Provisional text

OPINION OF ADVOCATE GENERAL

EMILIOU

delivered on 7 April 2022(1)

Case C?696/20

B.

v

Dyrektor Izby Skarbowej w W.

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

(Reference for a preliminary ruling – VAT Directive – Article 41 – Applicability – Non-exempt intra-Community supply – Reclassification of a transaction within a chain of transactions by the tax authority – Obligation to pay value added tax (VAT) on the transaction incorrectly classified as a domestic transaction by a party – Principle of proportionality)

I. Introduction

1. Making an error at the start of a mathematical exercise which is, otherwise, well executed, may generally lead to two possible outcomes depending on the personality of the professor. One might either receive credit for the part that is correct or one might be marked strictly for the wrongly completed exercise. It seems that, if tax authorities behaved like mathematics professors, they would most likely mark according to the second scenario, at least on basis of the facts of the present case.

2. B is a company established in the Netherlands which acted as an intermediary in a chain of transactions involving at least three operators. B purchased goods from BOP, a company established in Poland, and resold those goods to its own customers located in other Member States.

3. Although this chain did not involve any fraud, and although the valued added tax (VAT) was in fact declared at every stage, the Polish authorities nonetheless considered that this had been done incorrectly because the supply associated with the transport by which the goods were

shipped directly from BOP to B's final customers had been wrongly established. While B treated the first transaction (the supply from BOP to B) as a domestic transaction and the second one (B's own supplies to its customers) as an intra-Community transaction, attributing the transport to the latter, the Polish authorities attributed the transport and thus the intra-Community nature to the first transaction.

4. That reclassification led the Polish authorities to apply the fiction established in Article 41 of the VAT Directive (2) which determines that the place of an intra-Community acquisition of goods (and thus the place of taxation) is, in short, the Member State which issued the VAT identification number under which the person acquiring the goods acted, except where VAT has been applied in the place where the transport of the goods ends. As B could not provide evidence that it had applied VAT to the reclassified intra-Community acquisition in the Member States of final destination of the goods, the Polish authorities relied on the Polish VAT identification number that B had used for that acquisition to request the payment of the VAT.

5. The Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), the referring court seised of the matter, notes however that tax was already applied by B's customers. The referring court, therefore, harbours doubts as to whether Article 41 of the VAT Directive, read in the light of the principles of neutrality and proportionality, precludes the resulting situation in which the tax was, according to that court, paid twice; namely, by B's customers in the Member State of destination of the goods and also by B in Poland by application of the national rule transposing that provision.

II. **Legal framework**

1. ***European Union law***

6. Pursuant to Article 20 of the VAT Directive:

'"Intra-Community acquisition of goods" shall mean the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.

…'

7. Pursuant to Article 40 of the VAT Directive 'the place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends'.

8. Article 41 of the VAT Directive reads as follows:

'Without prejudice to Article 40, the place of an intra-Community acquisition of goods as referred to in Article 2(1)(b)(i) shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that VAT has been applied to that acquisition in accordance with Article 40.

If VAT is applied to the acquisition in accordance with the first paragraph and subsequently applied, pursuant to Article 40, to the acquisition in the Member State in which dispatch or transport of the goods ends, the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition.'

9. Article 138(1) of the VAT Directive, in its version prior to the adoption of Directive (EU) 2018/1910, (3) provided as follows:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

10. Article 1(3) of Directive 2018/1910 states:

'Article 138 [of the VAT Directive] is amended as follows:

'(a) paragraph 1 is replaced by the following:

"1. Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, where the following conditions are met:

(a) the goods are supplied to another taxable person, or to a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods begins;

(b) the taxable person or non-taxable legal person for whom the supply is made is identified for VAT purposes in a Member State other than that in which the dispatch or transport of the goods begins and has indicated this VAT identification number to the supplier";

…'

2. ***National law***

11. Article 25 of the ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug (Law on the tax on goods and services of 11 March 2004, 'the Law on VAT') reads as follows:

'1. An intra-Community acquisition of goods shall be deemed to have been made in the territory of the Member State in which the goods are located at the time when their dispatch or transport ends.

2. Notwithstanding paragraph 1, where the person acquiring the goods referred to in Article 9(2), in making an intra-Community acquisition of goods, has provided the number assigned to him by the Member State concerned for the purposes of intra-Community transactions other than the Member State in which the goods are located at the time when their dispatch or transport ends, the intra-Community acquisition of goods shall also be deemed to have been made in the territory of that Member State, unless the person acquiring the goods demonstrates that the intra-Community acquisition of goods:

(1) has been taxed in the territory of the Member State in which the goods are located at the time when their dispatch or transport ends; or

(2) is deemed to have been taxed in the territory of the Member State in which the goods are located at the time when their dispatch or transport ends due to the application of the simplified intra-Community triangular transaction procedure referred to in Chapter XII.'

III. **Facts, national proceedings and the question referred**

12. B is a company established in the Netherlands and registered for VAT purposes in that Member State. At the relevant time (April 2012), it was also registered for VAT purposes in Poland.

13. During that period, it acted as an intermediary in a chain of supplies relating to the same goods and involving at least three different operators. B purchased goods from BOP and then resold them to its own customers. The goods were shipped directly from the initial supplier in Poland (BOP) to the last operator in the supply chain.

