Provisional text

OPINION OF ADVOCATE GENERAL

SAUGMANDSGAARD ØE

delivered on 18 March 2021 (1)

Case C?855/19

G. sp. z o.o.

v

Dyrektor Izby Administracji Skarbowej w Bydgoszczy

(Request for a preliminary ruling from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling – Common system of value added tax – Intra-Community acquisition of motor fuels – Obligation to pay VAT early – Five-day period from the entry of the motor fuels into the national territory – Article 110 TFEU – Prohibition from collecting higher internal taxation on goods from other Member States – Directive 2006/112/EC – Article 273 – Measures intended to prevent evasion – Articles 62 and 69 – Chargeability of VAT – Non-chargeability – Article 206 – Concept of 'interim payments' – Interim payment relating to non-chargeable VAT – Basis of calculation – Gross amount calculated on a taxable transaction – Net amount of the VAT calculated over the tax period as a whole)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 110 TFEU and of Articles 69, 206 and 273 of Directive 2006/112/EC. (2)

2. The request has been made in proceedings between the company G. sp. z o.o. ('the applicant in the main proceedings') and the Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Director of the Tax Administration Chamber, Bydgoszcz, Poland) ('the tax authorities') concerning an obligation to make early payment of the value added tax (VAT) on intra-Community acquisitions of motor fuels, which was introduced with a view to combatting fraud.

3. The applicant in the main proceedings contested the validity, in the light of EU law, of that obligation to make early payment, in accordance with which it was required to pay the gross amount of VAT, calculated without account being taken of its right of deduction, on each intra-Community acquisition of motor fuels, within five days from their entry into the national territory.

4. For the reasons set out below, I am of the view that Articles 62 and 69 of the VAT Directive preclude such an obligation to make early payment in so far as it allows the tax authorities to demand a payment from the taxable person before the VAT becomes *chargeable*.

5. Furthermore, such an early payment cannot be regarded as an interim payment within the meaning of Article 206 of that directive. First, such payments can relate only to VAT that has become *chargeable* pursuant to the provisions cited above. Second, such payments must relate to the *net amount* of the tax, calculated over the tax period as a whole, and not to the gross amount of VAT payable on a taxable transaction considered in isolation.

II. **Legal context**

A. **EU law**

6. Article 62 of the VAT Directive provides:

‘For the purposes of this Directive:

(1) “chargeable event” shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become “chargeable” when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.’

7. Article 68 of that directive reads as follows:

‘The chargeable event shall occur when the intra-Community acquisition of goods is made.

The intra-Community acquisition of goods shall be regarded as being made when the supply of similar goods is regarded as being effected within the territory of the relevant Member State.’

8. Under Article 69 of that directive:

‘In the case of the intra-Community acquisition of goods, VAT shall become chargeable on issue of the invoice, or on expiry of the time limit referred to in the first paragraph of Article 222 if no invoice has been issued by that time.’

9. Article 206 of the VAT Directive states:

‘Any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Article 250. Member States may, however, set a different date for payment of that amount or may require interim payments to be made.’

10. Article 222 of that directive provides:

‘For supplies of goods carried out in accordance with the conditions specified in Article 138 or for supplies of services for which VAT is payable by the customer pursuant to Article 196, an invoice shall be issued no later than on the fifteenth day of the month following that in which the chargeable event occurs.

For other supplies of goods or services Member States may impose time limits on taxable persons for the issue of invoices.’

11. Under the first paragraph of Article 273 of the VAT Directive:

‘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.’

B. **Polish law**

12. Article 20(5) of the ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug (Law on VAT of 11 March 2004) (Dz. U. of 2016, item 710), as applicable at the time of the facts (‘the VAT Law’), provides:

‘In the case of the intra-Community acquisition of goods, VAT shall become chargeable on the day of issue of the invoice by the taxpayer, but no later than on the fifteenth day of the month following the month in which the acquisition of the goods was made …’

13. Pursuant to Article 99(11a) of the VAT Law, in cases of intra-Community acquisitions of goods referred to in Article 103(5a) of that law, the taxable person is required to submit to the head of the customs office competent in matters relating to the payment of excise duty a monthly statement of the amounts of VAT payable no later than on the fifth day of the month following that in which the payment obligation arose.

14. Under Article 103(5a) of the Law:

‘In the case of the intra-Community acquisition of the motor fuels referred to in Annex 2 to the ustawa z dnia 6 grudnia 2008 r. o podatku akcyzowym (Law of 6 December on excise duty, ‘the Excise Duty Law’), the production or marketing of which requires a licence pursuant to the provisions of the ustawa z dnia 10 kwietnia 1997 r. –Prawo energetyczne (Law of 10 April 1997 on energy), the taxable person shall be obliged, without being called upon to do so by the head of the customs office, to calculate and pay the tax to the customs authorities competent for the payment of excise duty:

(1) within five days of the date on which the goods were presented at the place of receipt of the goods subject to excise duties specified in the relevant permit – if the goods are the subject of intra-Community acquisition within the meaning of the [Excise Duty Law] by a registered consignee under the excise duty suspension procedure pursuant to the applicable provisions on excise duty;

(2) within five days of the date on which the goods were imported into a tax warehouse from the territory of another Member State;

(3) upon the movement of such goods within the national territory – if the goods are moved outside an excise duty suspension procedure pursuant to the applicable provisions on excise duty.’

III. **The dispute in the main proceedings, the questions referred and the procedure before the Court**

15. In December 2016, the applicant in the main proceedings made 20 intra-Community acquisitions of diesel fuel of a total quantity of 3 190 874 m3.

16. The tax authorities stated that the intra-Community acquisitions made by the applicant in

the main proceedings came under the second situation envisaged in Article 103(5a) of the VAT Law, namely the placement of the goods in a tax warehouse from the territory of another Member State.

