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OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 22 May 2019 ( 1 )

Case C?329/18

Valsts ie??mumu dienests

v

SIA Altic

(Request for a preliminary ruling from the Augst?k? tiesa (Supreme Court, Latvia))

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Right to deduct VAT — Refusal — Supply by co-contractors involved in tax fraud — Duty of care of the taxable person — Relevance of compliance by the taxable person with sectorial obligations — Regulation (EC) No 178/2002 — Obligation of traceability — Regulation (EC) No 852/2004 — Regulation (EC) No 882/2004 — Registration of food business operators)

## I. Introduction

1.

SIA Altic bought rapeseed from two other companies and deducted the input value added tax (VAT) paid on those transactions. A subsequent inspection carried out by the Latvian tax authorities revealed that those companies were fictitious. The tax authorities therefore considered that the transactions had not taken place and ordered SIA Altic to pay the corresponding VAT. SIA Altic sought the annulment of that decision. Both the first- and the second?instance national courts ruled in its favour.

2.

The Augst?k? tiesa (Supreme Court, Latvia), seised on appeal on a point of law, harbours doubts as to the correct interpretation of Directive 2006/112/EC on the common system of value added tax ( 2 ) read in conjunction with the requirements of sectorial legislation in the field of food law. Those doubts concern the argument by the Latvian tax authorities that SIA Altic should have known about the involvement of its co-contractors in VAT fraud, because it was active in the food sector and it was therefore obliged to verify its business partners to the higher standard applicable in that sector, in accordance with the obligations imposed by Regulations (EC) No 178/2002, ( 3 ) (EC) No 852/2004, ( 4 ) and by (EC) No 882/2004. ( 5 )

3.

The present case gives the Court the opportunity to refine its case-law on the criteria to determine whether an operator ‘knew or should have known’ that he was participating in an operation connected with VAT fraud for the purposes of refusing the right to deduct. In particular, the Court is asked to what extent, if at all, specific sectorial obligations applicable to operators active in certain

fields, such as those pertaining to food law, are of relevance for the general tax assessment of whether or not an operator was or should have been aware that he was involved in a transaction connected with VAT fraud.

II. Legal framework

A. The VAT Directive

4.

According to Article 168 of the VAT Directive: ‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a)

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

…’

5.

According to Article 178: ‘In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a)

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

…’

6.

Article 220 of the VAT Directive provides that ‘every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:

(1)

supplies of goods or services which he has made to another taxable person or to a non-taxable legal person;

…’

7.

According to Article 226 of the VAT Directive:

‘Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(4)

the customer’s VAT identification number, as referred to in Article 214, under which the customer received a supply of goods or services in respect of which he is liable for payment of VAT, or received a supply of goods as referred to in Article 138;

(5)

the full name and address of the taxable person and of the customer;

(6)

the quantity and nature of the goods supplied or the extent and nature of the services rendered;

…’

8.

Article 273 of the VAT Directive reads as follows:

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

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

B. Regulation No 178/2002

9.

Recitals 28 and 29 of Regulation No 178/2002 are drafted in the following terms:

‘(28)

Experience has shown that the functioning of the internal market in food or feed can be jeopardised where it is impossible to trace food and feed. It is therefore necessary to establish a comprehensive system of traceability within food and feed businesses so that targeted and accurate withdrawals can be undertaken or information given to consumers or control officials, thereby avoiding the potential for unnecessary wider disruption in the event of food safety problems.

(29)

It is necessary to ensure that a food or feed business including an importer can identify at least the business from which the food, feed, animal or substance that may be incorporated into a food or feed has been supplied, to ensure that on investigation, traceability can be assured at all stages.’

10.

According to Article 3 of Regulation No 178/2002:

‘…

2.

“food business” means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of production, processing and distribution of food;

3.

“food business operator” means the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control;

…

15.

“traceability” means the ability to trace and follow a food, feed, food?producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution;

16.

“stages of production, processing and distribution” means any stage, including import, from and including the primary production of a food, up to and including its storage, transport, sale or supply to the final consumer and, where relevant, the importation, production, manufacture, storage, transport, distribution, sale and supply of feed;

…’

11.

Article 18 of Regulation No 178/2002 provides:

‘1. The traceability of food, feed, food-producing animals, and any other substance intended to be, or expected to be, incorporated into a food or feed shall be established at all stages of production, processing and distribution.

2. Food and feed business operators shall be able to identify any person from whom they have been supplied with a food, a feed, a food-producing animal, or any substance intended to be, or expected to be, incorporated into a food or feed.

To this end, such operators shall have in place systems and procedures which allow for this information to be made available to the competent authorities on demand.

3. Food and feed business operators shall have in place systems and procedures to identify the other businesses to which their products have been supplied. This information shall be made available to the competent authorities on demand.

4. Food or feed which is placed on the market or is likely to be placed on the market in the Community shall be adequately labelled or identified to facilitate its traceability, through relevant documentation or information in accordance with the relevant requirements of more specific

provisions.

5. Provisions for the purpose of applying the requirements of this Article in respect of specific sectors may be adopted in accordance with the procedure laid down in Article 58(2).'

C. Regulation No 852/2004

12.