14. When it acquired the goods from BOP, B used its Polish VAT number. B considered those supplies to be domestic supplies and, accordingly, applied the VAT rate of 23% to them. B then classified the supplies it made to its clients as intra-Community supplies taxed at 0%. Those clients declared the VAT applicable to the intra-Community acquisition.

15. By its decision of 11 June 2015, the Dyrektor Urzedu Kontroli Skarbowej w R. (Director of the Tax Audit Office in R., Poland) ('the first-instance tax authority') reclassified the transaction at issue after it concluded that the supply to which the transport should be ascribed had been identified incorrectly. While B ascribed the transport to the second supply (made by it to its clients), the first-instance tax authority considered that the transport should have been ascribed to the first supply in the chain made by BOP to B. Accordingly, it considered that the first transaction amounted to an intra-Community supply which ought to have been declared as an intra-Community acquisition by B in the Member State of destination of the goods, for which purpose B should have registered there, while B's supplies to its clients there should have been taxed as domestic transactions.

16. Moreover, since B used its Polish VAT registration number, that is to say a VAT number provided for by a Member State other than the Member State in which the transport of the goods at issue ended, the first-instance tax authority decided, on the basis of Article 25(2), point 1 of the Law on VAT, transposing Article 41 of the VAT Directive, that B had to declare the VAT on its (reclassified) intra-Community acquisition in Poland. At the same time, it confirmed that BOP had to invoice VAT on its supply to B at the rate of 23% (4) and that B did not have the right to deduct the corresponding input VAT. (5)

17. By its decision of 11 September 2015, the Dyrektor Izby Skarbowej w W. (Director of the Tax Chamber in W) essentially confirmed those findings. (6)

18. B challenged that decision before the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) which rejected its action as unfounded.

19. That court shared the view of the tax authorities that B had characterised incorrectly both supplies in question and determined wrongly the supply to which the transport ought to have been ascribed.

20. B brought an appeal on a point of law before the Naczelny S?d Administracyjny (Supreme Administrative Court), that being the referring court.

21. B argues before that court that Article 25(1) and (2), point 1, of the Law on VAT was incorrectly applied because those provisions apply only to intra-Community acquisitions and not to

national situations (that is, as B explains, when the transport of goods starts in the Member State which issued the VAT registration number). B also argues that there has been an incorrect application of Article 25(2) of the Law on VAT, as well as of Article 41 of the VAT Directive read in combination with Article 16 of Implementing Regulation (EU) 282/2011, (7) because Article 25(2) of the Law on VAT was applied to a transaction that had already been taxed as a domestic transaction in Poland. Finally, B argues that Article 25(2), point 1, of the Law on VAT was applied incorrectly to its situation because the supplies at issue had been taxed in the Member States where the transport ended (by its own customers).

22. The referring court notes that the VAT has been paid at every stage of the chain at issue and that there is nothing to suggest fraud. That court states that it is B's wrongful assessment of the supplies at issue that resulted in the VAT being due by that operator in Poland.

23. It also notes that the Polish tax authorities lack competence to verify the entire chain of supplies at issue, which means that the VAT paid by B's customers in the Member State of destination of the goods cannot be taken into account. That, in the referring court's view, results in a disproportionate tax burden for B.

24. In those circumstances, the Naczelny S?d Administracyjny (Supreme Administrative Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'Do Article 41 of [the VAT Directive] and the principles of proportionality and neutrality preclude the application, in a situation such as that at issue in the main proceedings, of a national provision such as Article 25(2) of [the Law on VAT] to an intra-Community acquisition of goods by a taxable person

– if that acquisition has already been taxed in the territory of the Member State in which dispatch ends, by the persons acquiring the goods from that taxable person

– where it has been established that the taxable person's actions did not involve any tax fraud, but that they were the result of an incorrect designation of supplies in chain transactions and that that taxable person's Polish VAT identification number was provided for the purposes of a domestic rather than an intra-Community supply?'

25. Written observations in the present case were submitted by B, the Dyrektor Izby Skarbowej w W., the Polish Government, as well as the European Commission. Those parties also presented oral argument at the hearing which took place on 27 January 2022.

IV. **Assessment**

26. For Article 41 of the VAT Directive to apply, there must be, inter alia, an intra-Community acquisition of goods. Whether a given supply within a chain (such as the first supply concerned in the main proceedings) can be qualified as such depends on 'ascription of transport'. As the parties presented different views on how this issue should be assessed, I shall begin this Opinion by making preliminary remarks on that very matter (A). I will then address the question at the heart of the present case by turning to the rationale underpinning Article 41 of the VAT Directive (B) and by examining its applicability to the case in the main proceedings (C).

A. **Preliminary remarks on the ascription of the transport**

27. I note that, when assessing the tax treatment of the supplies of goods forming part of a chain, it is of paramount importance to establish the exact segment in that chain to which the

transport occurring in that context should be ascribed. That ascription determines which part of the supplies is to be classified as an intra-Community supply, and, thus, must be exempt from VAT by the Member States, as provided for by Article 138(1) of the VAT Directive.

