Provisional text

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 4 March 2021(1)

Case C?521/19

CB

v

Tribunal Económico Administrativo Regional de Galicia

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain))

(Reference for a preliminary ruling – Directive 2006/112/EC – Common system of value added tax – Administrative economic claim against liquidations and sanctions imposed on the basis of personal income tax – Non-invoiced transactions subject to value added tax – Taxable base – Inclusion in the price agreed by the parties)

I. Introduction

1. What measures, if any, should a tax authority adopt where it discovers that certain taxable persons (that is to say, parties to a transaction which are not a final consumers) have fraudulently concealed a transaction? Can the reasoning contained in the earlier judgment of this Court of 7 November 2013, *Tulic? and Plavo?in* (C?249/12 and C?250/12, EU:C:2013:722) be regarded as a satisfactory guide to that end? These are among the issues which arise in the present request for a preliminary ruling arising from proceedings before the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain) between a natural person, CB, and the Tribunal Económico Administrativo Regional de Galicia (Regional Tax Tribunal of Galicia, Spain).

2. Before turning to the facts, the relevant legal framework must first be set out.

II. Legal framework

A. EU law

3. Recitals 25, 26 and 39 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2) state:

‘(25) The taxable amount should be harmonised so that the application of VAT to taxable

transactions leads to comparable results in all the Member States.

(26) To prevent loss of tax revenues through the use of connected parties to derive tax benefits, it should, in specific limited circumstances, be possible for Member States to intervene as regards the taxable amount of supplies of goods or services and intra-Community acquisitions of goods.

…

(39) The rules governing deductions should be harmonised to the extent that they affect the actual amounts collected. The deductible proportion should be calculated in a similar manner in all the Member States.'

4. Article 1 of Directive 2006/112 provides:

'1. This Directive establishes the common system of value added tax (VAT).

2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.'

5. Article 72 of Directive 2006/112, which belongs to Title VII, entitled 'Taxable amount', states:

'For the purposes of this Directive, "open market value" shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax.

Where no comparable supply of goods or services can be ascertained, "open market value" shall mean the following:

(1) in respect of goods, an amount that is not less than the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply;

(2) in respect of services, an amount that is not less than the full cost to the taxable person of providing the service.'

6. Article 73 of Directive 2006/112 provides:

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

7. Article 74 of Directive 2006/112 provides:

‘Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.’

8. Article 77 of Directive 2006/112 provides:

‘In respect of the supply by a taxable person of a service for the purposes of his business, as referred to in Article 27, the taxable amount shall be the open market value of the service supplied.’

9. Article 78 of Directive 2006/112 states:

‘The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer.

For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses.’

10. Article 273 of Directive 2006/112 states:

‘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. **Spanish law**

11. Article 78(1) of the Ley 37/1992 del Impuesto sobre el Valor Añadido (Law 37/1992 on Value Added Tax) (3) of 28 December 1992 (‘Law 37/1992’) is entitled ‘Taxable amount. General rule’ and provides:

‘The taxable amount shall be composed of the total amount of the consideration for taxable transactions received from the customer or third parties.’

12. Article 88 of Law 37/1992, entitled ‘Passing on the tax’, states:

‘1. Taxable persons must pass on in full the amount of the tax to the person for whom the taxable transaction is carried out, and the latter must pay that tax provided that the tax is passed on in accordance with the provisions of this Law, regardless of the terms which the parties have agreed between themselves.

In the case of the taxable and non-exempt supply of goods or services to a customer which is a public body, the taxable person, when drawing up his financial proposals, even if these are verbal,

shall be deemed in all cases to have included in those proposals the value added tax which, nevertheless, must be passed on as a separate item, where appropriate, in the documents submitted for the purposes of collecting payment, while the overall amount agreed must not be increased as a result of showing the tax passed on.

2. The tax must be passed on in an invoice, under the conditions and in accordance with the criteria established by law. For that purpose, the amount passed on shall be shown separately from the taxable amount, including in the case of prices which are set officially, stating the rate of tax applied. Transactions which are determined by law shall be exempt from the above.

3. The tax must be passed on at the time when the relevant invoice is issued and delivered.

4. The right to pass on the tax shall be lost after one year has passed from the due date.

5. The person for whom the taxable transaction is carried out shall not be required to pay the VAT passed on to him before that tax becomes due.

6. Any disputes which may arise in connection with the passing on of the tax, relating to the lawfulness of passing on the tax and to the amount of tax, shall be treated as tax disputes for the purposes of the relevant complaint before a tax tribunal.'

13. Article 89 of Law 37/1992, entitled 'Correction of the amounts of tax passed on', provides:

'1. Taxable persons must correct the amounts of tax passed on where those amounts have been calculated incorrectly or where circumstances arise which, in accordance with Article 80 hereof, lead to the adjustment of the taxable amount.

The correction must be made at the time when the reasons for the incorrect calculation of the tax are identified or when the other circumstances referred to in the previous subparagraph arise, provided that four years have not passed from the due date of the tax to which the transaction is liable or, as the case may be, the circumstances referred to in Article 80 arose.

2. The provisions of the previous paragraph shall also apply where no tax has been passed on and the invoice for the transaction has been issued.

3. Notwithstanding the provisions of the previous paragraphs, the amounts of tax passed on shall not be corrected in the following situations:

(1) where the correction is not based on the grounds provided for in Article 80 hereof, involves an increase in the amounts passed on and the persons for whom the transactions were carried out do not act as businesses or professional persons, except where the rates of tax are raised by statute in which case the correction may be made in the month in which the new tax rates enter into force and in the following month;

(2) where the tax authorities demonstrate, through the relevant assessments, amounts of tax due and not passed on which are higher than those declared by the taxable person and it is established, by means of objective information, that that taxable person was involved in a fraud or that he knew or should have known, through the exercise of reasonable care in that regard, that he was carrying out a transaction which was part of a fraud.'