Article 6 of Regulation No 852/2004 (entitled 'Official controls, registration and approval') reads as follows:

'1. Food business operators shall cooperate with the competent authorities in accordance with other applicable Community legislation or, if it does not exist, with national law.

2. In particular, every food business operator shall notify the appropriate competent authority, in the manner that the latter requires, of each establishment under its control that carries out any of the stages of production, processing and distribution of food, with a view to the registration of each such establishment.

…'

D. Regulation No 882/2004

13.

Article 31(1) of Regulation No 882/2004 provides that:

'(a)

Competent authorities shall establish procedures for feed and food business operators to follow when applying for the registration of their establishments in accordance with Regulation (EC) No 852/2004, Directive 95/69/EC, or with the future regulation on feed hygiene;

(b)

They shall draw up and keep up-to-date a list of feed and food business operators which have been registered. Where such a list already exists for other purposes, it may also be used for the purposes of this Regulation.'

III. Facts, proceedings and the questions referred

14.

SIA Altic ('the Respondent') bought rapeseed from SIA Sakorex (in July and August 2011) and from SIA Ulmar (in October 2011). The rapeseed was duly received and kept in a store (silo) belonging to the company SIA Vendo. The Respondent deducted the input VAT paid on those transactions.

15.

An inspection by the Valsts ie??mumu dienests (State Tax Authority, Latvia; 'the VID') revealed that SIA Sakorex and SIA Ulmar were fictitious companies. The VID ruled that the transactions between the Respondent and those companies had therefore not taken place and, in a decision dated 14 September 2012, it ordered the Respondent to pay the previously deducted VAT, a fine

and late payment interest.

16.

The Respondent lodged an administrative appeal seeking the annulment of that administrative decision. The national courts of first and second instance ruled in its favour. In particular, the Administrat?v? apgabaltiesa (Regional Administrative Court, Latvia) declared, inter alia, that there was no doubt that the goods in question had been deposited in the silo belonging to SIA Vendo in the quantity and on the dates stated in the relevant documents. The documents on the case record and the explanations provided by the Respondent demonstrated, moreover, that it had acted in good faith. Furthermore, the nature of the transaction did not require verification of the other parties' capacity to provide the service, because the vendor delivered the goods at the delivery point stipulated in the contract. According to the contract between the Respondent and SIA Vendo, the latter was responsible for ensuring the accuracy of the information in the consignment note and for the consequences thereof. Finally, that court ruled that the VID had not stated which specific actions, stemming from a direct legal requirement, the Respondent should have taken but failed to take in order to verify the capacity of the other parties to the transaction to deliver the goods. Consequently, the Administrat?v? apgabaltiesa (Regional Administrative Court) concluded that the evidence submitted in the case did not demonstrate that the Respondent had taken deliberate action in order to obtain an advantage in the form of the input VAT deduction.

17.

The VID lodged an appeal against that judgment before the Augst?k? tiesa (Supreme Court), the referring court. The VID argues that the Administrat?v? apgabaltiesa (Regional Administrative Court) erred in holding that there was no legal requirement to determine the origin of the goods acquired. Under Regulation No 178/2002, food business operators must be able to identify any substance intended to be, or expected to be, incorporated into a food or feed. To this end, operators must have in place systems and procedures allowing this information to be made available to the competent authorities on demand. Therefore, the Respondent was required, under Regulation No 178/2002, to undertake detailed checks on its co-contractors, given that they were involved in the food chain. The Respondent did not check that its co-contractors were registered with the P?rtikas un veterin?rais dienests (Food and Veterinary Safety Agency, Latvia), and thus did not perform even minimal checks on the other parties. This demonstrates, according to the VID, that the Respondent knew or should have known that these transactions were part of a VAT fraud.

18.

The Respondent argues that the provisions invoked by the VID do not apply, because the seed it acquired was to be used to produce fuel and had no connection to any kind of food. There are therefore no grounds for applying the legislation regulating food business operators to the Respondent.

19.

In this context, the Augst?k? tiesa (Supreme Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

Having regard to the aim of ensuring food safety established in [Regulation No 178/2002] (which is achieved, amongst other means, by ensuring food traceability), should Article 168(a) of [the VAT

Directive] be interpreted as not precluding a refusal to allow deduction of input tax where the taxable person involved in the food chain, in choosing his co-contractor, has failed to demonstrate greater diligence (beyond normal commercial practice) entailing, in essence, a requirement to carry out checks on his co-contractor, but where he has at the same time verified the quality of the foodstuffs, thus meeting the aim of [Regulation No 178/2002]?

(2)

Does the requirement in Article 6 of Regulation No 852/2004 and in Article 31 of Regulation No 882/2004 concerning regulation of a food business, as interpreted in the light of Article 168(a) of [the VAT Directive], require a party that contracts with that business to check that the business is registered, and is that check relevant for the purposes of determining whether that party knew or should have known that it was taking part in a transaction with a fictitious undertaking, having regard to the particular characteristics of the transaction in question?'

20.

Written submissions were lodged by the Latvian and Spanish Governments, as well as by the European Commission. Those interested parties, as well as the Respondent, participated at the hearing that took place on 6 March 2019.

IV. Assessment

21.