28. That provision, in the version applicable to the facts of the case in the main proceedings, provided that the 'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began'. (8)

29. When the Court interpreted that provision it held that, in the context of a chain of successive supplies which gave rise to a single intra-Community transport, the transport 'can be ascribed to only one of the supplies, which, therefore, will alone be exempt …'. (9)

30. The Court held that the question of which supply in the chain is the one to which the transport shall be ascribed must be answered based on an overall assessment of all the circumstances of the individual case. (10) In that context, the Court stressed the importance of determining when the transfer of the right to dispose of the goods as an owner occurred. (11)

31. In the present case, B and the Dyrektor Izby Skarbowej w W. have adopted different views on the issue of the ascription of the transport by which the goods of the first operator in the chain (BOP) were shipped to the last one (B's customers). While B considered that that transport had to be ascribed to the second supply in the chain, namely to its own supplies to its customers, the Dyrektor Izby Skarbowej w W. considered that the transport had to be ascribed to the first supply (made by BOP to B). That difference in perspective was consequently reflected in their respective assessments as to which of the supplies constituted an intra-Community supply. That, in turn, affected their views as to the tax treatment of each of the supplies at issue.

32. In the present proceedings, B relies more specifically on Article 36a of the VAT Directive to argue that its position on the ascription of the transport complies with the second paragraph of that provision.

33. I observe that Article 36a of the VAT Directive indeed clarifies the issue of the ascription of the transport within a chain of supplies by providing, in its second paragraph, that 'the dispatch or transport shall be ascribed only to the supply of goods by the intermediary operator where the intermediary operator [such as B in the present case] has communicated to his supplier the VAT identification number issued to him by the Member State from which the goods are dispatched or transported'. Thus, if it were applicable to the case at hand, that provision would confirm the position taken by B. However, in my view, B cannot rely on it, in the present case, because that provision was introduced into the VAT Directive by Directive 2018/1910, (12) that is several years after the transaction at issue took place. As such, it is not applicable to the case at hand *ratione temporis.* Furthermore, I see nothing, whether it be in the text of Directive 2018/1910 or in the legislative history, to support B's claim that the content of the second paragraph of Article 36a of the VAT Directive reflects the Court's pre-existing case-law.

34. It follows from the Commission's proposal which led to the adoption of Directive 2018/1910 that that provision results from the Member States' request 'for legislative improvements in order to increase legal certainty for operators in determining the supply within the chain of transactions to which the intra-Community transport must be ascribed'. (13) Also other *travaux preparatoires* reveal an intention on the part of the EU legislature to 'avoid different approaches amongst Member States, which may lead to double or non-taxation, and in order to enhance legal certainty for operators'. (14) That concern is now expressed in recital 6 of Directive 2018/1910.

35. Those elements confirm, in my view, that the ascription of the transport in the main proceedings must be assessed in the light of the case-law referred to in point 30 above, reflecting the situation prior to the adoption of that directive. That conclusion is corroborated by the Explanatory Note on the so-called 'Quick Fixes', which states that 'the VAT Directive, in its wording prior to 1 January 2020, did not provide for any concrete rule for the allocation of the intra-Community transport of the goods', which thus had to be made based on an 'overall assessment of all the specific circumstances … in each particular case'. (15)

36. With those clarifications made, I recall that it is for the referring court, which has the exclusive power to establish and assess the facts of the dispute in the main proceedings, (16) to determine the ascription of the transport within the chain of supplies at issue. (17) The analysis which follows is thus relevant only if the referring court were to confirm that the transport shall be ascribed to the first supply at issue.

B. **Rationale underpinning Article 41 of the VAT Directive**

37. An intra-Community acquisition of goods has to be taxed, in general, in the Member States where the transport of the goods ends. That is provided for in Article 40 of the VAT Directive and reflects the main rule of the current regime of the common system of VAT which allocates the authority to tax to the State in which final consumption of the goods supplied takes place. (18)

38. By derogation (but without prejudice to the latter main rule), Article 41 of the VAT Directive determines the place of an intra-Community acquisition of goods (and thus the place of taxation) as also, put simply, the Member State which issued the VAT identification number under which the person acquiring the goods acted, except where VAT has been applied in the place where transport of the goods ends.

39. As the Court has held, Article 41 of the VAT Directive 'seeks, first, to ensure that the intra-Community acquisition in question is subject to tax and, secondly, to prevent double taxation in respect of the same acquisition'. (19)

40. The objective of preventing tax loss reflects uncertainty as to the Member State in which the dispatch or transport will effectively end. (20) An intra-Community acquisition of goods follows an intra-Community supply of goods which, in principle, has to be exempt pursuant to Article 138(1) of the VAT Directive. (21) Hence, in order to avoid tax losses, it is important to ensure that the same operation is subject to tax by the person making the acquisition.

41. It is true that, in pursuit of that objective, Article 41 of the VAT Directive creates a potential for double taxation because it creates two places of acquisition of the goods, one in the Member State which issues the VAT identification number, which is the fictional place of acquisition, and the other in the Member State in which transport of the goods ends (which is the real place of acquisition).

42. Such double taxation should, however, only be temporary because the second paragraph

of Article 41 of the VAT Directive provides for a corrective mechanism consisting in the possibility, for the operator concerned, of demonstrating that the transaction has been taxed in accordance with Article 40 of the VAT Directive, that is to say, in the Member State in which transport ends. In that situation, 'the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition'.