III. **The facts of the main proceedings and the request for the preliminary ruling**

14. CB, the applicant in the main proceedings, is a self-employed person pursuing an activity as an artistic agent subject, in principle, to VAT. In that capacity, he provided services to the Lito

Group, a group of undertakings, owned by the same person, which were responsible for managing the infrastructure and orchestras for religious and village festivals in Galicia. Specifically, CB contacted the festival committees, informal groups of inhabitants in charge of organising the festivities, and negotiated for the performance of the orchestras on behalf of Lito Group.

15. The payments made by the festival committees to the Lito Group in this context were mostly cash payments, which were disbursed without an invoice or accounting entry. They were undeclared for the purposes of corporate tax or VAT. Ten per cent of the Lito Group's income was repaid to CB in cash and was not declared. CB did not keep accounts or official records, did not issue or receive invoices and therefore did not issue VAT returns.

16. On 14 July 2014, following a tax inspection, the tax authorities noted that the amounts received by CB as remuneration for his activities as intermediary for the Lito Group, namely EUR 64 414.90 in 2010, EUR 67 565.40 in 2011 and EUR 60 692.50 in 2012, did not include VAT. They accordingly took the view that both the VAT and the income tax had to be established by taking the total amount received by CB as the taxable base.

17. The claimant filed a complaint against the decision of the tax authorities which was rejected by decision of 10 May 2018.

18. CB brought an action before the referring court to challenge that decision. He submitted that the a posteriori application of VAT to amounts withheld as income is contrary to, among others, the judgment of this Court of 7 November 2013, *Tulic? and Plavo?in* (C?249/12 and C?250/12, EU:C:2013:722), according to which, where the tax inspectorate discovers transactions which are, in principle, subject to VAT, which have not been declared and not invoiced, VAT must be regarded as included in the price agreed by the parties to those transactions. CB thus takes the view that, in so far as he cannot claim back under Spanish law the VAT that he has not been able to pass on because of his conduct constituting a tax offence, the VAT must be regarded as included in the price of the services which he supplied.

19. The referring court considers that, in order to decide the dispute in the main proceedings, it must establish whether the national legislation which provides that, where economic operators carry out, in a voluntary and concerted manner, transactions giving rise to payments in cash without invoices and without VAT declarations, such payments are to be regarded as including VAT, is compatible with Directive 2006/112.

20. In those circumstances, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia) stayed proceedings and referred the following question to the Court for preliminary ruling:

'Must Articles 73 and 78 of [Directive 2006/112], in the light of the principles of neutrality, prohibition of tax evasion and abuse of rights, and prohibition of the illegal distortion of competition, be interpreted as precluding national legislation and the case-law interpreting it, pursuant to which, where the tax authorities discover concealed transactions subject to value added tax for which no invoice was issued, the price agreed by the parties for those transactions must be regarded as already including value added tax?

Is it therefore possible, in cases of fraud in which the transaction was concealed from the tax authorities, to consider, as may be deduced from the judgments of the Court of Justice of the European Union of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614); of 5 October 2016, *Marinova* (C?576/15, EU:C:2016:740); and of 7 March 2018, *Dobre*, (C?159/17, EU:C:2018:161), that the amounts paid and received do not include value added tax in order to conduct the proper assessment and impose the appropriate penalty?'

IV. **Analysis**

A. **Preliminary remarks**

21. At the outset, it should be noted that the national court formulates its question on the premiss that the national legislation would provide for what the appellant alleges, namely that where the tax authorities discover hidden transactions subject to value added tax which have not been invoiced, VAT should be regarded as included in the price agreed by the parties. However, it should be recalled that, according to settled case-law (4), a directive cannot of itself create obligations on the part of an individual and cannot therefore be invoked as such against him. (5) I therefore propose to reformulate this question as to whether Articles 73 and 78 of Directive 2006/112, read in the light of the principles of neutrality, of prohibition of tax evasion and abuse of rights, and of prohibition of the illegal distortion of competition, can be interpreted as precluding national legislation and the case-law interpreting it, pursuant to which, where the tax authorities discover concealed transactions subject to value added tax for which no invoice was issued, the price agreed by the parties for those transactions must be regarded as not including VAT.

1. ***Presentation of the common VAT regime***

22. From the outset, it should be recalled that Article 73 of Directive 2006/112 defines the concept of 'taxable amount' as the consideration actually received, in return for the supply of a good or a service. According to Article 78 of Directive 2006/112, that taxable amount includes incidental expenses, taxes, duties, levies, and charges, excluding the VAT itself. This definition is then applied at each stage of the commercial chain to calculate the VAT which will be collected by the supplier and paid by the purchaser. However, although the VAT is therefore collected at each stage of the commercial chain, that tax will not be borne by intermediate purchasers, but rather will ultimately rest only on the final consumer. (6) Indeed, the principle of fractional payment should not be confused with the question of who bears the burden of the tax.

23. According to the *principle of fractional payment*, rather than providing for the imposition of a single tax on sales to final consumers, the VAT is levied instead at each stage of the production and distribution process. In line with this principle, VAT is accordingly charged in proportion to the price charged by the taxable person in return for the goods and services it has supplied and, therefore, irrespective of the number of transactions which have previously taken place. It should be kept in mind, however, that the supplier only collects the tax which is then remitted to the Member State concerned. The purchaser is the one who pays the VAT.

