oxford Institute of European and Comparative Studies, Oxford; De la Feria, R., ‘Giving themselves extra VAT? The ECJ ruling in Halifax’, *British Tax Review*, issue 2, 2006, pp. 119-123; De la Feria, R., ‘Prohibition of abuse of (community) law: the creation of a new general principle of EC law through tax’, *Common Market Law Review*, vol. 45, 2008, issue 2, pp. 395-441.

54 Judgment of 21 February 2008 (C?425/06, EU:C:2008:108, paragraph 45).

55 Judgment of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraph 41).

56 Judgment of 21 February 2018 (C?628/16, EU:C:2018:84, paragraph 46).

57 See, inter alia, judgment of 9 November 2017, *LS Customs Services* (C?46/16, EU:C:2017:839), where the Court held that ‘the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend his/its rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions. It is also necessary in order to enable to courts to review the legality of those decisions’ (at paragraph 40).

58 Judgment of 26 April 2017 (C?564/15, EU:C:2017:302, paragraph 59).