43. By making it possible to use that corrective mechanism, Article 41 of the VAT Directive is aimed at avoiding double taxation. (22) It is also yet another expression of the aim of transferring the tax revenue to the Member State in which the final consumption of the goods takes place. (23)

C. **Applicability of Article 41 of the VAT Directive to the case in the main proceedings**

44. The issue of the applicability of Article 41 of the VAT Directive to the case in the main proceedings has been approached, in the present proceedings, from different angles. In order to address those different angles, I will first examine B's argument according to which the applicability of Article 41 of the VAT Directive is altogether precluded because B made the acquisition with the Polish VAT identification number, that is to say with a VAT identification number of the Member State of origin of the goods (1).

45. Since I will conclude that the latter fact did not preclude the application of Article 41 of the VAT Directive at the relevant time, I will then turn to the referring court's question regarding the relevance of the fact that B's customers paid tax on the *second* operation in the chain at issue (2).

46. In this respect, I will also conclude that that circumstance does not affect the application of Article 41 of the VAT Directive. At that juncture, I shall move beyond the question as expressly put and examine the fact that the national authorities treated the *first supply* in the chain at issue after its reclassification as a non-exempted intra-Community supply. In the light of that specific circumstance, I will conclude that the application of the national rules transposing Article 41 of the VAT Directive creates a disproportionate tax burden and is precluded (3).

1. ***Is Article 41 of the VAT Directive applicable where the intermediary operator uses the VAT identification number of the Member State of origin of the goods?***

47. B argues that Article 41 of the VAT Directive cannot apply in the main proceedings because at the time when B acquired the goods from BOP, it used its Polish VAT registration number, a number issued by the Member State of origin of the goods. According to B, such a situation amounts to a domestic supply to which Article 41 of the VAT Directive cannot apply.

48. I admit that the facts of the present case do not reflect a typical scenario that one would have in mind when discussing Article 41 of the VAT Directive. Indeed, such a scenario would involve three Member States with, for example, a taxable person established in the Netherlands acquiring, under its Netherlands VAT registration number, goods in Poland to be delivered to Germany. (24) In that situation, the Netherlands authorities would act based on the fiction provided for under Article 41 of the VAT Directive so as to 'secure' the collection of the tax unless (and until) the tax is effectively paid in the Member State of final destination of the goods (Germany in the given example).

49. That being said, I fail to see anything from the wording of Article 41 of the VAT Directive, or from its context or purpose, (25) that would limit the application of that provision to the scenario involving three Member States and which would, in any event, support the position taken by B when considered in the light of the provisions of the VAT Directive which were applicable at the relevant time.

50. As regards, *first*, the wording, it follows from Article 41 of the VAT Directive that the authorities of the Member State which issued the VAT identification number can exercise their powers provided by that provision, where there is an intra-Community acquisition of goods and where the trader has acted with the VAT identification number issued by that Member State. Those conditions seem to have been fulfilled in the case in the main proceedings. By contrast, the wording of that provision does not make its application dependent upon any specific VAT identification. (26)

51. *Second*, looking at the broader normative context, B argues that regard should be had to Article 20 of the VAT Directive from which it follows, according to that party, that for there to be an intra-Community acquisition of goods, the trader must have acted with a VAT registration number issued by a Member State other than that of the origin of the goods.

52. Article 20 of the VAT Directive defines the concept of 'intra-Community acquisition of goods' and states that it is 'the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began'.

53. B explained at the hearing, in essence, that Article 41 of the VAT Directive cannot broaden the concept of 'intra-Community acquisition' as defined in Article 20 of the same directive. In B's view, Article 41 of the VAT Directive merely puts into place a special mechanism for the taxation of intra-Community acquisitions. According to B, the concept of the intra-Community acquisition requires the Member States of departure and destination of the goods to be different. However, according to B, *in casu*, the Polish authorities taxed the intra-Community acquisition of goods in the Member State of origin even though those goods were transported from that very state. In such a situation, according to B, the operation must be taxed as a domestic transaction.

54. Contrary to B's arguments, I fail to see how, under the rules of the VAT Directive applicable *ratione temporis* to the case in the main proceedings, the definition provided for in Article 20 of the VAT Directive would make the conclusion as to whether an operation is an intra-Community acquisition or not dependent on the use of a specific VAT identification number.

55. Prior to the adoption of Directive 2018/1910,(27) the Court relied on the wording of Article 20 and Article 138(1) (as then in force) of the VAT Directive to hold that 'the place where a trader is identified for VAT purposes is not a criterion for classification of an intra-Community supply or intra-Community acquisition'. (28)

56. Indeed, the concept of intra-Community acquisition defined in Article 20 of the VAT Directive is tied to the concept of intra-Community supply in Article 138(1) of the same directive because there can be, in principle, an intra-Community acquisition only where there is, first, an intra-Community supply. (29) Since the applicability of Article 41 of the VAT Directive requires the existence of an intra-Community acquisition, as it follows from its text, that provision is in turn tied to both Article 20 and Article 138(1) of the VAT Directive. (30)

57. I note that the case-law of the Court referred to in point 55 above must now be read in the light of subsequent changes made to the wording of Article 138(1) of the VAT Directive. That provision defines the material conditions under which an intra-Community supply must be exempted. More specifically and until the adoption of Directive 2018/1910, (31) the obligation to exempt occurred when 'the right to dispose of the goods as owner has been transferred to the purchaser, the supplier establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically

left the territory of the Member State of supply.' (32) By adopting Directive 2018/1910, the EU legislature added a new condition according to which 'the taxable person or non-taxable legal person for whom the supply is made [must be] identified for VAT purposes in a Member State other than that in which the dispatch or transport of the goods begins' and that person 'has indicated this VAT identification number to the supplier' as now provided for in Article 138(1)(b) of the VAT Directive.