24. Since, however, the application of VAT is supposed to be neutral, the purchaser can however deduct the VAT that it had to pay in addition to the price charged by the supplier if the good or the service in question is in turn intended to be used for the purposes of a taxed activity. (7) In order to limit the impact of the common system of VAT on the cash flow of taxable persons, the common VAT system provides that each purchasing taxable person is required only to remit to the Member State concerned the difference between the VAT that it has collected on its own sales subject to VAT and the deductible VAT, namely that which it has paid for the purposes of its activities subject to that tax. (8)

25. At the next stage, the purchaser, if a taxable person, will do the same, and so on until the final stage, where the good or service is sold to either a non-taxable person or to a taxable person, but for activities that do not give rise to a right of deduction. It follows that the overall VAT collected does not depend on the number of stages in the production chain, but rather on the final selling price. However, since the absence of VAT returns at an intermediate stage of this chain contravenes those mechanisms, such an omission is nonetheless considered unlawful. (9)

2. ***On the required measures from Member States in response to an infringement of the common system of VAT***

26. Measures that Member States are called upon to take in response to any infringement of EU law by individuals can be divided into two categories, namely, sanctions and restitutionary measures. (10) Sanctions have a punitive and dissuasive character. Restitutionary measures, on the other hand, are aimed at re-establishing the situation that would have existed if that infringement had not occurred. Accordingly, they most often take the form of reparation or restitution.

27. With regard to measures aimed at repairing the consequence of an illegal act in matters of taxation, the Court underlined, for example, in *Fontana*, that the classification of such act as fraud entails the obligation for Member States to take the necessary measures ‘to re-establish the situation that would have prevailed in the absence of tax evasion’ when the unlawful transaction is discovered. (11) As far as sanctions are concerned, the Court held in *Menci* that ‘Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests’. (12)

28. Although the Court has only very rarely mentioned this distinction in tax matters, it is nevertheless important. First, while the obligations to take remedial and sanctioning measures both result from the primacy of EU law (13) and are the consequence of the obligation for the Member States to ensure the full effect of Directive 2006/112, (14) they do not enjoy the same margin of discretion with respect to each other. Indeed, as regards the obligation to redress the situation, to the extent that it is an obligation of result, Member States must take the necessary measures to ensure that, at the very least, the situation which should have prevailed is restored, (15) whereas, concerning the obligation to dissuade any other infringement of the VAT rules, since Directive 2006/112 contains no mention of the kind of sanctions to be adopted, it is for the Member State to define precisely which sanctions should be taken, provided, as mentioned above, that they are *effective, dissuasive and proportionate*. (16) Second, whereas Member States must provide for the adoption of the first kind of measure in the absence of any fault, Member States are only required to sanction the taxpayers when the latter, at the very least, have been negligent. (17)

29. In view of the foregoing, it is important in my view to bear in mind in the present case that the issue under discussion must be seen as separate from the question of whether it is necessary

to impose a sanction on the individuals concerned for violating the rules of the common VAT mechanism. Indeed, the questions before the Court concern the measures to be adopted in the light of the concept of ‘taxable amount’ in order to re-establish the situation as it should have prevailed in the absence of fraud. I will therefore consider these questions directly, putting aside the question of sanctions that might have to be adopted in order to punish and deter taxpayers who have defaulted on their tax obligations under the VAT system. (18)

3. *On the concept of ‘taxable amount’*

30. It is clear from recital 25 of Directive 2006/112 that one of its objectives is to harmonise the concept of ‘taxable amount’, so that the application of VAT to taxable transactions leads to comparable results in all the Member States. Accordingly, this concept must be regarded as an autonomous concept of EU law and one which must be interpreted uniformly throughout the European Union. (19)

31. What, however, is at stake in a situation such as the one at issue in the judgment in *Tulic? and Plavo?in* or in the present case is not the concept of ‘taxable amount’ in itself, but rather the measures to be taken to reconstitute that taxable amount, namely, the price before tax. Admittedly, in the present case, the price paid for the services performed is known, but since it remains unclear whether or not the VAT has been collected and not remitted and, therefore, whether that price includes VAT, the taxable amount is to be considered as not yet fully reconstituted.

B. On the relevance of the Case-law Court’s case-law cited by the referring Court and by the applicant

1. *Astone, Dobre and Maya Marinova*

32. In its request for a preliminary ruling, the referring court wonders whether it can be inferred from three judgments, namely *Astone*, (20)*Dobre* (21) and *Maya Marinova*, (22) that the amounts paid and received in the course of a concealed transaction are to be considered as including the VAT which has not been paid, with the consequence, in essence, that the tax which, according to the referring court, the supplier should remit, should be calculated on the basis of a taxable base lower than the turnover thus achieved.

33. However, none of the three judgments cited by the referring court provides a *direct* answer to that question. As it happens, *Astone* and *Dobre* concern the right of deduction and not the determination of the taxable amount to be retained, if appropriate, for the calculation of the VAT due. As for *Maya Marinova*, it is true that the Court held that ‘Article 2(1)(a), Article 9(1) Article 14(1) and Articles 73 and 273 of … Directive [2006/112] and the principle of fiscal neutrality must be interpreted as not precluding national legislation, …, under which … tax authorities may … determine the taxable amount of the sale of … goods according to the factual information at hand pursuant to rules not provided for in that directive’. (23) It should, however, be noted that, in that case, the price actually paid by the purchaser during the concealed transactions remained unknown to the tax administration. Consequently, the Court did not have to take a position on whether, if that price had been known, it had to be regarded as including the VAT.

2. *Tulic? and Plavo?in*

34. For its part, the applicant relies on *Tulic? and Plavo?in,* (24) which concerns the cases of two natural persons who had concluded numerous contracts for the sale of land and properties in respect of which no VAT was initially charged. (25) Later, the tax authorities found that the activities pursued by those natural persons bore the hallmarks of economic activity and that, as a

result, these transactions were in fact subject to VAT. The tax authorities issued tax assessment notices to them, by which they ordered the payment of the VAT, calculated by taking the price agreed by the contracting parties, plus overdue interest, as the taxable base. In this context, the question which was asked by the national court in both cases concerned, in essence, whether Articles 73 and 78 of Directive 2006/112 should be interpreted in the sense that, when the price of a good has been established by the parties without any reference to VAT and the supplier of that good is the taxable person, the price agreed must be regarded as including the VAT or as not including the VAT, which must be added thereto.

35. In its judgment in those joint cases, the Court held that Articles 73 and 78 of Directive 2006/112 must be interpreted as meaning that, when the price of a good has been established by the parties without any reference to value added tax and the supplier of that good is the taxable person for the value added tax owing on the taxed transaction, in a situation where this supplier is not able to recover from the purchaser the VAT claimed by the tax authorities, the price agreed must be regarded as already including the VAT.