17. The applicant in the main proceedings did not pay the VAT on those acquisitions, which came to a total of 1 530 766 Polish zloty (PLN) (approximately EUR 337 319.59), within five days from the entry of the diesel fuel into the national territory, as required by Article 103(5a) of the VAT Law. Furthermore, nor did it submit a monthly statement no later than on the fifth day of the month following that in which the payment obligation arose, as required by Article 99(11a) of that law.

18. By decision of 6 April 2018, the tax authorities required the applicant in the main proceedings, by means of a tax adjustment for December 2016, to make immediate payment of the VAT payable on the intra-Community acquisitions at issue, plus interest for late payment calculated from the day following the due date for payment.

19. The applicant in the main proceedings filed an appeal before the Wojewódzki S?d Administracyjny w Bydgoszczy (Regional Administrative Court, Bydgoszcz, Poland), which dismissed that appeal by judgment of 10 July 2018.

20. The applicant in the main proceedings brought an appeal on a point of law against that judgment before the referring court, calling into question the legality of Article 103(5a) of the VAT Law in the light of Article 110 TFEU and of Articles 69 and 206 of the VAT Directive.

21. That court explained that Article 103(5a) of the VAT Law is part of a ‘fuel package’ which was adopted nationally and came into force on 1 August 2016, that is to say a set of amendments intended to make the collection of VAT on intra-Community acquisitions of motor fuels more effective and to prevent VAT fraud on the cross-border market in motor fuels.

22. The referring court described as follows the practical consequences of that new scheme for taxable persons making intra-Community acquisitions of motor fuels, such as the applicant in the main proceedings.

23. Under the ordinary scheme applicable to intra-Community acquisitions, the acquirer is, in principle, to declare the VAT payable and claim his right of deduction in the same return, it being understood that that return must be submitted no later than on the twenty-fifth day of the month following each (monthly or quarterly) tax period.

24. Under the new rules introduced in Article 103(5a) of the VAT Law, the time limit for payment of the VAT payable on intra-Community acquisitions of motor fuels is significantly curtailed: that VAT must be paid within five days from the entry of the motor fuels into the national territory.

25. In practice, the taxable person pays the VAT payable on intra-Community acquisitions of motor fuels before the submitting the VAT return relating to those acquisitions, since that return has to be submitted no later than on the fifth day of the month following that in which the payment obligation arose pursuant to Article 99(11a) of that law.

26. A taxable person making such acquisitions can exercise his right of deduction only in the return which he submits after paying the VAT due. Thus, contrary to the ordinary scheme applicable to intra-Community acquisitions, there is a time delay between the payment of the VAT, which is required within the five days following the entry of the motor fuels into the national territory, and the deduction of that VAT, which will occur when the VAT return is submitted.

27. It is in the light of those specific features that the referring court asks about the compatibility

of the scheme introduced in Article 103(5a) of the VAT Law with a number of provisions of EU law.

28. First, that court asks about the compatibility of that new scheme with Article 110 TFEU and Article 273 of the VAT Directive. That question relates not to the difference between the rules governing intra-Community acquisitions of motor fuels and those governing other intra-Community acquisitions, as described above, but about the potential difference of treatment between intra-Community acquisitions of motor fuels and domestic supplies of motor fuels.

29. Next, the referring court asks about the compatibility of the obligation to pay VAT early, as laid down in Article 103(5a) of the VAT Law, with Article 69 of the VAT Directive, which governs the chargeability of VAT.

30. Lastly, that court asks whether the obligation to make early payment may be regarded as an interim payment, the collection of which is permitted in Article 206 of the VAT Directive. It points out in this regard that the amount to be paid by the taxable person is a ‘gross’ amount of VAT, that is to say the amount of VAT payable on intra-Community acquisitions before deduction.

31. It is in those circumstances that the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Do Article 110 [TFEU] and Article 273 of [the VAT Directive] not preclude a provision such as Article 103(5a) of the [VAT Law], which stipulates that, in the case of an intra-Community acquisition of motor fuels, the taxable person is obliged, without being called upon to do so by the head of the customs office, to calculate and pay the amounts of tax to the account of the customs office competent for dealing with the payment of excise duty:

(a) within five days of the date on which the goods in question enter the place of receipt of excise goods specified in the relevant permit – if the goods are the subject of intra-Community acquisition within the meaning of the [Excise Duty Law] by a registered consignee under the excise duty suspension procedure pursuant to the provisions on excise duty;

(b) within five days of the date on which such goods enter a tax warehouse from the territory of a Member State other than Poland;

(c) upon movement of these goods within the territory of Poland – if the goods are moved outside of the excise duty suspension procedure pursuant to the provisions on excise duty?

(2) Does Article 69 of [the VAT Directive] preclude a provision such as Article 103(5a) of the VAT Law, which stipulates that, in the case of the intra-Community acquisition of motor fuels, the taxable person is obliged, without being called upon to do so by the head of a customs office, to calculate and pay the amounts of tax to the account of the customs office competent for dealing with the payment of excise duty:

(a) within five days of the date on which the goods in question enter the place of receipt of excise goods specified in the relevant permit – if the goods are the subject of intra-Community acquisition within the meaning of the [Excise Duty Law] by a registered consignee under the excise duty suspension procedure pursuant to the provisions on excise duty;

(b) within five days of the date on which such goods enter a tax warehouse from the territory of a Member State other than Poland;

(c) upon the movement of these goods within the territory of Poland – if the goods are moved outside of the excise duty suspension procedure pursuant to the provisions on excise duty:

- where the above amounts are interpreted as not constituting interim VAT payment within the meaning of Article 206 of [the VAT Directive]?

(3) Does an interim VAT payment within the meaning of Article 206 of [the VAT Directive] which is not paid on time lose its legal status at the end of the tax period for which it is to be paid?'