58. It follows that the fact that the purchaser uses a VAT identification number, allocated by a Member State *other than that in which dispatch or transport of the goods began*, has become an additional substantive condition for the exemption of an intra-Community supply of goods. (33)

59. That, in my view, has a consequence for the interpretation of Article 20 of the VAT Directive as it currently stands because, as noted in point 40 above, an intra-Community acquisition logically follows on from an intra-Community supply. In other words, the former cannot occur where the latter is absent since intra-Community supply and intra-Community acquisition are essentially two sides of the same coin. In turn, the change to the material conditions for the exemption of intra-Community supplies under Article 138(1) of the VAT Directive also affects, currently, the scope of Article 41 of the VAT Directive because, as was stated, and as B in principle correctly argues, for Article 41 of the VAT Directive to apply, there must be an intra-Community acquisition within the meaning of Article 20 of the VAT Directive.

60. However, the important change to the wording of Article 138(1) of the VAT Directive which transforms the VAT registration number from a formal to a substantive requirement was made by the EU legislature with the adoption of Directive 2018/1910, (34) while the case at hand falls still under the previous regime under which the VAT identification number was not considered to be a substantive requirement but rather a formal one. (35) Therefore, as I already noted, the fact that B used the VAT identification number of the Member State of origin of the goods does not, in and of itself, preclude the intra-Community nature of the transaction and the applicability of Article 41 of the VAT Directive to the facts of the case in the main proceedings.

61. With that said, I shall now examine whether the two objectives pursued by Article 41 of the VAT Directive, namely the prevention of tax evasion and of double taxation, support my proposed interpretation of that provision.

62. In this respect, I note that both of those objectives can effectively be pursued by the authorities of the Member State of origin of the goods when the latter is also the Member State which issued the VAT identification number used for the transaction concerned.

63. The Court held that 'a VAT identification number provides proof of the tax status of the taxable person for the purposes of the application of VAT and facilitates the tax audit of intra-Community transactions'. (36) There is no reason to doubt that the VAT identification number can fulfil that role and facilitate the tax audit when that audit is conducted by the authorities of the Member State of origin of the goods and when they act under Article 41 of the VAT Directive.

64. To explain, the Member State of origin of the goods, such as Poland in the present case, will act as the place considered to be the place of the intra-Community acquisition at issue, based on the fiction established by Article 41 of the VAT Directive, so as to ensure the collection of the tax and to prevent tax evasion. It will also be able to ensure avoidance of double taxation by applying the corrective mechanism, if the trader concerned provides evidence of payment of the tax in the Member State of the final destination of the goods.

65. In other words, the role that the Member State which issued the VAT identification number fulfils when acting, on the basis of the fiction under Article 41 of the VAT Directive, is in no way

hampered when that Member State is also the country of the origins of the goods.

66. In the light of those considerations, I am of the view that the fact that an intermediary operator in a chain of supplies, such as B, acting during a period to which Directive 2018/1910 does not apply *ratione temporis*, has used a VAT identification number of the Member State of origin of the goods, does not affect the applicability of Article 41 of the VAT Directive to the acquisition made by that operator.

2. ***The relevance of the application of the tax to the acquisition, in the Member State of destination, by the customers of the intermediary operator in a chain of supplies***

67. It is not disputed that, in the present case, VAT has been applied at every stage of the given chain, including by B's customers on the acquisition of goods in the Member State of destination.

68. The referring court emphasises that last fact and asks, in essence, whether that specific fact prevents the national authorities from requiring B to pay VAT on the reclassified intra-Community acquisition of goods, by application of the national provision transposing Article 41 of the VAT Directive. That question is based on the premiss that there has been no fraud and on the basis that the trader acting as the intermediary operator in the chain (here, B) made a mistake in the classification of the respective supplies of the transaction at issue.

69. I understand that the referring court is of the view that a disproportionate tax burden has been imposed on B because, on the one hand, B's clients applied VAT in the Member State of final destination of the goods (on what was presumably considered by them to be an intra-Community acquisition) and, on the other hand, the Polish tax authorities requested B to pay VAT on the first supply made to B by BOP after that supply was reclassified as intra-Community and treated in accordance with the national provisions transposing Article 41 of the VAT Directive.

70. The Commission, in principle, makes the same observation.

71. Nevertheless, I do not consider the fact that B's customers taxed the acquisition of goods in the Member State of destination to play any role in the assessment of the applicability of Article 41 of the VAT Directive.

72. That conclusion follows from the very simple reason that the tax applied by B's customers concerns *their* acquisition of goods supplied to them by B, while the main proceedings are concerned with the applicability of Article 41 of the VAT Directive to the acquisition *carried out by B* of the goods supplied to it by BOP. In other words, the tax applied by B's customers is a tax applied to the *second* supply in the chain at issue, whereas the main proceedings are concerned with the taxation of the *first* supply in the same chain. Those are two different operations and, as such, the tax obligations that relate to them place a burden upon different operators.