36. This reasoning, however, needs further examination and perhaps even some further clarification. Leaving aside the paragraphs of that judgment that merely re-state certain key VAT principles, it may be observed that the Court puts forward two arguments to justify the conclusions it reached, the first being set out at paragraphs 34 to 35 and, the second at paragraph 36.

37. According to the *first argument*, the price invoiced must be considered to include VAT so that the VAT charged should burden the supplier as little as possible, in accordance with the principle that VAT should be borne solely by the final consumer.

38. Under the *second argument*, if tax authorities were to consider that the VAT was not included in the price charged, that would conflict ‘with the rule that the tax authorities may not charge a VAT amount exceeding the amount paid by the taxable person’.

39. Although the words ‘the amount paid by the taxable person’ used by the Court might be ambiguous since they could be understood as referring either to the amount paid in consideration for the goods concerned – the consideration – or to the VAT paid by the purchaser, I believe nonetheless that the term ‘amount’ is to be understood as clearly referring here to the VAT charged. (26) Therefore, the rule mentioned is to be understood in this sense: the tax authorities cannot collect more VAT from the supplier than the VAT which the supplier has correctly calculated and invoiced to the purchaser. Accordingly, that argument is similar to the first argument mentioned by the Court, which relies on the principle of fiscal neutrality, understood in that context in its ‘vertical sense’. (27) Indeed, in both cases, the idea is that the VAT burden should not weigh on economic operators.

40. In this regard, this solution might be puzzling if, as the absence of explicit reference to the circumstances of the case may give the impression, the solution reached were to be applied to all situations where transactions do not comply with VAT rules and, in particular, where, as in the present case, two taxable persons agreed to conceal their transactions from the fiscal authorities. In such a situation, the logical consequence of the fact that they concealed their transaction is that they did not take into consideration any VAT. Since they both know that the transaction will not be subject to VAT and, therefore, that the purchaser will not be able to deduct any VAT on the price paid, the latter logically corresponds, on the purchaser’s side, to the cost that it would have otherwise borne, excluding VAT that it would in principle have advanced, and, on the supplier’s side, to the remuneration that it would have received, excluding VAT, that would have been normally collected and remitted. (28)As a matter of fact, when two taxable persons agree to conceal a transaction carried out between them for the purposes of a taxed activity, generally their aim is simply to evade income tax, but not the VAT in itself, since VAT is, by definition, precisely

because of the principle of neutrality, neutral for them. The reason they do not make a VAT return is simply that they want to avoid any formal record of the transaction for general revenue (including income tax) purposes.

41. The situation is different where the purchaser does not know that the supplier is not going to remit any VAT. Indeed, in such a case, the purchaser will be willing in principle to pay a price corresponding to the one it would have paid for a similar good or service including VAT since either the purchaser is a final consumer, in which case it will expect to bear the VAT or that purchaser is a taxable person, in which case it expects to be able to deduct this VAT. (29)

42. I note, however, that even in that situation, economic rationality advocates that, under certain circumstances, the price paid might not include any VAT. Indeed, the supplier may decide not to remit the VAT precisely in order to lower its selling price without reducing its margin and therefore to sell large quantities of goods or services quickly (most often before disappearing).

43. In my opinion, there is another case in which the approach adopted in the judgment in *Tulic? and Plavo?in* would not necessarily apply, and that is simply when the tax administration has no information about the price paid. Depending on the method used to reconstitute this price, and in particular in cases of comparison, the VAT should or should not be considered as not included in the price thus reconstituted. It all depends on the point of comparison used. (30)

44. All this illustrates that, from the perspective of the measures to be adopted to re-establish the situation as it should have been in the absence of any illegality, there is no single method that might apply to all situations. (31) In particular, the approach adopted by the Court in the judgment in *Tulic? and Plavo?in* appears to be valid only where the transaction was carried out with purchasers who could reasonably be expected to be unaware that the transactions carried out were subject to VAT. Indeed, it is only in this situation that it can reasonably be considered that the price paid would have been the same as the one which would have been paid if that transaction had been subject to VAT.

45. Accordingly, in my view, the approach adopted in the judgment in *Tulic? and Plavo?in* should be understood as only applicable in that situation and, even in that situation, as only laying down a presumption which can be rebutted by the tax authorities if it appears, for example, that the price realised was closer to the one, excluding tax, asked of similar goods or products. (32)

3. ***On the type of approach to be used to determine the measures to be adopted***

46. Some may be tempted to go even further and consider that, when taxable persons (that is to say, parties to a transaction which are not final consumers) have fraudulently concealed a transaction, no VAT should be paid. Indeed, from an economic perspective, if one considers the full commercial chain, the logical consequence of the argument based on the principle of neutrality would be that, under certain circumstances, no payment of VAT to the Member State concerned is necessary at all to re-establish the situation as it should have been. (33)

47. In particular, when the transaction takes place between two taxable persons, as in the present case (the judgment in *Tulic? and Plavo?in* does not specify whether or not the purchasers were taxable persons for VAT purposes), it is true that, if the transaction had been carried out as it should have been, VAT would have been paid by the purchaser to the supplier who would then have remitted it to the Member State concerned. However, the purchaser would also have deducted that VAT from the tax it would have collected on its own sales (or it would have obtained the refund of the excess VAT paid). (34) Accordingly, as explained above, the VAT definitively collected by a Member State would have remained equal to the VAT collected at the stage of the final transaction, namely, the one involving a purchaser which is not going to use the goods or

services for the need of its taxable operations. (35) This is why, as underlined by the Court's case-law, the VAT, which is an indirect tax on consumption, ultimately only rests on the consumer. (36)