This Opinion is structured as follows. After a few preliminary considerations (A), I shall outline the case-law regarding the diligence required in the field of VAT in situations where fraud is found to have been committed by co?contractors (B). I will then examine the first question, related to the issue of whether non-compliance with sectorial obligations incumbent on a taxable person but unrelated to VAT, such as the traceability obligation of Article 18 of Regulation No 178/2002, should lead to the refusal of the right to deduct input VAT (C). I will then turn to the second question, which essentially asks whether failure to verify that co-contractors are in compliance with their own registration obligation following from Regulation No 882/2004 is relevant for the assessment of whether the taxable person should have known that he was taking part in an operation connected to VAT fraud (D).

A. Preliminary considerations

22.

The issues raised by this case exclusively concern whether a taxable person should be deprived of the right to deduct on the basis of its alleged lack of diligence, assessed by reference to its behaviour in relation to obligations imposed on it and its co-contractors by non-tax-related sectorial rules. It is therefore taken as a given that the material and formal conditions for the right to deduct would otherwise be fulfilled.

23.

There are two further factual statements ascertained by the referring court that I shall take as given.

24.

First, it is not disputed that the Respondent's co-contractors turned out to be fictitious

undertakings. While it was not possible to ascertain the origin of the goods, the goods were nevertheless delivered and apparently of good quality.

25.

Second, the referring court has found that there is no evidence in support of the Respondent's claim that the seeds at issue were destined for fuel production. In the contracts concluded by the Respondent with both of the co-contractors, there was a term stipulating that the goods be compliant with the requirements of the Food and Veterinary Safety Agency. Moreover, the undertakings identified by the Respondent as its business partners are not active in the field of fuel production. Hence, having evaluated the evidence before it, the referring court came to the conclusion that the delivery in question (and hence also the Respondent with regard to that delivery) was subject to the obligations of Regulation No 178/2002.

B. Case-law on fraud and the right to deduct VAT

26.

The importance of the right to deduct has been stressed by this Court on a number of occasions. It has been described as a 'fundamental principle of the common system of VAT', ( 6 ) and an 'integral part of the VAT scheme' that may not, in principle, be limited. ( 7 ) It is central to the neutrality of the VAT system, as it is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT therefore ensures that all economic activities are taxed in a neutral way, provided that they are in principle themselves subject to VAT. ( 8 )

27.

That also explains why the right to deduct cannot be affected by the fact that, in the chain of supply, another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing. ( 9 )

28.

However, in line with the general duty of national authorities to prevent and fight VAT fraud, those authorities are permitted to refuse the right of deduction (and, ultimately, to claim repayment) if it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends. ( 10 )

29.

That is the case not only where a tax fraud is committed by the taxable person but also when a taxable person 'knew, or should have known, that, by his purchase, he was taking part in a transaction connected with VAT fraud'. ( 11 ) In those circumstances, the taxable person is regarded 'as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods'. ( 12 ) This is because, in such a situation, the taxable person aids the perpetrators of the fraud and becomes their accomplice. ( 13 )

30.

However, the refusal of the right to deduct still remains an exception to the default, and indeed essential, right to deduct. The tax authority must therefore establish 'to the requisite legal standard, the objective evidence which allows the conclusion to be drawn that the taxable person knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was

connected with fraud committed by the supplier or by another trader acting earlier in the chain of supply'. ( 14 )

31.

The Court has emphasised on several occasions that the responsibility to carry out controls lies with the competent authorities, warning against effectively shifting the obligation to carry out checks and verifications onto taxable persons. ( 15 ) It is indeed for the tax authorities themselves, having found fraud or irregularities committed by the issuer of an invoice, to establish that the recipient knew or should have known that the transaction was connected with fraud. This must be done based on objective factors 'and without requiring the recipient of the invoice to carry out checks which are not his responsibility'. ( 16 )

32.

The Court has also clarified that tax authorities cannot, as a general rule, require the taxable person to ensure that the issuer of the invoice relating to the goods and services at issue also complied with his obligations as regards the declaration and payment of VAT and the possession of documents. ( 17 ) Similarly, the Court has found that tax authorities cannot require a taxable person to produce documents attesting that the supplier has complied with his own sectorial obligations imposed by EU law. ( 18 )

33.

The diligence of taxable persons is the decisive factor. That is because 'traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT'. ( 19 )

34.

The required level of diligence is context-sensitive. The case-law of the Court has consistently shown that the measures which may reasonably be required of a taxable person depend on the circumstances of the particular case. ( 20 ) Indeed, the specific factual context may be such as to require a high degree of diligence on the part of the taxable person (for example, with reference to the value of the goods in the context of an acquisition). ( 21 ) When there are indications pointing to an infringement or fraud, and depending on the specific circumstances, traders may be required to make enquiries about their business partners in order to ascertain their trustworthiness. ( 22 )

35.

However, two elements are of note. First, so far, the context-sensitive aspect of the level of diligence has revolved around different factual contexts, but always within the VAT Directive and its legal regime. Second, the case-law of the Court on the level of diligence required also makes clear that even when there are indications of an irregularity, tax authorities cannot, as a general rule, require taxable persons, first, to ensure that issuers of invoices were in possession of the goods or were in a position to supply them and that they had complied with their own VAT obligations, in order to be satisfied that there are no irregularities or, second, to be in possession of the corresponding documentation. ( 23 )

36.