73. Therefore, I am of the view that the application of VAT by B's customers could not be relied upon by B before the Polish authorities under the corrective mechanism (should the applicability of Article 41 of the VAT Directive be confirmed). In my view, first, the wording of that provision excludes that possibility because the fiction of acquisition in the Member State of VAT identification does not apply anymore when 'the person acquiring the goods establishes that VAT has been applied to *that acquisition* in [the Member State of destination of goods]'. (37) The expression 'that acquisition' refers logically, in my view and as, in essence, argued by the Polish Government, to the intra-Community acquisition made by the 'person acquiring the goods' and who is thus potentially liable to VAT under Article 41 of VAT Directive.

74. Second, taking into account the application of VAT by B's customers in order to moderate the tax burden borne by B itself cannot contribute to either of the two objectives pursued by Article 41 of the VAT Directive.

75. In that respect, it does not ensure the effective collection of the tax because, in essence, no tax could be collected in those circumstances on a specific intra-Community acquisition based on the fiction established in Article 41 of the VAT. A fortiori, the corrective mechanism deployed under those circumstances could not be invoked in order to avoid double taxation because, under the considered scenario, B would not be taxed in the Member State of destination of the goods and tax would thus, in principle, be refunded to a trader who, under this scenario, has not paid any tax in the Member State of destination.

76. In the light of the foregoing, I conclude that Article 41 of the VAT Directive and the principles of neutrality and proportionality do not preclude the application of Article 25(2) of the Law on VAT to an intra-Community acquisition of goods by a taxable person where the persons acquiring the goods from that taxable person applied VAT on the acquisition of those goods in the territory of the Member State in which the transport ends.

77. That being said, I agree with the referring court and with the Commission that the facts of the case as presented in the order for reference do indeed seem to reveal a problem of disproportionate tax burden, which, in my view, *in fine* precludes the application of Article 41 of the VAT Directive in the main proceedings.

78. However, unlike the referring court and the Commission, I am of the view that, in order to assess whether B has been subject to a tax burden which is incompatible with the principles of VAT neutrality and proportionality, the focus must be placed on *B*'s tax obligations in respect of the *first supply* at issue because the main proceedings concerns specifically that operator and that transaction.

79. In this regard, I consider it problematic that the national law transposing Article 41 of the VAT Directive was applied to a (reclassified) intra-Community acquisition that corresponded to a (reclassified) intra-Community supply which, however, was not exempted.

3. *The relevance of the non-exemption of the reclassified intra-Community supply*

80. The referring court observes that, although the supply by BOP to B was reclassified by the Polish authorities from a national to an intra-Community supply, those authorities maintained that that supply could not be exempted. The tax authorities took the position that BOP was obliged to charge 23% VAT on the reclassified intra-Community supply because B had used the Polish VAT number. Thus, B had to pay VAT invoiced to it by BOP. Moreover, as the referring court observes, B's right to deduct the corresponding input VAT was refused. (38) The referring court also adds that that issue is not covered by the question referred, but notes that that refusal resulted in B being charged 46% VAT in total.

81. In its written submissions, B refers to those facts to argue that they prevent the application of Article 41 of the VAT Directive.

82. As the Polish Government correctly pointed out at the hearing, those elements are not mentioned in the question referred. However, since they are clearly mentioned in the order for reference (and were commented upon by B in its written submission and at the hearing), I will consider them below so as to provide the referring court with a useful response in the interest of resolving the case pending before it. It is, nevertheless, clear that the legal assessment of those

elements does not fall within the scope of the present case. (39)

83. In order to understand Article 41 of the VAT Directive, this provision must be placed within the context of the broader system of the VAT Directive under which, on the one hand, intra-Community supplies are in principle exempted in the Member States of origin of goods and, on the other hand, intra-Community acquisitions are taxed in the Member State of destination. (40) That is the expression of the aim to allocate the collection of the tax revenues to the Member States of the final consumption of the goods.

84. It is within that broader scheme that Article 41 of the VAT Directive is aimed at ensuring the collection of VAT by establishing the fiction of the place of an intra-Community acquisition as being the Member State of VAT identification. Since an intra-Community acquisition of goods has, in principle, for its corollary an exempt intra-Community supply, it is important to make sure the resulting operation is taxed, either in the Member State of VAT identification or in the Member State of (actual) acquisition.

85. That being said, I recall that the measures adopted by the Member States to ensure the correct levying and collection of tax and for the prevention of fraud may not be used in such a way as to undermine the neutrality of VAT which precludes economic operators who carry out the same transactions from being treated differently in respect of the levying of VAT and which seeks to relieve the taxable person entirely of the burden of VAT in the course of his or her economic activities. (41) Moreover, in accordance with the principle of proportionality, the measures employed to secure the effective collection of tax ‘must go no further than necessary for that purpose’. (42)

86. The fact that the national authorities decided to treat the intra-Community supply made by BOP to B, after its reclassification, as ‘non-exempt’ means that the tax was indeed applied to that operation in Poland.

87. While its effective taxation in the State of origin of the goods is without prejudice to the authority of the Member State of destination, (43) that taxation renders, in my view, the need for the application of Article 41 of the VAT Directive moot because, as stated above, tax has been applied and there is no longer any reason for concern about a possible tax evasion.

88. Relying on the general scheme of exempt supplies and taxed acquisition, Article 41 of the VAT Directive provides for the Member State of VAT registration to intervene in order to prevent losses that may occur as a result of the tax exemption in the country of origin of the goods. However, since, *in casu*, there was no exemption in the Member State of origin of the goods, there was, in my view, no risk of tax evasion. Therefore, there was no reason for the Member State of VAT registration to step in, as argued, in essence, by B.