48. Under these conditions, when a Member State claims payment of VAT from a supplier who, a priori, did not include it in the sale price and which therefore was not subsequently deducted by the purchaser, first, the latter might ultimately collect more VAT than the tax that would have been collected in the absence of the fraud. Second, such requirement will necessarily reduce the supplier's profit if it cannot pass that tax on to the purchaser, which seems contrary to the principle of neutrality outlined at point 38 of this Opinion. (37)

49. Admittedly, in the judgment in *Tulic? and Plavo?in,* the Court agreed that the question of the measures to be adopted to remedy the situation may vary depending on whether or not the supplier is entitled to recover from the purchaser the VAT claimed by the tax authorities, precisely in order to ensure this neutrality. However, the existence of such a possibility does not solve the problem, but might rather transfer it to the purchaser who may have acted in good faith. Indeed, the purchaser could legitimately have been unaware that, for example, the supplier had not included the VAT in the price, or that it had included it but had intended not to remit it. The purchaser could have therefore paid a price identical to the one that it would have paid if the transaction had been *ab initio* subject to VAT and, accordingly, already exercised its right of deduction of the amount of VAT mentioned in the invoice issued, when the supplier is going to claim back the VAT required by the tax authorities. (38)

50. One could suggest in turn that the purchaser should be allowed in return to deduct the VAT paid in a certain way a second time, so that it will remain neutral for that purchaser. However, that would penalise the Member State concerned since the deduction operated by the purchaser would be more than the VAT remitted. (39) In my view, neither the purchasers nor the Member States (and, therefore, indirectly, their taxpayers) should have to suffer from the consequence of the illegality committed, even in good faith, by the suppliers. From that perspective, if it is to be considered that the VAT should ultimately only rest on the consumers as required by the principle of neutrality, to restore the situation to what it should have been in the absence of the illegality committed would require an assessment to be made beforehand as to whether any VAT should be remitted, in view of the stage of production at which the infringement was carried out and the kind of infringement committed. (40)

51. However, even though this approach is coherent from a purely economic perspective which would be focused on the commercial chain as a whole and the theoretical underpinnings of the entire VAT system, I consider that such a perspective must give way to the practical realities of the system, which in turn must focus on the obligations borne by each taxable person.

52. From the *legal perspective*, indeed, the question of what measures should be taken to remedy a situation is to be assessed solely in the light of the obligations that have not been respected by the person concerned. (41) There is no need to assess whether or not VAT would have been deducted afterwards or whether or not the Member States will eventually receive more VAT than would have been collected in the absence of the fraud. The only relevant question is whether or not in the case of concealed transactions, the tax relating to these transactions should be calculated from the premiss that that VAT was included in the sums collected by the supplier in respect of this transaction.

53. In essence, since each taxable person must comply with VAT rules, where one did not subject these transactions to VAT, restoring the situation implies requiring from the latter that it remits the appropriate VAT. From this perspective, the notion of the obligation to remedy the situation is not intended to neutralise the effects of the illegality committed, but rather aims at purely and simply obliging the taxable person to comply with the VAT regulations regardless of any

consideration related to the return on the tax or to competitive neutrality.

54. Although this issue has never been clearly raised before the Court, to consider that the measures to be adopted to restore the situation in question should be assessed in the light of the impact of fraud along the commercial chain would constitute a fairly radical change in the existing case-law. Indeed, even if, according to the case-law of the Court, consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT, (42) it seems to me that the approach taken by the Court, at least as far as the payment of that tax is concerned, has always been implicitly to consider that the determination of the measures to be adopted to restore the situation must be assessed at the specific level of each taxable person and, therefore, of each stage of the commercial chain. (43)

55. However, this dichotomy between an approach to the measures to be adopted that would be economic and global on the one hand and a legal approach based on the individual situation of each taxable person on the other, illustrates, for the reasons set out above, that the approach adopted in the judgment in *Tulic? and Plavo?in* cannot be justified by the principle of neutrality. In fact, as soon as it is considered that the measures to be adopted must be assessed at the level of each taxable person, without any determination being made as to whether, overall, the fraud has had consequences on the yield of VAT, the solutions adopted will necessarily not be economically neutral.

56. This is particularly obvious with regard to the distinction drawn in that judgment depending on whether or not national law allows the supplier to recover from the purchaser the VAT claimed by the tax authorities, since it is difficult to understand how the fact that the supplier may recover from the purchaser the VAT claimed by the tax authorities might rule out the possibility that the VAT was collected, but not remitted by that supplier and that, therefore, it has been included in the price, but not remitted. It also appears difficult to justify the solution adopted on the sole basis of the principle of neutrality since the Court did not seek to determine what the consequences that will result for the purchaser, who may have been acting in good faith, from the fact that the supplier could be entitled to recover from the purchaser the VAT claimed by the tax authorities. (44)

57. In my opinion, the only way to fully comply with the principle of neutrality in the sense that the Court gave to it in the judgment in *Tulic? and Plavo?in* would have been to *require* that Member States provide first, that the supplier might recover the VAT claimed by the tax authorities from the purchaser, but only if it can reasonably be inferred from the circumstances of the case that this tax was not included in the price and, second, that that purchaser can, where the latter could reasonably have been unaware of the fraud, deduct the *difference* between the VAT already deducted, calculated on the basis of the price paid, and the VAT claimed afterwards. Since, however, this issue does not directly arise in the present case, it is unnecessary to consider this further.

58. One is nonetheless left with the conclusion that the most practical approach to be taken at the individual level in case of fraud is whether it is obvious that the price paid did not include VAT, as it would have made no sense for traders to include it. Viewed from that perspective, the approach adopted in the judgment in *Tulic? and Plavo?in* must be understood as being based on the assumption that the purchaser was not informed of the illegality committed by the supplier.

59. The Court’s reasoning in the judgment in *Tulic? and Plavo?in* should therefore be understood as only concerning the situation where the purchaser has no reason to suspect that the supplier is not going to remit any VAT and as laying down, in that specific situation, a presumption in order to simplify the task of the tax authorities. (45) Such a presumption shall nonetheless be considered rebuttable in the sense that if evidence can be supplied, with reference to the prices usually charged for the product or service in question, that the price did not include

VAT, the presumption that the price concluded between the parties included VAT shall be overturned.