32. The request for a preliminary ruling was registered at the Court Registry on 22 November 2019.

33. The applicant in the main proceedings, the tax authorities, the Polish Government and the European Commission lodged written observations. Those parties and interested parties also replied in writing to questions put by the Court on 27 November 2020.

IV. **Analysis**

34. By its questions, the referring court asks the Court about the compatibility of an obligation to make early payment, such as that at issue in the dispute in the main proceedings, with Article 110 TFEU and with Articles 69, 206 and 273 of the VAT Directive. It is apparent from the order for reference that the applicant in the main proceedings was required, under that obligation, to pay in full the VAT due on each intra-Community acquisition of motor fuels within five days following their entry into the national territory.

35. For reasons of clarity, I consider it expedient to structure my analysis in four parts.

36. In the first place, I will reject the existence of discrimination prohibited by Article 110 TFEU, on account of the lack of comparability between domestic transactions and intra-Community acquisitions in the light of the risk of VAT fraud.

37. I will examine, in the second place, the possibility of adopting such an obligation to make early payment on the basis of Article 273 of the VAT Directive, as a measure intended to prevent evasion. Although such a possibility is not precluded, it is however subject to compliance with the other provisions of that directive, in particular those relating to the chargeability of VAT.

38. In the third place, I will set out the reasons why such an obligation to make early payment is incompatible with Articles 62 and 69 of the VAT Directive, in so far as it allows the tax authorities to require payment from the taxable person before the VAT becomes *chargeable*, it being understood that the possibility of collecting interim payments, which is provided for in Article 206 of that directive, can relate only to VAT that has become chargeable under the provisions cited above.

39. In the fourth place, and in the alternative, I will explain why Article 206 of the Directive precludes the collection of interim payments relating to the *gross* amount of a taxable transaction considered in isolation, without taking account of the taxable person's right of deduction.

A. **The compatibility of the obligation to make early payment with Article 110 TFEU (first question)**

40. The Polish Government argued, as a preliminary point, that Article 110 TFEU is not applicable on the ground that the VAT Directive brought about exhaustive harmonisation.

41. It is settled case-law that any national measure in a sphere which has been the subject of

exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of primary law. (3)

42. It is true that some provisions of the VAT Directive give no leeway to the Member States, in particular those relating to the definition of intra-Community acquisition, the definition of importation (4) or the determination of the basis of assessment. (5)

43. However, other provisions do grant – sometimes significant – leeway to the Member States, such that that directive cannot be regarded as having harmonised all aspects thereof exhaustively. (6) This is the case, inter alia, with Article 273 of the VAT Directive, about which the Court is asked in the present case and which allows Member States to adopt certain measures to ensure the correct collection of VAT and to prevent evasion. (7)

44. I am therefore of the view that the provisions of primary law, including Article 110 TFEU, are indeed applicable to such measures. I would point out that the Court ruled on the interpretation of VAT legislation and of Article 110 TFEU at the same time in the judgment in *Dansk Denkavit*, (8) which concerned a case with some similarities to the present case.

45. That being said, I would add that that question is exclusively formal in scope in the context of the present case since Article 273 of the VAT Directive incorporates, as a condition of validity of the measures adopted, the prohibition of discrimination between domestic transactions and transactions between Member States, thus enshrining the prohibition laid down in Article 110 TFEU.

46. Article 110 TFEU prohibits Member States from imposing on the products of other Member States internal taxation in excess of that imposed on similar domestic products.

47. I would point out that intra-Community acquisitions and domestic supplies give rise, ultimately, to the payment of the same amount of VAT, as the tax authorities and the Polish Government observed. Those two types of transactions are in fact subject to the same rate of VAT and give rise to a right to deduct the input VAT payable.

48. The question that arises is that of a potential *cash-flow disadvantage* affecting intra-Community acquisitions of motor fuels as compared with domestic supplies of motor fuels. The Court has already held on several occasions that laying down shorter deadlines for payment for domestic taxes charged on goods from other Member States is, in principle, contrary to Article 110 TFEU. (9)

49. Accordingly, it is necessary to determine whether, in the context of the dispute in the main proceedings, taxable persons making intra-Community acquisitions of motor fuels are required to pay VAT sooner than taxable persons purchasing motor fuels by way of domestic supplies.

50. As the tax authorities and the Polish Government explained, there is some similarity, as regards the payment of VAT, between the schemes applicable to those two types of transactions.

51. In the case of an intra-Community acquisition of motor fuels, the taxable person is required, pursuant to Article 103(5a) of the VAT Law, to pay VAT to the State within five days from the entry of the motor fuels into the national territory. In his subsequent return, he will be entitled to deduct that amount of VAT.

52. In the case of a domestic supply of motor fuels, the seller is obliged to invoice the purchaser for the amount of VAT payable. In practice, the purchaser does not pay the VAT directly to the State but to the seller, and the seller is responsible for remitting that VAT to the State, it

being understood that the purchaser will be entitled to deduct the VAT in his subsequent return.

53. Thus, in both cases (intra-Community acquisition and domestic supply of goods), the purchaser has to ‘advance’ the total amount of the VAT payable on the purchase of motor fuels, it being understood that he will be entitled to deduct that VAT in his subsequent return.

54. That being said, in the context of the dispute in the main proceedings, in what circumstances do intra-Community acquisitions of motor fuels suffer a cash-flow disadvantage as compared with domestic supplies of motor fuels? The existence of such a disadvantage will depend on the payment terms agreed in the context of domestic supplies of motor fuels, between the seller and the purchaser, as the tax authorities and the Polish Government rightly pointed out.

55. Put more precisely, intra-Community acquisitions will suffer a cash-flow disadvantage each time the deadline for payment agreed in the context of domestic supplies is *longer* than that imposed in Article 103(5a) of the VAT Law, that is to say five days from the entry of the motor fuels into the national territory. In the words of both the tax authorities and the Polish Government, the deadline agreed between the parties in the context of a domestic supply may, in practice, be either shorter or longer than five days.