In sum, the right to deduct is to be refused only where it can be ascertained by the competent authorities that the taxable person knew or should have known that he was taking part in a

transaction connected with VAT fraud. The level of diligence required from the taxable person to fulfil the duty of care may vary depending on the circumstances. However, the authorities must rely on objective factors in order to determine whether that taxable person was or should have been aware that he was participating in a transaction connected with VAT fraud. They are not allowed to shift onto the invoice recipient the burden of carrying out checks that are not his responsibility.

C. First question: right to deduct and Regulation No 178/2002

37.

By its first question, the referring court enquires about the relevance of compliance with the traceability obligation imposed by Article 18 of Regulation No 178/2002 for the purposes of assessing whether a taxable person, who is an operator in the food sector, knew or should have known that he was participating in a transaction connected to VAT fraud, in order to refuse the right to deduct.

38.

In my view, non-compliance with sectorial obligations incumbent on a taxable person but not imposed by the VAT rules themselves, such as the traceability obligation of Article 18 of Regulation No 178/2002, is not in itself decisive for refusing the right to deduct input VAT. In other words, potential non?compliance with such sectorial obligations cannot automatically be equated with a finding that the taxable person should have known that the operation was connected to VAT fraud (1). Provided that the sectorial legislation indeed imposes on a taxable person a clear and broader legal duty to identify co-contractors, non?compliance with such sectorial obligations may form part of the general assessment to be carried out by the referring court as one of the objective factors in determining what measures may be required of such a taxable person in order for him to satisfy himself that his transactions are not linked with VAT fraud committed by one of his suppliers (2).

1. Failure to ensure traceability does not equate to ‘should have known’ about a VAT fraud

39.

The Latvian Government is of the view that, even if there is no evidence in the present case that the Respondent knew that it was taking part in an operation connected with VAT fraud, numerous elements indicate that it should have been aware of that fact. The Respondent did not initiate contacts with its co-contractors. Rather, it was the latter that contacted the Respondent in response to advertisements in the media. The goods were not received directly by the Respondent but through an intermediary, who did not verify the information regarding the suppliers.

40.

Despite the fact that, according to national case-law, there is no general obligation to check business partners, the situation is different in the food sector. The Latvian Government submits that, as a result of the traceability obligation imposed by Regulation No 178/2002, undertakings active in the food sector are obliged to conduct in-depth checks on their co-contractors. Moreover, by stating that the seed was destined for fuel production, the Respondent has shown that it knew about the higher requirements applicable to the food industry and tried to evade them. At the hearing, the Latvian Government further explained that, in its view, the traceability obligation of Article 18(2) of Regulation No 178/2002 includes the obligation to check that co-contractors are duly registered with the Food and Veterinary Safety Agency.

41.

The Spanish Government submits that the Respondent did not comply with the obligation to identify the undertakings that supplied the rapeseed. That obligation emanates from Article 18 of Regulation No 178/2002. The failure to identify the suppliers had two consequences: a risk to food safety, and that the Respondent did not become aware of the fictitious character of its suppliers and the existence of fraud in the VAT chain. That breach of material requirements incumbent on the taxable person, although not of a tax nature, has had negative consequences for the collection of the VAT due.

42.

I am bound to disagree, both at the structural level (that is, that the potential non-compliance with sectorial obligations would have the necessary consequence of refusing the right to deduct input VAT), and also at the level of the specific obligation that Article 18(2) of Regulation No 178/2002 is said to contain. In this section, I shall explain why the proposition advanced by both governments is structurally incorrect. In the following section, I shall explain why I believe that their reading of the scope of the specific obligation imposed by Article 18(2) of the Regulation No 178/2002 is also problematic.

43.

As a preliminary point in the general discussion, it is important to note that the case-law of the Court has consistently confirmed that the principle of fiscal neutrality prevents any distinction between lawful and unlawful transactions for the purposes of VAT, as the fact that the activities at issue are illegal does not alter their economic character. ( 24 ) That finding applies to activities that are themselves illegal, and also where there is proximity between the goods or services supplied and illegal activity. Thus, for example, in Coffeeshop ‘Siberië’, ( 25 ) the Court concluded that hiring out a table to a third party to sell cannabis in a coffee shop in Amsterdam fell within the scope of the VAT rules, even if under national law that activity amounts to complicity in the offence of dealing in ‘soft drugs’.

44.

A fortiori in the context of the present case, the fact that an (as to its object, clearly lawful) operation is carried out in a context where one or more sectorial legal obligations are said to have been breached is much more remote from any illegality, and thus irrelevant, from an economic point of view, for the purposes of VAT. There is therefore no doubt that the operation at issue falls within the rules on VAT, including the right of deduction.

45.

There are at least three principled arguments why, in general, the interpretation outlined by the Latvian and Spanish Governments cannot be embraced: the imperative of legality; the differences in the logic and objectives of each regime; and the issue of (potential cumulation of) sanctions.

46.