60. Given that, as previously explained, in the present case, it is clear from the Court's file that the parties agreed to conceal their transactions, the presumption set out in the judgment in *Tulic? and Plavo?in* should not apply. In the circumstances, it must rather be presumed that the price paid did not include VAT, unless, for example, the parties can demonstrate that this price is close to the price that would have been paid if the transaction had been subject to VAT. In the latter case, if, therefore, CB can demonstrate that the overall remuneration he received for these services corresponds in substance to the price on the relevant market for such services (including VAT) which prevailed at the time, the tax authorities would then be required to proceed on the basis that this sum necessarily includes VAT.

V. **Conclusion**

61. In those circumstances, I propose to answer the question referred by the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain) to the effect that Articles 73 and 78 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in the light of the principles of neutrality, of prohibition of tax evasion and abuse of rights, and of prohibition of the illegal distortion of competition, do not preclude national legislation, in the circumstances of the case at issue in the main proceedings (namely, that of a concealed transaction carried out between two taxable persons in the course of their activity giving rise to a right to deduction), from calculating the VAT due on the premiss that it has not been included in the price charged. In these circumstances, however, the national legislation must also provide that this premiss can be rebutted by the taxpayer by the provision of evidence to the contrary, in particular, by comparing the price paid with the prevailing prices (including VAT) for similar goods or services.

1 Original language: English.

2 OJ 2006 L 347, p. 1.

3 BOE No 312 of 29 December 1992, p. 44 247.

4 See, in particular, judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84 paragraph 48); of 12 May 1987, *Traen and Others* (372/85 to 374/85, EU:C:1987:222, paragraphs 24 to 26), of 14 July 1994, *Faccini Dori* (C?91/92, EU:C:1994:292, paragraphs 20 to 23); of 7 January 2004, *Wells* (C?201/02, EU:C:2004:12, paragraph 56); of 21 October 2010, *Accardo and Others* (C?227/09, EU:C:2010:624, paragraph 45); of 24 January 2012, *Dominguez* (C?282/10, EU:C:2012:33, paragraph 37) and of 15 January 2015, *Ryanair* (C?30/14, EU:C:2015:10, paragraph 30).

5 Admittedly, the Court recalled that the principle of prohibition of abusive practices, as applied in the sphere of VAT by the case-law stemming from the judgment of 21 February 2006, *Halifax and Others*, (C?255/02, EU:C:2006:121), is not a rule established by a directive, but a general principle of law. See, to that effect, judgment of 22 November 2017, *Cussens and Others* (C?251/16, EU:C:2017:881, paragraph 27). However, the present case does not concern abusive practices, a concept which has a precise meaning in EU law (see judgment of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraph 74) but on how the taxable base is to be reconstituted once fraud has been established. On the other hand, it should be recalled that national courts are obliged to examine whether, having regard to the methods of interpretation permitted under national law, legislation may be interpreted differently in order to achieve the result pursued by a directive. See in this sense, judgment of 5 October 2004, *Pfeiffer and Others*

(C?397/01 to C?403/01, EU:C:2004:584, paragraphs 108 to 118).

6 See, to that effect, for example, judgment of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 28).

7 Except where otherwise stated or where concerning the final consumer, references made in the present Opinion to economic operators are to be understood as referring to taxable persons.

8 See Articles 168 and 179 of Directive 2006/112.

9 See, for example, judgment of 5 October 2016, *Maya Marinova* (C?576/15, EU:C:2016:740, paragraph 39).

10 For example, in order to clarify the concept of ‘charged with a criminal offence’ in Article 6 of the European Convention on Human Rights (‘the ECHR’) and the concept of ‘penalty’ in Article 7 of the ECHR, the European Court of Human Rights has established a distinction between tax measures designed to penalise taxpayers and those which aim at repairing the consequences of their unlawful action on public finances. See, in particular, ECtHR, 24 February 1994, *Bendenoun v. France*, (CE:ECHR:1994:0224JUD001254786, §47).

11 See judgment of 21 November 2018, *Fontana* (C?648/16, EU:C:2018:932, paragraphs 33 to 34).

12 See, to that effect, judgment of 20 March 2018, *Menci* (C?524/15, EU:C:2018:197, paragraph 19).

13 According to the case-law of the Court, the Member States are obliged to provide for effective, proportionate and dissuasive sanctions in reaction to any infringement of EU law, even in the absence of an express provision in the EU act in question. See, judgments of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 28), and of 21 September 1989, *Commission* v *Greece* (68/88, EU:C:1989:339, paragraph 24). See, to that effect, regarding the common system of VAT, judgment of 5 December 2017, *M.A.S. and M.B.* (C?42/17, EU:C:2017:936, paragraphs 34 to 35).

14 Admittedly, Article 273 of Directive 2006/112 provides that States ‘may’ take other measures and, therefore, should be understood as empowering Member States to adopt certain additional measures. However, the obligation for Member States to act against tax fraud arises from Articles 310(6) and 325 TFEU, as well as more generally from the obligation for Member States to ensure the full effect of EU law. See, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.* (C?42/17, EU:C:2017:936, paragraph 30) and, with regard to the *obligation* of States to ensure the full effect of EU law in VAT matters, judgment of 5 July 2016, *Ognyanov* (C?614/14, EU:C:2016:514, paragraph 34).

15 See, judgment of 21 November 2018, *Fontana* (C?648/16, EU:C:2018:932, paragraphs 33 to 34).

16 See, to that effect, judgments of 5 December 2017, *M.A.S. and M.B.* (C?42/17, EU:C:2017:936, paragraph 33), or of 20 March 2018, *Menci* (C?524/15, EU:C:2018:197, paragraph 20).