56. However, according to settled case-law, an infringement of Article 110 TFEU occurs when the tax on the imported product and the tax on the similar domestic product are calculated in a different way and under different conditions so that the imported product, *even if only in certain cases*, is more heavily taxed. (10) It follows that a system of taxation can be considered compatible with Article 110 TFEU only if it is proved to be so structured as to exclude *any possibility* of imported products being taxed more heavily than domestic products. (11)

57. In accordance with that case-law, the fact that taxable persons making intra-Community acquisitions of motor fuels are required, *in certain cases*, to pay VAT sooner than taxable persons purchasing motor fuels by way of domestic supplies is sufficient, in principle, to find that Article 110 TFEU is infringed.

58. However, it remains to be determined whether Article 110 TFEU lays down an absolute obligation, to the effect that it prohibits *any* heavier domestic taxation of goods from other Member States, or whether that obligation offers some flexibility that allows the Member State concerned to *justify* such a difference of treatment.

59. It must be observed, in that regard, that Article 110 TFEU is not coupled with a justification clause, as are, inter alia, the provisions prohibiting restrictions on the freedoms of movement. (12) In the words of the Court, ‘once discrimination has been established, Article [110 TFEU] does not provide any means of justification for the State concerned’. (13)

60. Nevertheless, the principle of non-discrimination set out in Article 110 TFEU (14) requires that, where there is a difference of treatment such as that at issue in the case in the main proceedings, the situations considered must be *comparable*.

61. The Commission has, however, argued that taxable persons purchasing motor fuels by way of an intra-Community acquisition or a domestic supply, respectively, are not in comparable situations, such that the obligation to make early payment laid down in respect of intra-Community acquisitions does not infringe Article 110 TFEU.

62. The Commission recalled that, under the transitional scheme introduced by Directive 91/680/EEC, (15) intra-Community acquisitions are characterised by the supply, within the territory of the Member State of destination, of a VAT-exempt product. The intra-Community supply made

by the seller is, in fact, exempted in the country of origin and it is for the taxable person making the intra-Community acquisition, in the country of destination, to calculate the VAT payable in his return. (16) However, the risks of fraud inherent in that situation justify putting specific preventative measures in place.

63. I agree with that line of reasoning.

64. It is in fact well established that the risks of large-scale VAT fraud are concerned specifically with intra-Community transactions, in particular in the form of ‘carousel fraud’ or ‘missing trader’ fraud. (17) Accordingly, intra-Community acquisitions and domestic supplies of motor fuels are not in a comparable situation in the light of the risk of VAT fraud. As the Commission observed, that objective difference is the result of choices made by the EU legislature when it introduced the transitional scheme under Directive 91/680.

65. Furthermore, it is not contested that the obligation to make early payment at issue in the dispute in the main proceedings helps to combat those types of fraud. First, combatting VAT fraud is the objective explicitly pursued by the ‘fuel package’ of which that early payment obligation forms part. (18) Second, as the Commission has observed, the obligation to pay in full the amount of VAT payable on the acquisition of motor fuels within five days following their entry into the national territory helps to combat ‘missing trader’ fraud.

66. I would further point out that that approach is consistent with that adopted by the Court in the judgment in *Dansk Denkavit*. (19) The Court held that Article 110 TFEU did not preclude national legislation providing for different time limits for ‘imports’ (a concept which, at the time, included intra-Community acquisitions) (20) and domestic transactions in relation to VAT, in view of the fact that the schemes applicable to those transactions were not comparable. (21)

67. Lastly, I would draw attention to the schematic consequences of the interpretation *a contrario*, namely a finding of infringement of Article 110 TFEU. Having regard to the hierarchy of rules of EU law, that interpretation would mean that the EU legislature would not have the power to amend the VAT Directive so as to provide for an obligation to make early payment solely in respect of intra-Community acquisitions with a view to combatting the abovementioned types of fraud. I consider an interpretation to that effect to be unacceptable.

68. In the light of the foregoing, I take the view that Article 110 TFEU is to be interpreted as not precluding the introduction of an obligation to make early payment of VAT in respect of intra-Community acquisitions of motor fuels within five days following their entry into the national territory, such as that at issue in the dispute in the main proceedings.

B. **The possibility of classifying the obligation to make early payment as a ‘measure to prevent evasion’ within the meaning of Article 273 of the VAT Directive (first question)**

69. Article 273 of the VAT Directive allows Member States to impose certain additional obligations in order to ensure the correct collection of VAT or to prevent evasion, provided that:

– those obligations comply with the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons; and

– the obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

70. Consideration must be given, in the first place, to whether those conditions are satisfied in connection with the obligation to make early payment at issue in the dispute in the main

proceedings.

71. First of all, as I noted in point 65 of this Opinion, the purpose of that obligation is to combat methods of VAT fraud that exploit specific features of the scheme applicable to intra-Community acquisitions.

72. Next, I set out, in points 58 to 68 of this Opinion, the reasons why that obligation is not discriminatory, since intra-Community acquisitions and domestic supplies of motor fuels are not in a comparable situation in the light of the risk of VAT fraud.

73. Lastly, I would add that the obligation to make early payment does not give rise, in trade between Member States, to 'formalities connected with the crossing of frontiers' within the meaning of Article 273 of the VAT Directive.

74. After all, it is apparent from well-established case-law that, if the purpose of a formality imposed on the importer of a product subject to a national tax is to ensure payment of the debt corresponding to that tax, such a formality is related to the event giving rise to the tax, namely an intra-Community acquisition, and not to the crossing of a frontier within the meaning of that provision. (22)

75. There can be little doubt that an obligation to make early payment seeks, by its very nature, to ensure payment of the debt corresponding to the tax payable, as the Commission rightly noted.