89. It is true that, if B were to pay the tax on its reclassified intra-Community acquisition in the Member State of destination of the goods, it would be able to rely on the corrective mechanism of Article 41 of the VAT Directive, as confirmed by the Polish Government at the hearing. The additional tax burden that now results from the application to B of Article 25(2) of the Law on VAT, considered in isolation, would then be mitigated. This, however, does not change the starting premiss that, because of the non-exemption of the intra-Community supply at issue, the application of that provision became unnecessary and resulted in an unnecessary tax burden.

90. In those circumstances, I am of the view that, by applying Article 25(2) of the Law on VAT to an intra-Community acquisition which resulted from a non-exempt intra-Community supply, the national authorities acted in breach of the principle of proportionality.

91. The unnecessary tax burden that was imposed upon B as a result of the application of Article 25(2) of the Law on VAT seems further exacerbated by the refusal to deduct its input VAT paid on the reclassified intra-Community acquisition. I do not think, however, that that circumstance is in itself decisive for the conclusion I reached above vis-à-vis the inapplicability of Article 41 of the VAT Directive. In my view, that conclusion would be the same even if the right to deduct were granted, because that circumstance would not affect the fact that the reclassified intra-Community supply at issue was not exempted which, as I explained, renders the application of Article 41 of the VAT Directive redundant.

92. It follows from the foregoing above that Article 41 of the VAT Directive and the principle of proportionality preclude the application of Article 25(2) of the Law on VAT to an intra-Community acquisition of goods where that acquisition resulted from an intra-Community supply which, upon verification, which it is for the referring court to carry out, was not treated as exempt.

V. **Conclusion**

93. I suggest that the Court respond to the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) as follows:

Article 41 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principles of neutrality and proportionality do not preclude the application of Article 25(2) of the ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug (Law on the tax on goods and services of 11 March 2004; 'the Law on VAT') to an intra-Community acquisition of goods by a taxable person where the persons acquiring the goods from that taxable person applied value added tax (VAT) on the acquisition of those goods in the territory of the Member State in which the transport ends.

However, Article 41 of Directive 2006/112 and the principle of proportionality preclude the application of Article 25(2) of the Law on VAT to an intra-Community acquisition of goods where that acquisition resulted from an intra-Community supply which, upon verification, which it is for the referring court to carry out, was not treated as exempt.

1 Original language: English.

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

3 Council Directive of 4 December 2018 amending Directive 2006/112 as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States (OJ 2018 L 311, p. 3).

4 It follows from the order for reference that the absence of exemption of the reclassified intra-Community supply resulted from the national rule, in force at the relevant time, according to which an exemption could not be granted when the purchaser acted under its national VAT identification number.

5 The order for reference does not contain information as to why B's right of deduction was denied.

6 It follows from the order for reference that the Dyrektor Izby Skarbowej w W. annulled the decision of the first-instance tax authority and determined a slightly higher amount of the VAT difference to be refunded for April 2012. It is also indicated that this change is irrelevant to the question referred, since the Dyrektor Izby Skarbowej w W. confirmed the factual and legal findings

made at first instance.

7 Council Implementing Regulation of 15 March 2011 laying down implementing measures for Directive 2006/112 on the common system of value added tax (OJ 2011 L 77 p. 1).

8 Article 138(1) of the VAT Directive has been amended by Directive 2018/1910. I discuss the change in more depth below in point 57 of this Opinion.

9 See, for example, judgment of 19 December 2018, *AREX CZ* (C?414/17, EU:C:2018:1027, paragraph 70 and the case-law cited), or of 23 April 2020, Herst, C?401/18, EU:C:2020:295, paragraph 43 and the case-law cited).

10 See, for example, judgment of 16 December 2010, *Euro Tyre Holding* (C?430/09, EU:C:2010:786, paragraph 27), or of 23 April 2020, *Herst* (C?401/18, EU:C:2020:295, paragraph 43 and the case-law cited).

11 See, recently, judgments of 19 December 2018, *AREX CZ* (C?414/17, EU:C:2018:1027, paragraphs 70 and 72), and of 10 July 2019, *Kuršu zeme* (C?273/18, EU:C:2019:588, paragraph 39). See, also, for further guidance, Opinion of Advocate General Kokott in *AREX CZ* (C?414/17, EU:C:2018:624, points 58 to 64), in which she emphasises specifically the related risk for the accidental loss of the goods during the transport.

12 See above, footnote 3 to this Opinion.

13 Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States (COM(2017) 569 final), p. 11 *in fine*.

14 See the Council Document ST 10335 2018 INIT of 20 June 2018, recital 7 of the proposed text.

15 European Commission, Explanatory Notes on the EU VAT changes in respect of call-off stock arrangements, chain transactions and the exemption for intra-Community supplies of goods (‘2020 Quick Fixes’), Council Directive (EU) 2018/1910, Council Implementing Regulation (EU) 2018/1912, Council Regulation (EU) 2018/1909, 2019 (‘Explanatory Notes on 2020 Quick Fixes’), point 3.2.

16 See, for example, judgment of 13 January 2022, Benedetti Pietro e Angelo and Others (C?377/19, EU:C:2022:4, paragraph 37 and the case-law cited).