17 See, to that effect, judgments of 21 June 2012, *Mahagében and Dávid* (C?80/11 and C?142/11, EU:C:2012:373, paragraph 47), and of 6 December 2012, *Bonik* (C?285/11, EU:C:2012:774, paragraphs 41 and 42).

18 In my view, this was also the case in the judgment of 7 November 2013, *Tulic? and Plavo?in* (C?249/12 and C?250/12, EU:C:2013:722), which I will discuss below.

19 It is true that Articles 74 to 82 of Directive 2006/112 provide for certain exceptions in particular, according to recital 26 of that directive, to prevent loss of tax revenue through the use of connected parties, to the definition of the concept of 'taxable amount' in Article 73 thereof. However, those exceptions apply uniformly to the operations that they target: they are not intended to confer any discretion on Member States in this respect, but rather to provide for alternative definitions in certain particular situations where either no price is paid or where the price paid might not be fully in line with economic reality. Neither is the harmonised nature of the concept of 'taxable amount' called into question by Article 273 of Directive 2006/112 which provides that, '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'. Emphasis added. Indeed, it flows from the wording of that provision that the latter only authorises Member States to impose additional obligations. It does not, however, authorise Member States to derogate from the existing rules with respect to the taxable amount. It seems to me, in any event, clear from the context in which Article 273 of Directive 2006/112 is set out that when Article 273 mentions 'other obligations' it is in relation to the obligations referred to in Title XI, entitled 'Obligations of taxable persons and certain non-taxable persons'.

20 Judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614).

21 Judgment of 7 March 2018, *Dobre* (C?159/17, EU:C:2018:161).

22 Judgment of 5 October 2016, *Maya Marinova* (C?576/15, EU:C:2016:740).

23 Paragraph 50 of that judgment.

24 Judgment of 7 November 2013, *Tulic? and Plavo?in* (C?249/12 and C?250/12, EU:C:2013:722, 'the judgment in Tulic? and Plavo?in').

25 This fact was mentioned in both references for a preliminary ruling.

26 See, to that effect, in particular judgments of 3 July 1997, *Goldsmiths* (C?330/95, EU:C:1997:339), paragraph 15), and of 26 April 2012, *Balkan and Sea Properties and Provadinvest* (C?621/10 and C?129/11, EU:C:2012:248, paragraph 44) to which the Court refers in the judgment in *Tulic? and Plavo?in*. In the English version of the judgment in *Tulic? and Plavo?in* the terms used are: 'the amount paid by the taxable person' whereas in the Romanian version, the expression used is: 'superioar? celei primite de persoana impozabil?' and in the French version: 'que l'assujetti a perçu' which rather amounts to: 'paid *to* the taxable person'.

27 The term 'principle of neutrality' can indeed also refer, in the context of the VAT, to the application of the principle of non-discrimination in VAT. See, in this respect, judgment of 15 November 2012, *Zimmermann* (C?174/11, EU:C:2012:716, paragraph 48).

28 Where the supplier is not registered for VAT, and the purchaser did not intend to deduct any VAT, the latter logically purchased the goods at the price it would have paid, excluding the applicable VAT if the transaction had been subject to that tax, since it can be assumed that the purchaser knew that it could, in that case, have deducted any tax paid. This is why, in the practice

of business between professionals, prices in commercial offers are often expressed net of tax, since it is this price that the purchaser is interested in.

29 It should be remembered, however, that in order to retain a right of deduction in the event of fraud the purchaser must, at the very least, not have been negligent. Indeed, the Court has repeatedly held that EU law cannot be relied on for abusive or fraudulent ends. Therefore national courts and authorities should refuse the right of deduction, if it is shown, in the light of objective factors, that that right is being relied on for such fraudulent or abusive ends. See, for example, judgment of 16 October 2019, *Glencore Agriculture Hungary* (C?189/18, EU:C:2019:861, paragraph 34 and the case-law cited). If this is the case when a fraud is committed by the taxable person himself or herself, it is also the case where a taxable person who knew, or ought to have known, that, by its purchase, it was taking part in a transaction connected with the fraudulent evasion of VAT. See judgment of 21 June 2012, *Mahagében and Dávid* (C?80/11 and C?142/11, EU:C:2012:373, paragraph 46). With regard to the level of diligence required of a taxpayer wishing to exercise its right to deduct, the Court considers that the taxpayer must take all measures that may reasonably be required to ensure that the transaction it carries out does not lead it to participate in tax evasion. See, to that effect, judgment of 19 October 2017, *Paper Consult* (C?101/16, EU:C:2017:775, paragraph 52). In particular, where there is a suspicion of irregularities or fraud, a prudent trader may, depending on the circumstances of the case, be required to obtain information about another trader from whom it intends to purchase goods or services in order to ascertain the latter’s trustworthiness. See, to that effect, judgment of 21 June 2012, *Mahagében and Dávid* (C?80/11 and C?142/11, EU:C:2012:373, paragraph 60).

30 It is in this sense that I understand the approach followed by the Court in *Fontana*, where the Court essentially held that it is possible, where reporting obligations have not been complied with, to use the turnover of an undertaking, calculated by extrapolation on the basis of sectoral studies approved by ministerial decree, as the taxable amount, without referring to the approach adopted in *Tulic? and Plavo?in*. See judgment of 21 November 2018, *Fontana* (C?648/16, EU:C:2018:932, paragraph 36).

31 By analogy, I note, with regard to the determination measures that a European institution whose decision has been annulled must take in order to put the applicant back in the position in which it should have been in the absence of the illegality committed, that that determination required that a detailed examination of the situation be carried out. See judgments of 31 March 1971, *Commission* v *Council* (22/70, EU:C:1971:32, paragraph 60), of 6 March 1979, *Simmenthal* v *Commission* (92/78, EU:C:1979:53, paragraph 32), of 17 February 1987, *Samara* v *Commission* (21/86, EU:C:1987:88, paragraph 7) and, more explicitly, but regarding the General Court, judgment of 23 April 2002, *Campolargo* v *Commission* (T?372/00, EU:T:2002:103, paragraph 109.)