76. It follows from the foregoing that the conditions explicitly laid down in Article 273 of the VAT Directive are satisfied by the obligation to make early payment at issue in the dispute in the main proceedings.

77. However, it is still necessary, in the second place, to examine whether laying down such an obligation does not go beyond the leeway granted to the Member States by Article 273 of the VAT Directive.

78. In that connection, the Court has repeatedly held that Article 273 of the VAT Directive does indeed afford discretion to the Member States as regards the means of achieving the objectives of recovering VAT in full and combatting fraud. However, they must exercise their power in accordance with EU law and its general principles and, in particular, in accordance with the principle of proportionality and the principle of fiscal neutrality. (23)

79. That requirement to comply with EU law means that, in order to be justified on the basis of Article 273 of the VAT Directive, an obligation laid down by a Member State must be compatible with the other provisions of that directive.

80. As the Commission rightly observed, that interpretation is borne out by the existence of Article 395 of the VAT Directive, under which the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures *for derogation from the provisions of that directive*, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

81. The relationship between those provisions seems clear to me: since Article 395 of the VAT Directive makes the adoption of measures derogating from that directive subject to authorisation from the Council, Article 273 of that directive is necessarily concerned with the adoption of measures that *do not derogate* from that directive. An interpretation *a contrario* would render Article 395 of the VAT Directive meaningless, in particular the need to obtain authorisation from the Council to adopt derogatory measures.

82. In my view, confirmation of that interpretation can be found in the judgment in *Maks Pen*, (24) in which the Court examined the compatibility of an obligation established on the basis of Article 273 of the VAT Directive with the provisions on the chargeability of VAT and the right to deduct that tax.

83. Therefore, turning to the present case, it is necessary to examine whether the obligation to make early payment is compatible with the other provisions of the VAT Directive, in particular those relating to the chargeability of VAT, which form the subject matter of the second and third questions submitted by the referring court.

C. The compatibility of an obligation to make early payment relating to non-chargeable VAT with Articles 62, 69 and 206 of the VAT Directive (second and third questions)

84. By its second and third questions, the referring court asks the Court, in essence, whether an obligation to make early payment such as that at issue in the main proceedings is contrary to Articles 62 and 69 of the VAT Directive, which govern the chargeability of VAT on intra-Community acquisitions, as interpreted in the light of Article 206 of that directive, which provides for the possibility of collecting interim payments.

85. In order to clarify the scope of those questions, I consider it useful to recall the relationship between the concepts of the ‘chargeable event’, ‘chargeability’ and the ‘obligation to pay’ VAT.

86. According to the definitions provided in Article 62 of the VAT Directive, the *chargeable event* means the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled. In turn, the *chargeability* of VAT means the entitlement of the tax authority under the law, at a given moment, to claim the tax from the person liable to *pay*, even though the time of *payment* may be deferred. Pursuant to Article 206 of that directive, the *obligation to pay* arises, in principle, on submission of the VAT return.

87. It can be inferred from those definitions that the chargeable event, chargeability and the obligation to pay represent three *successive* stages in the process culminating in the collection of VAT: for an obligation to pay to arise, the tax must become chargeable; for the tax to be chargeable, the chargeable event must have occurred beforehand. (25)

88. In the case of the obligation to make early payment at issue in the dispute in the main proceedings, it appears to me difficult to dispute that the *chargeable event* actually occurred when that obligation arose, as the tax authorities and the Commission rightly observed.

89. Indeed, under Article 68 of the VAT Directive, the chargeable event occurs when the intra-Community acquisition is made. Article 103(5a) of the VAT Law expressly refers to ‘intra-Community acquisitions’ of motor fuels and gives rise to the obligation at issue following the entry of the motor fuels into the national territory. (26) Thus, the obligation to make early payment at issue in the dispute in the main proceedings arises, by definition, after the occurrence of the chargeable event.

90. However, I am of the opinion that such an obligation is incompatible with the provisions on the *chargeability* of VAT, and more specifically with Articles 62 and 69 of the VAT Directive.

91. Under Article 69 of the VAT Directive, read in conjunction with Article 222 of that directive, VAT on an intra-Community acquisition *becomes chargeable* on issue of the invoice or no later than on the fifteenth day of the month following that in which the chargeable event occurs (if no invoice has been issued by that time).

92. However, Article 103(5a) of the VAT Law gives rise to the obligation to make early payment regardless of the conditions of chargeability laid down in Article 69 of the VAT Directive, namely within five days following the entry of the motor fuels into the national territory. More specifically, that obligation arises regardless of whether an invoice is issued and before the expiry of the time limit mentioned in the preceding point (at the end of which the VAT necessarily becomes chargeable).

93. Accordingly, such a provision appears to me irreconcilable with Article 69 of the VAT Directive, read in the light of Article 62 of that directive. VAT becomes chargeable ‘when the tax authority becomes entitled to claim the tax from the person liable to pay’. Before that entitlement arises, the tax authority cannot take any steps to obtain payment of the VAT.

94. I note that the VAT Directive does not contain any exception to the provisions of Article 69 thereof concerning the chargeability of VAT on intra-Community acquisitions, as the referring court observed. Irrespective of the exact wording of the rules determining the time at which VAT becomes chargeable, (27) the principle is the same for all transactions subject to VAT: a tax authority does not have the power to *require* any payment whatsoever before the VAT becomes *chargeable*.

95. That finding also applies to the possibility of collecting interim payments, as provided for in the second sentence of Article 206 of the VAT Directive, contrary to the claims made by the tax authority and the Polish Government.

96. Under that provision, any taxable person is required to pay the net amount of the VAT when submitting his return, it being understood that Member States may require that interim payments be made in advance.