First, there is simply no legal basis, either in EU or, apparently, in national law, for the automatic inclusion of (various) sectorial requirements in the general VAT regime. According to Article 178(a) of the VAT Directive, the exercise of the right of deduction is subject to the possession of an invoice and, according to Article 220(1) of that directive, such an invoice must be issued for every supply of goods or services, which a taxable person has made to another taxable person. Article

226 of the VAT Directive enumerates (exhaustively) the items that must appear on the invoice, amongst which is mentioned the full name and address of the taxable person and of the customer. The obligation to include those data is incumbent upon the issuer of the invoice and is to be considered amongst the formal requirements of valid invoices.

47.

In the present case, it follows from the submissions of the Respondent at the hearing that those requirements have been duly fulfilled in the present case and that, moreover, the Respondent has verified the registration of his suppliers in the VAT register.

48.

Beyond that clearly stated obligation in the context of VAT, pursuant to Article 273 of the VAT Directive, Member States may impose obligations other than those provided for by that directive, which they deem necessary to ensure the correct collection of VAT and to prevent evasion, so long as those obligations do not impose additional invoicing obligations, and only if such obligations do not go beyond what is necessary to achieve the objectives pursued. ( 26 )

49.

Irrespective of the issue of whether additional obligations related to traceability of traders active in the food sector would in fact be compatible with Article 273 of the VAT Directive, it is apparent from the responses of the Latvian Government to the questions of the Court during the hearing that no such additional obligations were in fact laid down by national legislation.

50.

Thus, what is being suggested is apparently just a ‘matter of creative interpretation’ without any explicit legal basis in either national law or, for that matter, EU law. As far as specific and explicit requirements flowing from EU law are concerned, I shall return to the issue of what exactly is required by Article 18(2) of Regulation No 178/2002 in the next section. ( 27 )

51.

Second, it is rather clear that each of the regimes, the general VAT system on the one hand, and the various instruments of food regulation in the internal market on the other, follows a different objective and regulatory logic. One is not there to reinforce the other. That also translates into the issue of sanctions for disregard for either of the instruments, which are also separate.

52.

Third, at the cross-section of both of the previous points lies not only the issue of potential sanction in the form of refusal to allow deduction of input VAT without a proper legal basis, but also the danger of effectively cumulating sanctions across legal regimes. Indeed, the interpretation put forward by the Latvian and Spanish Governments would transform the refusal of the right to deduct into an additional penalty connected to an irregularity committed by a taxable person in a different regulatory sphere. ( 28 ) Specific consequences already attach to failure to comply with the obligations imposed by Regulation No 178/2002, as is readily apparent from Article 17(2), according to which Member States shall lay down rules on penalties applicable to infringements of food and feed law.

53.

In addition, there is a systemic argument that, to my mind, renders the arguments advanced by the Spanish and Latvian Governments impossible to embrace. Should the right to deduct VAT be made dependent on the existence and content of sectorial regulations and specific obligations unconnected with VAT? Should different yardsticks of diligence automatically apply as matter of fact depending on what is being sold under each contract? Would it then be possible that, in some sectors, the requirements could be even lower than those provided for by the VAT Directive?

54.

The systemic consequences of such an approach would indeed render the right of deduction a right à géométrie variable, as the conditions for such right would depend on whether there are additional sectorial obligations related to the obligation to check co-contractors.

55.

Finally, in support of its arguments, the Latvian Government refers to the case-law of the Court according to which ‘refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not, in fact, met, and accordingly such a refusal does not require a specific legal basis’. ( 29 ) Suffice it to state, in reply to that argument, that that case-law refers to the objective conditions contained in the taxation rules, and not in legislative instruments unconnected to the regulation of VAT, such as Regulation No 178/2002.

56.

In sum, the potential infringement of Regulation No 178/2002 does not have any automatic and direct consequence for the right to deduct VAT. The expression ‘knew or should have known’ in the case-law of the Court is used to establish a general standard of diligence within the VAT context. It does not permit equating failure to comply with any obligation imposed on a taxable person by any regulatory instrument with failure to meet the required duty of care for VAT purposes.

2. A potential element to be taken into account

57.

However, the specific sector in which a taxable person operates and the sectorial obligations to which he is subject may play a role in the assessment of whether a taxable person should have known that he was involved in a transaction connected with VAT fraud, taking due account of all the relevant specific circumstances of a given case.

58.

As the Commission rightly submits, failure to comply with the obligations stemming from sectorial rules in the field of food law may only be considered as one element amongst other objective factors, in the context of the examination to determine whether the taxable person knew or should have known that he was participating in an operation connected with VAT fraud. Indeed, as the Commission points out, a particularly high level of diligence is required in operations involving the food chain.

59.

It is in this context that the national authorities could rely, in conjunction with other relevant elements, on the behaviour of the taxable person by reference to the specific obligations which are proper to the regulatory context in which that person develops his economic activity.

60.

That being said, it is still not entirely clear to me how such a general statement would be of much help to the national tax authority in the context of the present case, for a rather simple reason: in my view, the precise scope of the traceability obligation established by Article 18(2) of Regulation No 178/2002 is narrower than the one suggested by the Latvian Government.

61.