32 In this respect, I note that the market price constitutes a method of correcting price anomalies envisaged by Directive 2006/112 itself. Indeed, Article 80 of Directive 2006/112, which is part of the same title as Articles 73 and 78 of that directive, provides, in the event that the parties are related and, therefore, for whom it is probable that the price paid does not reflect the real economic value of the transaction, the possibility for Member States to take the normal market value instead of the price paid. See also recital 26 and Article 77 of Directive 2006/112.

33 Admittedly, in paragraph 28 of judgment of 2 July 2020, *Terracult* (C?835/18, EU:C:2020:520), the Court held that ‘where the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue, the principle of neutrality of VAT requires that VAT which has been improperly invoiced can be corrected’. However, I do not think that by referring to the existence of a loss of tax revenue, the Court really intended to engage in a global examination of the overall consequences of an infringement of the VAT rules.

34 According to the Court’s case-law, the right to deduct input VAT of a taxable person who carries out such transactions likewise cannot be affected by the fact that, in the chain of supply of which those transactions form part, another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing. See judgment of 6 July 2006, *Kittel and Recolta Recycling* (C?439/04 and C?440/04, EU:C:2006:446, paragraph 45).

35 By way of example, let us take a standard commercial supply chain in respect of a good that includes three intermediaries, each making a EUR 10.00 margin profit. Let us further assume that each transaction is subject to 20% VAT. Accordingly, the first time that that good is sold, it will be for EUR 12.00 (including VAT) which means that the VAT collected and then remitted to the Member State is EUR 2.00. The second time this good will be resold for EUR 24.00 (including VAT), the VAT collected will be EUR 4.00, but the tax remitted will only be EUR 2.00, since the EUR 2.00 of VAT paid upstream are deductible. When it will be sold a third time to a final consumer for EUR 36.00 (including VAT), the tax collected will be EUR 6.00 but the VAT remitted will be only EUR 2.00 (6 collected minus 4 paid upstream). At the end, the total amount of tax collected will be EUR 6.00, exactly the same amount as if that good had been sold directly by the first taxpayer to the final consumer for EUR 36.00 (including VAT).

36 See, for example, judgment of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 28).

37 From this perspective, as soon as the payment of some amount of VAT is not necessary for the restoration of public finances, any such obligation should be considered as a sanction and not as a measure aimed at restoring the situation.

38 Indeed, according to the Court’s case-law, a tax authority cannot refuse a taxable person the right to deduct the VAT paid on purchases of goods which were supplied to it, on the ground that credence cannot be given to the invoices relating to those purchases. See order of 3 September 2020, *Vikingo F?vállalkozó* (C?610/19, EU:C:2020:673, paragraph 66).

39 Since the VAT would have been remitted only once, whereas it would have been deducted twice.

40 Viewed from that purely economic perspective, the fact that the obligation to redress the situation may require no remission of VAT in certain situations is not really called into question by the fact that the VAT system relies on the principle of fractional payment. Indeed, as explained above, the mechanism that implements this principle does not affect the return of this tax, but rather pursues other objectives. On the one hand, it aims at limiting the risk of loss of tax revenue in the event of the insolvency of an intermediary. On the other hand, such a system aims at providing the tax administration with an overview of the turnover achieved by the taxable person and its intermediate consumption, which allows cross-referencing with statements made about other taxes. Where, however, the resale to persons who are in fact the final consumers has already taken place, has been subject to VAT and, as a result, the Member State has collected all the VAT due as in the present case, that first objective loses its relevance with regard to the measures to be adopted to redress the situation. From that perspective, it remains fully relevant,

however, as regards the sanctions to be adopted against those who have wrongly concealed certain transactions, since sanctions should be intended to dissuade others from doing the same. As for the second objective, since it is not directly linked to the very principle of VAT, the latter can, as a matter of principle, only be relevant in the context of the determination of the sanction to be provided for.

41 Under such a legal approach, the distinction between measures aimed at restoring the situation and measures constituting a sanction does not depend on whether the measure goes beyond the reparation of the damage suffered by the Member State concerned, but only on the objective pursued by the measure in question, namely to combat VAT evasion: a sanction is what the administration requires from the person concerned for having infringed the VAT rules in addition to the payment of the VAT due, irrespective of whether this payment goes beyond what is strictly necessary to compensate for the loss of tax incurred.

42 See, for example, judgments of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia* (C?295/17, EU:C:2018:942, paragraph 43), or of 11 June 2020, *Vodafone Portugal* (C?43/19, EU:C:2020:465, paragraph 40).

43 Indeed, while in VAT matters the Court takes into account the economic effects of the behaviour of taxable persons, it appears from a global reading of the case-law in this area that the Court still attaches a larger amount of significance to the respect of the norm that has been breached in order to re-establish the situation. See, for example, judgment of 5 October 2016, *Maya Marinova* (C?576/15, EU:C:2016:740, paragraph 48) in which the Court referred to ‘all individual circumstances’.

44 This distinction appears all the more difficult to understand since, as explained, the obligation for Member States to take the necessary measures to restore the situation stems from the obligation for these same States to ensure the full effect of Directive 2006/112 and cannot therefore be frustrated by the domestic law of the Member States. In this regard, I note that, according to certain judgments, the Court has held that the Member States could not prevent the seller from correcting invoices issued (which constitute evidence of a commercial transaction and not of the payment of the price charged) where the risk of any loss of tax revenue has been eliminated. See, judgment of 2 July 2020, *Terracult* (C?835/18, EU:C:2020:520, paragraph 28). In this context, given that the Court considered that that obligation had to be weighed against the principle of legal certainty, it was in principle for the Court to say in which case this principle required Member States to deny sellers the right to pass on the tax to purchasers. See, by analogy, to that effect, judgment of 9 June 2016, *Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR* (C?332/14, EU:C:2016:417, paragraph 53 and 54).

45 See, to that effect, recital 5 of Directive 2006/112.