97. However, it is apparent from the relationship between the relevant provisions that that possibility afforded to Member States to require that interim payment be made can relate only to VAT that has become chargeable under Article 62 et seq. of the VAT Directive.

98. First, it is clear that the second sentence of Article 206 of the VAT Directive (possibility of collecting interim payments) qualifies the principle established in the first sentence of that provision (obligation to pay on submission of the return), which comes under Chapter 1, entitled ‘Obligation to pay’, in Title XI of that directive.

99. However, second, the second sentence of Article 206 of the VAT Directive cannot establish a derogation from Articles 62 and 69 of that directive, which come under Title VI of the Directive, which is entitled ‘Chargeable event and chargeability of VAT’.

100. More specifically, the possibility of collecting interim payments allows Member States to bring forward not the date on which VAT becomes chargeable (second stage of the VAT collection process), but rather the date of payment of VAT that has already become chargeable (third stage of the VAT collection process). (28)

101. I find further confirmation of that interpretation in a joint reading of Articles 206 and 250 of the VAT Directive. Although Article 206 of that directive does provide for an obligation to pay on submission of the return, Article 250 of the Directive clarifies that the taxable person must set out in that return 'all the information needed to calculate the tax that has become *chargeable*'. (29) Those provisions confirm that, under the scheme established by the VAT Directive, any obligation to pay, even an obligation to make early payment, can relate only to VAT that has become *chargeable*, which must be calculated in the taxable person's return.

102. I also find confirmation of that interpretation in the judgment in *Balocchi*, (30) in which the Court distinguished between chargeable and non-chargeable taxes.

103. That judgment concerned Italian legislation under which taxable persons were required, before 20 December, to make a payment equating to 65% of the net amount of VAT payable for the whole of the current quarter, which ended no later than 5 March of the following year.

104. The Court held that such a mechanism was contrary to the provisions of the Sixth Directive that correspond to Articles 62, 63 and 206 of the VAT Directive, since it culminated in 'transforming the interim payments into advances which are contrary to the rule of the directive under which Member States *should require VAT to be paid only in respect of transactions which have been performed*'. (31)

105. In other words, the Court found that no payment, including interim payments, can be required before the VAT becomes *chargeable*. (32) In so doing, the Court adopted the position taken by the Commission in that case, (33) which is in line with the interpretation that I propose in the present case.

106. I would clarify that that interpretation does not preclude the flat-rate calculation of interim payments, provided that that calculation is structured so as to avoid the inclusion of taxes that are not yet chargeable. This is, in my view, the main lesson to be taken from the judgment in *Balocchi*. (34)

107. It follows from the foregoing that Articles 62 and 69 of the VAT Directive preclude an obligation to make early payment such as that at issue in the case in the main proceedings in so far as it allows the tax authority to require payment from the taxable person before the VAT becomes chargeable. That conclusion is not undermined by the possibility of collecting interim payments, as provided for in Article 206 of that directive, which can relate only to VAT that has become chargeable pursuant to the provisions cited above.

108. Since it is contrary to several provisions of the VAT Directive, such an obligation to make early payment cannot be adopted on the basis of Article 273 of that directive.

D. **The compatibility of an obligation to make early payment relating to the gross amount of VAT payable on a taxable transaction with Article 206 of the VAT Directive (second and third questions)**

109. In the alternative, I would now like to consider one further aspect of the obligation to make early payment at issue in the case in the main proceedings, namely the fact that it relates to the *gross amount*

of the VAT payable on an intra-Community acquisition of motor fuels, considered in isolation, without taking into account the taxable person's right of deduction.

110. For the following reasons, I take the view that Article 206 of the VAT Directive precludes such an obligation, as the applicant in the main proceedings and the Commission rightly argued.

111. The fundamental principle laid down in Article 206 of the VAT Directive is that the taxable person is obliged to pay VAT not after each *taxable transaction* that he makes (for example, an intra-Community acquisition or a supply of goods), but in fact on expiry of each *tax period*. Thus, the *net amount* of VAT, to which reference is made in the first sentence of that provision, is obtained by adding together the VAT payable on all input taxable transactions made during the tax period, from which the VAT paid on all output transactions made during that same period is deducted.

112. In my view, the possibility of collecting interim payments, as provided for in the second sentence of Article 206 of the VAT Directive, allows Member States to require, *in advance*, a partial payment of the *net amount* of the VAT calculated over the *tax period* as a whole. The term 'interim payment' in fact means the partial payment of an amount which will be payable subsequently, that is to say the net amount of VAT calculated over the tax period as a whole. That interpretation is supported by the Polish language version of that provision, which expressly refers to the collection of interim payments on 'that amount', (35) as noted by the applicant in the main proceedings.

113. Contrary to the claims made by the tax authority and the Polish Government, that interpretation does not make it impossible or excessively difficult, in practice, to collect interim payments. In order to be compatible with the second sentence of Article 206 of the VAT Directive, such payments must be based on an assessment of the net amount of VAT payable at the end of the tax period, like the obligation to make early payment examined by the Court in the judgment in *Balocchi*. (36)

114. However, that provision cannot be interpreted as making it possible to require the *gross amount* of VAT payable on each *taxable transaction* taken in isolation, as laid down by the obligation to make early payment at issue in the dispute in the main proceedings. In my view, an interpretation to that effect would ultimately change the very nature of VAT, which is a tax the payment of which is required at the end of each *tax period* and not after each taxable transaction.

115. I would point out that that interpretation is in no way called into question by the judgment in *Macikowski*. (37) As the applicant in the main proceedings and the Commission rightly observed, the solution adopted in that judgment was justified by special – if not exceptional – circumstances having regard to all the transactions subject to VAT, and cannot be applied generally.