17 See, for guidance, for example, the references in footnotes 10 and 11 above.

18 See recital 10 of the VAT Directive and, for example, judgment of 16 December 2010, *Euro Tyre Holding* (C?430/09, EU:C:2010:786, paragraph 43 and the case-law cited).

19 See, in the context of Article 28(b)(A)(2) of the Sixth Directive that corresponds to Article 41 of the VAT Directive, judgment of 22 April 2010, *X* (C?536/08 and C?539/08, EU:C:2010:217, paragraph 35). Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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).

20 In the context of Article 28b(A)(1) of the Sixth Directive, corresponding to Article 40 of the VAT Directive, it was noted that ‘it is not sufficiently certain that [the transfer of the goods from one Member State to another] has taken place so long as the goods have not passed the frontier’.

Opinion of Advocate General Kokott in Teleos and Others (C?409/04, EU:C:2007:7, point 46).

21 See also the Commission's proposal (COM(2017) 569 final), p. 2, quoted above in footnote 13.

22 In the context of the Sixth Directive, judgment of 22 April 2010, X (C?536/08 and C?539/08, EU:C:2010:217, paragraph 35).

23 Ibid., paragraph 44. See above point 37 of the present Opinion.

24 See, for instance, practical examples given in this sense in Ben Terra, Julie Kajus, *A Guide to the European VAT Directives*, IBFD, 2021, point 11.3.1, and in the context of German legislation transposing Article 41 of the VAT Directive, by Marchal *in* Rau/Dürrwächter, *Umsatzsteuerrecht*, UStG, § 3d, point 16, or by Hummel *in* Mössner u.a., *Steuerrecht international tätiger Unternehmen*, point 14.387.

25 I recall that 'when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'. See, for example, judgment of 19 April 2018, Firma Hans Bühler (C?580/16, EU:C:2018:261, paragraph 33 and the case-law cited).

26 As opposed to other provisions of the VAT Directive. See, for instance, Article 141(a), (c) and (d) of the VAT Directive.

27 See above, footnote 3 to this Opinion.

28 Judgment of 26 July 2017, Toridas (C?386/16, EU:C:2017:599, paragraph 42). See also judgment of 27 September 2012, *VSTR* (C?587/10, EU:C:2012:592, paragraph 30 and the case-law cited).

29 Bearing in mind that 'the meanings of "intra-Community supply" and "intra-Community acquisition" are objective in nature and apply without regard to the purpose or results of the transactions concerned'. See, for example, judgment of 16 December 2010, *Euro Tyre Holding* (C?430/09, EU:C:2010:786, paragraph 28 and the case-law cited).

30 See Opinion of Advocate General Kokott in *X* (C?84/09, EU:C:2010:252, point 49 in which she notes that 'Member States must … observe a uniform interpretation of the provisions on exemption for intra-Community supplies (Article 138 of [the VAT Directive) and the taxation of intra-Community acquisitions (Article 20 of [the VAT Directive]'.

31 See above, footnote 3 to this Opinion.

32 See, for instance, judgment of 9 October 2014, *Traum* (C?492/13, EU:C:2014:2267, paragraph 24 and the case-law cited).

33 Explanatory Notes on 2020 Quick Fixes, see above footnote 15, point 1.1., p. 9. See also the Commission Proposal (COM(2017) 569), see above footnote 13, pp. 10 to 11.

34 Recital 3 of Directive 2018/1910 recalls that 'the Council, … invited the Commission to make certain improvements to the Union VAT rules for cross-border transactions with regard to the role of the VAT identification number in the context of the exemption for intra-Community supplies, call-off stock arrangements, chain transactions and the proof of transport for the purposes of the exemption for intra-Community transaction'. See also recital 7.

35 See, for example, judgments of 20 October 2016, Plöckl (C?24/15, EU:C:2016:791, paragraphs 41 and 42); or of 9 February 2017, Euro Tyre (C?21/16, EU:C:2017:106, paragraph 29 and the case-law cited). See also Explanatory Notes on 2020 Quick Fixes, quoted above in footnote 15, point 4.3.1., p. 71.

36 Judgment of 6 September 2012, *Mecsek-Gabona* (C?273/11, EU:C:2012:547, paragraph 60).

37 Emphasis added.

38 As noted in footnote 5 above, the order for reference contains no information about the reasons for that refusal.

39 For what is relevant, I recall that pursuant to established case-law, the exemption of an intra-Community supply must be granted upon the satisfaction of the material conditions. Those conditions now include the VAT identification number as explained above in points 57 to 61 of the present Opinion. However, the case at hand does not fall under this new rule *ratione temporis*.

40 See judgment of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 24 and the case-law cited). See also the Commission's proposal (COM(2017) 569 final), p. 2, quoted above in footnote 13.

41 See, for both facets of the principle of neutrality, Opinion of Advocate General Kokott in AGROBET CZ (C?446/18, EU:C:2019:1137, point 57 and the case-law cited).

42 Judgment of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 53 and the case-law cited).

43 Article 16 of the Implementing Regulation 282/2011, referred to in footnote 7 above, provides: 'Where an intra-Community acquisition of goods within the meaning of Article 20 of [the VAT Directive] has taken place, the Member State in which the dispatch or transport ends shall exercise its power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began. ...' See also Opinion of Advocate General Kokott in *X* (C?84/09, EU:C:2010:252, point 49).