Article 18 of Regulation No 178/2002 and the traceability obligation laid down therein were introduced so that ‘targeted and accurate withdrawals can be undertaken or information given to consumers or control officials, thereby avoiding the potential for unnecessary wider disruption in the event of food safety problems’. ( 30 ) For this purpose, Article 18(2) establishes the obligation on food and feed business operators to be able to identify any person from whom they have been supplied with a food, a feed, a food-producing animal, or any substance intended to be, or expected to be, incorporated into a food or feed. To this end, that provision establishes that such operators shall have in place systems and procedures which allow for this information to be made available to the competent authorities on demand.

62.

However, as the referring court correctly points out, the obligation of identification imposed by Article 18(2) of Regulation No 178/2002 is not developed any further. That provision does not state the way in which traceability is to be ensured. It does not specify the action that traders must take or what information must be verified.

63.

Therefore, the scope of the obligation must be taken at face value: the obligation to identify any person from whom they have been supplied, means, in my understanding, the obligation to be able to identify, upon request, the individual immediate supplier from whom the trader acquired foodstuff. Nothing more and nothing less. The ability to identify normally refers to the name and the address of that person. ( 31 ) Beyond that, it certainly cannot be stated that Article 18(2) of Regulation No 178/2002 imposes any systematic obligation to check the specific registration with the competent authorities.

64.

Such a failure to comply with the traceability obligation imposed by Article 18(2) of Regulation No 178/2002, understood as the obligation to identify by name and address the immediate suppliers, could then indeed be considered amongst other relevant elements in the framework of the overall assessment of the diligence required of a taxable person. ( 32 )

65.

It is true that the information to be included in the invoice by the issuer for the purposes of VAT corresponds, as far as name and address are concerned, with the essential elements which should be verified under the traceability obligation of Article 18(2) of Regulation No 178/2002 in order to identify the immediate supplier in the food chain.

66.

It must, however, be stressed, in line with the considerations set forth in the previous section of this Opinion, that that correspondence does not allow for the two sets of obligations to be conflated with one another.

67.

As a closing remark, in some instances, it might be plausible to suggest that a diligent food business operator should have carried out additional verifications to identify his contracting partner in order to comply with the requirement of traceability, and thus failure to do so could be taken into account as one of the elements eventually leading, together with other factual findings, to the conclusion that such a trader knew or should have known of a VAT fraud. However, in other circumstances, in particular in the absence of any other factual indications, such a finding will be of limited or even zero value: the traceability obligation per se has little to do with VAT fraud. VAT fraud can be committed by an undertaking duly complying with all traceability requirements. Conversely, even an undertaking that fails for whatever reason to meet some traceability requirements in a particular case may still run, from the point of VAT, a legal and legitimate operation.

68.

As a result, non-compliance with the level of diligence required under the traceability obligation in Regulation No 178/2002 can only be relevant, in the context of the refusal of the right to deduct VAT, if, taking account of the particular circumstances, it constitutes one of the objective factors indicating that the taxable person knew or should have known that, despite the fact that the transaction at issue met the objective criteria for a ‘supply of goods’, it was participating in a transaction connected with fraudulent evasion of VAT. ( 33 )

3. Interim conclusion

69.

As a result, it is my view that failure to comply with the traceability obligation in Article 18(2) of Regulation No 178/2002 cannot lead, automatically and as the sole decisive criterion, to the conclusion that a taxpayer ‘should have known’ that he was taking part in a transaction connected with VAT fraud.

70.

I therefore propose that the Court answer the first question in the sense that Article 168(a) of the VAT Directive precludes national authorities from refusing deduction of input VAT on the sole ground that a taxable person involved in the food chain has failed to carry out checks on his co-contractor in compliance with the traceability obligation laid down in Article 18 of Regulation No 178/2002. Non-compliance with the obligations imposed by that provision may be taken into account, together with other factors relevant to the circumstances of the case, in the framework of the overall assessment to be carried out by the referring court in order to assess the diligence of a taxable person.

D. Second question: an obligation to check registration?

71.

By its second question, the referring court asks whether Article 6 of Regulation No 852/2004 and Article 31 of Regulation No 882/2004 require a party that contracts with a food business operator to check that such business is duly registered. The referring court further wishes to know whether that verification is relevant for the purposes of determining whether that party knew or should have known that it was taking part in a transaction with a fictitious undertaking, for the purposes of VAT deduction.

72.

The Latvian Government states that participants in the food sector need to meet a higher standard of diligence, which encompasses the obligation to verify that their business partners are properly registered. According to that government, Article 6 of Regulation No 852/2004 and Article 31 of Regulation No 882/2004 impose that obligation on taxable persons in the food sector. As a consequence, such verification is relevant for the purposes of determining whether a taxable person knew or should have known that he was dealing with a fictitious company.

73.

The Commission considers it inconceivable to make the right to deduct subject to the condition that taxable persons verify the registration of their business partners in the specific national registers set up in the field of food safety. The Commission subscribes to the view expressed by the referring court, according to which the absence of registration does not automatically lead to the conclusion that the economic activity is fictitious or that the operation has not been concluded with the person that appears in the documents provided. Checking proper registration of a business partner does not provide any guarantee that the operation is not fraudulent, because fraud is not exclusively the province of non?registered companies. However, if a taxable person enters into a contractual relationship with another party after having discovered that that party is not properly registered, that element can be taken into account by the competent authorities and national courts.