116. More specifically, that judgment concerned the payment of the VAT due on the sale, effected through enforcement, of immovable property belonging to a taxable person, the company Royal. Mr Marian Macikowski, the court enforcement officer, had seized and auctioned that immovable property. The sale price, including the amount of VAT payable, had been deposited into the account of the court having jurisdiction. However, as VAT was not paid within the time limits specified, the tax authority had held Mr Macikowski liable, as the paying agent.

117. The Court held that, in such circumstances, Article 206 of the VAT Directive does not preclude the obligation, on the court enforcement officer, to pay the *gross amount* of the VAT payable on the sale of the immovable property effected through enforcement. (38)

118. However, that interpretation was explicitly based on one essential finding, namely the

distinction between the person liable to VAT on that transaction (the court enforcement officer, Mr Macikowski) and the person enjoying the right of deduction at the end of the tax period (the taxable person, Royal). (39) In such circumstances, Article 206 of the VAT Directive does not preclude an obligation to pay the gross amount of VAT on the taxable transaction in question, since, by definition, the person liable to pay that amount (the court enforcement officer) does not have the corresponding right of deduction.

119. Moreover, I would point out that that solution is tailored to the context of a sale effected through enforcement, the proceeds of which cannot be paid to the owner of the property, who is none other than the taxable person.

120. The judgment in *Macikowski* (40) is however irrelevant in all 'ordinary' situations, in which the person liable to VAT *is* the taxable person who enjoys the right of deduction. In all those situations, an interim payment within the meaning of that provision can relate only to part of the *net amount* of the VAT payable during the *tax period*.

121. I would add that the scope of the judgment in *Macikowski* (41) is further limited by paragraph 58 thereof, in which the Court notes that the payment of VAT by the person liable (the court enforcement officer) is required *after the submission of the return* by the taxable person. However, in the circumstances of the dispute in the main proceedings, the early payment is required before the submission of the return by the taxable person. (42)

122. It follows from the foregoing that Article 206 of the VAT Directive precludes an obligation to make early payment of VAT in respect of intra-Community acquisitions of motor fuels within five days following the entry of the motor fuels into the national territory, such as that at issue in the dispute in the main proceedings, since that obligation relates to the gross amount of the VAT payable on that transaction, considered in isolation, and not on the net amount of the VAT calculated over the tax period as a whole.

V. **Conclusion**

123. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) for a preliminary ruling as follows:

(1) Article 110 TFEU is to be interpreted as not precluding the introduction of an obligation to make early payment of value added tax (VAT) in respect of intra-Community acquisitions of motor fuels within five days following the entry of the motor fuels into the national territory.

(2) Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive (EU) 2016/856 of 25 May 2016, is to be interpreted as not precluding the introduction of an obligation to make early payment of VAT in respect of intra-Community acquisitions of motor fuels within five days following the entry of the motor fuels into the national territory, provided that that obligation is compatible with the other provisions of that directive, in particular those relating to the chargeability of VAT.

(3) Articles 62 and 69 of Directive 2006/112, as amended by Directive 2016/856, are to be interpreted as precluding an obligation to make early payment in respect of intra-Community acquisitions of motor fuels within five days following the entry of the motor fuels into the national territory, in so far as it allows the tax authority to require payment from the taxable person before the VAT becomes chargeable, it being understood that the possibility of collecting interim payments, as provided for in Article 206 of that directive, can relate only to VAT that has become chargeable pursuant to the provisions cited above.

(4) Article 206 of Directive 2006/112, as amended by Directive 2016/856, is to be interpreted as precluding an obligation to make early payment of VAT in respect of intra-Community acquisitions of motor fuels, since that obligation relates to the gross amount of the VAT payable on that transaction, considered in isolation, and not on the net amount of the VAT calculated over the tax period as a whole.

1 Original language: French.

2 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive (EU) 2016/856 of 25 May 2016 (OJ 2016 L 142, p. 12) (‘the VAT Directive’).

3 See, inter alia, judgments of 11 December 2003, *Deutscher Apothekerverband* (C?322/01, EU:C:2003:664, paragraph 64); of 1 July 2014, *Ålands Vindkraft* (C?573/12, EU:C:2014:2037, paragraph 57); and of 17 September 2020, *Hidroelectrica* (C?648/18, EU:C:2020:723, paragraph 25).

4 See Opinion of Advocate General Campos Sánchez-Bordona in *Eurogate Distribution and DHL Hub Leipzig* (C?226/14 and C?228/14, EU:C:2016:1, point 106).

5 See Opinion of Advocate General Kokott in *Grattan* (C?310/11, EU:C:2012:568, point 50) and judgment of 19 December 2012, *Grattan* (C?310/11, EU:C:2012:822, paragraph 34).

6 See, in the same vein, with regard to Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), Opinion of Advocate General Cruz Villalón in *Commission* v *France* (C?216/11, EU:C:2012:819, point 49) and judgment of 14 March 2013, *Commission* v *France* (C?216/11, EU:C:2013:162, paragraph 28).

7 See, to that effect, Opinion of Advocate General Elmer in *Eismann* (C?217/94, EU:C:1996:183, point 29).

8 Judgment of 10 July 1984 (42/83, EU:C:1984:254, paragraph 27). That case concerned Danish legislation providing for different accounting periods and time limits for payment for import VAT from the corresponding periods and time limits for payment of VAT under the internal system.

9 See judgments of 27 February 1980, *Commission* v *Ireland* (55/79, EU:C:1980:56, paragraph 9); of 10 July 1984, *Dansk Denkavit* (42/83, EU:C:1984:254, paragraph 30); of 17 June 1998, *Grundig Italiana* (C?68/96, EU:C:1998:299, paragraphs 23 and 24); and of 12 February 2015, *Oil Trading Poland* (C?349/13, EU:C:2015:84, paragraph 48).