74.

I cannot but agree with the Commission.

75.

Regardless of the (doubtful) usefulness of checking such a register in order to prevent or identify fraud, ( 34 ) the position of the Latvian Government is simply unsustainable. The arguments of the Latvian Government are based on the alleged failure by the Respondent to check that its co-contractors complied with the obligation of registration in the food business register. However, and

aside from the fact that verifying that business partners comply with their own sectorial registration obligations goes beyond usual business practices, there is simply no legal basis for imposing any such obligation.

76.

Indeed, such an obligation has no legal basis either in Regulation No 852/2004 or in Regulation No 882/2004. According to Article 6 of Regulation No 852/2004, every food business operator shall notify the appropriate competent authority, in the manner that the latter requires, of each establishment under its control that carries out any of the stages of production, processing and distribution of food, with a view to the registration of each such establishment. For the purposes of the present case, this obligation would be incumbent upon the Respondent's business partners, not the Respondent.

77.

Regulation No 882/2004 is concerned with the official controls that national authorities must perform in order to verify compliance with food law. Article 31 of that regulation imposes obligations exclusively on national authorities regarding registration procedures that must be established for feed and food business operators.

78.

Moreover, as stated in Section C of this Opinion, the obligation to check that business partners comply with their own registration obligations as mandated by specific sectorial food law does not stem from the traceability obligation imposed by Article 18(2) of Regulation No 178/2002 either.

79.

As a consequence, that obligation is not only nowhere to be found in the VAT Directive, it is also completely absent from the specific sectorial regulations in the field of food law. Thus, in contrast to the interpretation of Article 18(2) of Regulation No 178/2002, where some, albeit limited, discussion could be had about the precise scope of the obligation imposed by that provision with regard to question 1, there is nothing at all that would warrant the interpretation proposed by the Latvian Government with regard to question 2.

80.

It can only be repeated that the case-law of the Court makes clear that the duty of care and the standard of diligence required from traders cannot lead to shifting the responsibility of the authorities to carry out controls and verifications regarding the sectorial registration obligations onto undertakings in the sector by imposing on them the burden of ensuring that issuers of invoices comply with those obligations. Indeed, when national tax authorities, having found irregularities committed by the supplier, seek to establish that the recipient knew or should have known that the relevant transaction was connected with VAT fraud, they are not permitted to require the recipient to carry out checks, which are not his responsibility. ( 35 )

81.

Regarding the situation raised by the Commission, where a taxable person conducts checks of his own motion and decides to engage with a business partner despite having discovered an irregularity, that consideration may form part of the overall assessment of the specific facts by the national courts and authorities, with a view to assessing whether the taxable person was or should have been aware of a fraud.

82.

Therefore, Article 6 of Regulation No 852/2004 and Article 31 of Regulation No 882/2004 do not require a food business operator to check the registration of its business partners in the relevant food business register. A fortiori, failure to verify such registration is immaterial for the purposes of determining, in the context of the right to deduct VAT, whether that party knew or should have known that it was taking part in a transaction with a fictitious undertaking.

V. Conclusion

83.

In the light of the foregoing considerations, I propose that the Court answer the questions referred to it by the Augst?k? tiesa (Supreme Court, Latvia) as follows:

(1)

Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax precludes national authorities from refusing deduction of input VAT on the sole ground that a taxable person involved in the food chain has failed to carry out checks on his co-contractor in compliance with of the traceability obligation laid down in Article 18(2) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. Non-compliance with the obligations imposed by that provision may, however, ultimately be taken into account, together with other factors relevant to the circumstances of the case, in the framework of the overall assessment to be carried out by the referring court in order to assess the diligence of a taxable person.

(2)

Article 6 of Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs and Article 31 of Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules do not require a food business operator to check the registration of its business partners in the relevant food business register. The fact that a taxable person has not checked whether a co-contractor is registered in compliance with Article 6 of Regulation No 852/2004 is not relevant when it comes to examining, in the context of Article 168(a) of Directive 2006/112, whether an undertaking knew or should have known that it was taking part in a transaction with a fictitious undertaking.

( 1 ) Original language: English.

( 2 ) Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) (‘the VAT Directive’).

( 3 ) Regulation of the European Parliament and of the Council of 28 January 2002 laying down

the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1; ‘Regulation No 178/2002’).

( 4 ) Regulation of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1; corrigendum in OJ 2004 L 226, p. 3; ‘Regulation No 852/2004’).

( 5 ) Regulation of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1; corrigendum in OJ 2004 L 191, p. 1; ‘Regulation No 882/2004’).

( 6 ) Judgment of 15 September 2016, Senatex (C?518/14, EU:C:2016:691, paragraph 26 and the case-law cited).

( 7 ) Judgment of 6 September 2012, Tóth (C?324/11, EU:C:2012:549, paragraph 24 and the case-law cited).

( 8 ) Judgment of 22 October 2015, PPUH Stehcemp (C?277/14, EU:C:2015:719, paragraph 27 and the case-law cited).

( 9 ) Judgment of 6 July 2006, Kittel and Recolta Recycling (C?439/04 and C?440/04, EU:C:2006:446, paragraphs 45 and 46 and the case-law cited).