10 See, inter alia, judgments of 2 April 1998, *Outokumpu* (C?213/96, EU:C:1998:155, paragraph 34); of 19 March 2009, *Commission* v *Finland* (C?10/08, not published, EU:C:2009:171, paragraph 23); and of 15 March 2018, *Cali Esprou* (C?104/17, EU:C:2018:188, paragraph 41).

11 See, inter alia, judgments of 19 March 2009, *Commission* v *Finland* (C?10/08, not published, EU:C:2009:171, paragraph 24); of 19 December 2013, *X* (C?437/12, EU:C:2013:857, paragraph 28); and of 12 February 2015, *Oil Trading Poland* (C?349/13, EU:C:2015:84, paragraph 46).

12 For instance, Article 36 TFEU is a justification clause which relaxes the prohibitions laid down in Articles 34 and 35 TFEU.

13 Judgment of 17 June 1998, *Grundig Italiana* (C?68/96, EU:C:1998:299, paragraph 24). See also Opinion of Advocate General Bot in *Visnapuu* (C?198/14, EU:C:2015:463, point 57).

14 See, inter alia, judgments of 17 July 1997, *Haahr Petroleum* (C?90/94, EU:C:1997:368, paragraph 29); of 5 October 2006, *Nádasdi and Németh* (C?290/05 and C?333/05, EU:C:2006:652, paragraph 51); and of 8 November 2007, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* (C?221/06, EU:C:2007:657, paragraph 56).

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

16 See point 23 of this Opinion.

17 See, inter alia, Opinion of Advocate General Ruiz-Jarabo Colomer in *Kittel and Recolta Recycling* (C?439/04 and C?440/04, EU:C:2006:174, points 27 to 35); Opinion of Advocate General Poiares Maduro in *Federation of Technological Industries and Others* (C?384/04, EU:C:2005:745, points 7 to 9); and Opinion of Advocate General Szpunar in *Schoenimport "Italmoda" Mariano Previti and Others* (C?131/13, C?163/13 and C?164/13, EU:C:2014:2217, points 31 to 38).

18 See point 21 of this Opinion.

19 Judgment of 10 July 1984 (42/83, EU:C:1984:254, paragraph 32).

20 Before the concept of 'intra-Community acquisition' was introduced into the transitional scheme by Directive 91/680, Article 7 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, 'the Sixth Directive') defined 'importation' as the entry of goods into the territory of a Member State. Under the current scheme, the concept of 'intra-Community acquisition' covers supplies of goods between Member States (Article 20 of the VAT Directive), whereas the concept of 'importation' is restricted to entries of goods from non-Member States (Article 30 of the VAT Directive).

21 Judgment of 10 July 1984, *Dansk Denkavit* (42/83, EU:C:1984:254, paragraph 32).

22 Judgments of 18 January 2007, *Brzezi?ski* (C?313/05, EU:C:2007:33, paragraphs 47 and 48); of 3 June 2010, *Kalinchev* (C?2/09, EU:C:2010:312, paragraph 27); and of 12 February 2015, *Oil Trading Poland* (C?349/13, EU:C:2015:84, paragraph 37).

23 See, inter alia, judgments of 17 May 2018, *Vámos* (C?566/16, EU:C:2018:321, paragraph 41); of 21 November 2018, *Fontana* (C?648/16, EU:C:2018:932, paragraph 35); and of 8 May 2019, *EN.SA.* (C?712/17, EU:C:2019:374, paragraphs 38 and 39).

24 Judgment of 13 February 2014 (C?18/13, EU:C:2014:69, paragraphs 42 to 48).

25 With regard to the need to distinguish between those three concepts, see judgment of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraphs 21 to 24).

26 See point 14 of this Opinion.

27 In the case of domestic transactions, the time at which VAT becomes chargeable is the subject of more complex rules: see Articles 63 to 67 of the VAT Directive.

28 See points 85 to 87 of this Opinion.

29 Emphasis added.

30 Judgment of 20 October 1993 (C?10/92, EU:C:1993:846).

31 See judgment of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraphs 27 and 31). Emphasis added.

32 Under Article 63 of the VAT Directive, 'the chargeable event shall occur and *VAT shall become chargeable* when the goods or the services *are supplied*' (emphasis added).

33 In the report for the hearing in *Balocchi* (C?10/92), the Commission's arguments are summarised as follows: 'The Commission argues in the first place that the Italian legislation is contrary to Article 10 of the Directive. The essential rule laid down by that provision – which harmonized the concepts of chargeable event and the chargeability of VAT – is that *the tax is chargeable only when the taxable transaction has been carried out; advance payment of the tax – albeit partial – may in no event be demanded*. … Likewise, Article 22 of the directive, which provides for the possibility of demanding "interim payments", authorizes Member States to postpone the date for the payment of the tax and *to demand interim payments between the time when the tax is chargeable and the date laid down for its payment*' (emphasis added).

34 Judgment of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraphs 27 to 31).

35 'Ka?dy podatnik zobowi?zany do zap?aty VAT musi zap?aci? kwot? netto VAT w momencie sk?adania deklaracji VAT przewidzianej w art. 250. Pa?stwa cz?onkowskie mog? jednak?e ustali? inny termin zap?aty tej kwoty lub pobra? zaliczki od tej kwoty.'

36 Judgment of 20 October 1993 (C?10/92, EU:C:1993:846). See points 102 to 106 of this Opinion.

37 Judgment of 26 March 2015 (C?499/13, EU:C:2015:201).

38 Judgment of 26 March 2015, *Macikowski* (C?499/13, EU:C:2015:201, paragraph 57 et seq.).

39 Judgment of 26 March 2015, *Macikowski* (C?499/13, EU:C:2015:201, paragraph 57).

40 Judgment of 26 March 2015 (C?499/13, EU:C:2015:201).

41 Judgment of 26 March 2015 (C?499/13, EU:C:2015:201).

42 See points 17 and 26 of this Opinion.