( 10 ) Judgment of 6 July 2006, Kittel and Recolta Recycling (C?439/04 and C?440/04, EU:C:2006:446, paragraph 55 and the case-law cited), or of 19 October 2017, Paper Consult (C?101/16, EU:C:2017:775, paragraph 43).

( 11 ) Judgment of 18 July 2013, Evita-K (C?78/12, EU:C:2013:486, paragraph 40 and the case-law cited).

( 12 ) Judgment of 6 July 2006, Kittel and Recolta Recycling (C?439/04 and C?440/04, EU:C:2006:446, paragraph 56).

( 13 ) Judgment of 6 July 2006, Kittel and Recolta Recycling (C?439/04 and C?440/04, EU:C:2006:446, paragraph 57).

( 14 ) Judgment of 21 June 2012, Mahagében and Dávid (C?80/11 and C?142/11, EU:C:2012:373, paragraph 49).

( 15 ) See, to that effect, judgment of 31 January 2013, Stroy trans (C?642/11, EU:C:2013:54, paragraph 50) or of 19 October 2017, Paper Consult (C?101/16, EU:C:2017:775, paragraph 51 and the case-law cited).

( 16 ) Judgment of 22 October 2015, PPUH Stehcemp (C?277/14, EU:C:2015:719, paragraph 50 and the case-law cited).

( 17 ) Judgments of 21 June 2012, Mahagében and Dávid (C?80/11 and C?142/11, EU:C:2012:373, paragraph 61), and of 31 January 2013, LVK (C?643/11, EU:C:2013:55, paragraph 61).

( 18 ) Judgment of 18 July 2013, Evita-K (C?78/12, EU:C:2013:486, paragraph 42), concerning the relevance, for the purposes of the right to deduct, of the failure to produce documents issued by the issuer of the invoice mentioning the ear tags of animals subject to the identification and

registration system established by Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97 (OJ 2000 L 204, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1).

( 19 ) Judgment of 21 June 2012, Mahagében and Dávid (C?80/11 and C?142/11, EU:C:2012:373, paragraph 53 and the case-law cited).

( 20 ) Judgment of 21 June 2012, Mahagében and Dávid (C?80/11 and C?142/11, EU:C:2012:373, paragraph 59).

( 21 ) Judgment of 14 June 2017, Santogal M-Comércio e Reparação de Automóveis (C?26/16, EU:C:2017:453, paragraph 74).

( 22 ) Judgment of 21 June 2012, Mahagében and Dávid (C?80/11 and C?142/11, EU:C:2012:373, paragraph 60).

( 23 ) Judgment of 22 October 2015, PPUH Stehcemp (C?277/14, EU:C:2015:719, paragraph 52, and the case-law cited).

( 24 ) See, to that effect, judgments of 29 June 1999, Coffeeshop Siberië (C?158/98, EU:C:1999:334, paragraphs 21 and 22), and of 6 July 2006, Kittel and Recolta Recycling (C?439/04 and C?440/04, EU:C:2006:446, paragraph 50 and the case-law cited).

( 25 ) Judgment of 29 June 1999 (C?158/98, EU:C:1999:334).

( 26 ) See, to that effect, judgment of 19 October 2017, Paper Consult (C?101/16, EU:C:2017:775, paragraphs 49 and 50 and the case-law cited).

( 27 ) Points 60 to 63 below.

( 28 ) Argumentum ad absurdum: why stop there, in fact? Should not an alleged failure of diligence by an undertaking in one sector or area of its activity (food supply) also determine whether that undertaking acted as a ‘diligent operator’ in other regimes involving public funds, or even private ones?

( 29 ) Judgment of 22 November 2017, Cussens and Others (C?251/16, EU:C:2017:881, paragraph 32).

( 30 ) Recital 28 of Regulation No 178/2002.

( 31 ) This interpretation is confirmed by the Guidance on the implementation of Articles 11, 12, 14, 17, 18, 19 and 20 of Regulation No 178/2002 on general food law, adopted by the Commission’s Standing Committee on the Food Chain and Animal Health. Regarding Article 18, that guidance indicates that food operators must have in place a system enabling them to identify the immediate supplier(s) and immediate customer(s) of their products. With regard to the information that must be recorded, the Guidance mentions the name and address of the supplier.

( 32 ) Conversely, the more stringent obligations regarding traceability that are contained in Commission Implementing Regulation (EU) No 931/2011 of 19 September 2011 on the traceability requirements set by Regulation (EC) No 178/2002 of the European Parliament and of the Council for food of animal origin (OJ 2011 L 242, p. 2), which include the obligation to also identify the owner of products, cannot be relevant in order to assess whether the taxable person, in the

present case, acted with the required diligence, since those obligations only concern food of animal origin.

( 33 ) Judgment of 6 July 2006, Kittel and Recolta Recycling (C?439/04 and C?440/04, EU:C:2006:446, paragraph 59).

( 34 ) With the closing remark made with regard to the traceability requirement in point 67 above being applicable a fortiori here.

( 35 ) See, to that effect, judgment of 22 October 2015, PPUH Stehcemp (C?277/14, EU:C:2015:719, paragraph 50 and the case-law cited).