Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 22 March 2018 [1]

Case C-108/17

UAB 'Enteco Baltic'
v
Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos,
other party:
Vilniaus teritorinė muitinė

(Request for a preliminary ruling
from the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania))

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Article 14(1) of Directive 2006/112/EC — Article 138(1) and Article 143(1)(d) and (2) of Directive 2006/112 — VAT Exemption for importation followed by an exempt intra-Community supply — Goods dispatched or transported from a third country to a Member State other than the Member State of arrival — Communication by the importer of the VAT registration number of the purchaser in the Member State of destination — Formal or substantive requirement for entitlement to the import exemption — Sufficient documentation to prove dispatch of the goods to another State Member — Concept and conditions of the transfer of the right to dispose of the goods to the purchaser — Good faith of the importer — Knowledge on the part of a taxable person of the purchaser's involvement in tax evasion — Acceptance by the competent authority of declarations by the importer — Legal certainty — Possible duty of the competent authority to help a taxable person to collect the information necessary to prove compliance with the conditions of exemption)

I. Introduction

1. By this reference for a preliminary ruling, the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) seeks from the Court, in essence, an interpretation of Article 14(1), Article 138(1) and Article 143(1)(d) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,[2] as amended by Council Directive 2009/69/EC of 25 June 2009, as regards tax evasion linked to imports[3] ('the VAT Directive'), and the principle of the protection of legal certainty.

2. The seven questions submitted by the referring court have been raised in the context of the importation, by UAB Enteco Baltic, into Lithuania of fuels from Belarus intended for intra-Community supply to other Member States.

1 Original language: French.

2 OJ 2006 L 347, p. 1.

3 OJ 2009 L 175, p. 12.

3. The most difficult issue raised in the present case is whether the obligation on the part of an importer, such as Enteco Baltic, to communicate to the competent authorities of the Member State of importation the VAT identification number of its customer, issued in the Member State of destination of the goods, has constituted, since the entry into force of Directive 2009/69, which introduced that obligation into Directive 2006/112, a mere formal requirement, or conversely a substantive requirement, for entitlement to the exemption from import VAT.

II. Legal framework

A. EU law

4. According to Article 14(1) of the VAT Directive, '"supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

5. Article 20 of that directive defines 'intra-Community acquisition' as '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'.

6. Under Article 131 of that directive:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other [EU law] provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

7. Article 138(1) of that directive provides:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the [European Union], 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. Article 143 of Directive 2006/112 was amended by Directive 2009/69, the first subparagraph of Article 2(1) of which establishes 1 January 2011 as the deadline for transposition. Recitals 3 to 5 of Directive 2009/69 state:

'(3) The importation of goods is exempt from [VAT] if followed by a supply or transfer of those goods to a taxable person in another Member State. The conditions under which that exemption is granted are laid down by Member States. Experience, however, shows that divergences in application are exploited by traders to avoid payment of VAT on goods imported under those circumstances.

(4) In order to prevent that exploitation it is necessary to specify, for particular transactions, at Community level, a set of minimum conditions under which this exemption applies.

(5) Since, for those reasons, the objective of this Directive, namely to address the problem of VAT evasion, cannot be sufficiently achieved by the Member States themselves and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the [EC] Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.'

9. Under Article 143(1)(d) and (2) of the VAT Directive:

'1. Member States shall exempt the following transactions:

…

(d) the importation of goods dispatched or transported from a third territory or a third country into a Member State other than that in which the dispatch or transport of the goods ends, where the supply of such goods by the importer designated or recognised under Article 201 as liable for payment of VAT is exempt under Article 138;

…

2. The exemption provided for in paragraph 1(d) shall apply in cases when the importation of goods is followed by the supply of goods exempted under Article 138(1) and (2)(c) only if at the time of importation the importer has provided to the competent authorities of the Member State of importation at least the following information:

(a) his VAT identification number issued in the Member State of importation or the VAT identification number of his tax representative, liable for payment of the VAT, issued in the Member State of importation;

(b) the VAT identification number of the customer, to whom the goods are supplied in accordance with Article 138(1), issued in another Member State, or his own VAT identification number issued in the Member State in which the dispatch or transport of the goods ends when the goods are subject to a transfer in accordance with Article 138(2)(c);

(c) the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State.

However, Member States may provide that the evidence referred to in point (c) be indicated to the competent authorities only upon request.'

10. In accordance with Article 157(1)(a) of the VAT Directive 'Member States may exempt … the importation of goods which are intended to be placed under warehousing arrangements other than customs warehousing'.

11. Article 167 of that directive provides that a right of deduction is to arise at the time the deductible tax becomes chargeable.

B. Lithuanian law

12. Article 35 of the Lietuvos Respublikos pridėtinės vertės mokesčio įstatymas (Lithuanian Law on value added tax, 'the Law on VAT'), entitled 'Cases where imported goods are exempt from import VAT', provides:

'1. Imported goods shall be exempt from VAT if it is known at the time of importation that those goods are intended for export and will be transported to another Member State and that the supply of goods by the importer from the Republic of Lithuania to another Member State, under Chapter VI of this Law, shall be subject to a zero rate of VAT.

2. The provisions of this article shall be applicable if the importer is registered for the purposes of VAT in the Republic of Lithuania and the goods are transported to another Member State within a period not exceeding one month from the day of the chargeable event, referred to in Article 14(12) of (13) of this Law. A longer period for transport may be set on objective grounds.

3. Detailed rules for the application of this article shall be laid down by the national customs service ["the SND"] together with the central tax authority.'

13. Article 49(1) of the Law on VAT provides:

'The zero rate of VAT shall apply to goods supplied to a person registered for the purposes of VAT in another Member State which are exported from the national territory to another Member State [regardless of whether the goods are transported by the supplier, the purchaser or any third party whom they might use].'

14. Article 56 of the Law on VAT, relating to 'evidence of applicability of a zero rate of VAT', provides in particular:

'1. ... A taxable person for the purposes of VAT who has applied the zero rate of VAT under Article 49 of this Law must have evidence of exportation of the goods from the national territory and, where the zero rate of VAT is applied at the time of the supply of the goods to a person registered for the purposes of VAT in another Member State, evidence that the person to whom the goods were exported is subject to VAT in another Member State.

...

4. Notwithstanding the other provisions of this Article, the tax authority shall have the right, in accordance with the detailed rules laid down by the Mokesčių administravimo įstatymas (Law on tax administration), to require the submission of additional evidence to allow an assessment of the basis for application of the zero rate of VAT. Where the taxable person is unable to show that the zero rate of VAT was duly applied to the supply of goods, to the purchase of goods from another Member State or to the supply of services, that supply of goods, that purchase of goods from another Member State or that supply of services shall be taxed at the standard rate of VAT, or at a reduced rate of VAT if such a rate is laid down for those goods or services.

...

5. Notwithstanding the other provisions of this article, the tax authority has the right to collect, on its own initiative or through the competent law enforcement services, additional evidence to allow an assessment of the basis for application of the zero rate of VAT. Having received evidence that a zero rate of VAT was improperly applied to the supply of goods, to the acquisition of goods from another Member State or to the supply of services, the supply of goods, the acquisition of goods from another Member State or the supply of services shall be taxed at the standard rate of VAT, or at a reduced rate of VAT if such a rate is laid down for those goods or services.'

15. Paragraph 4 of the 'Rules on the exemption from import VAT of goods imported and supplied to another Member State of the European Union' ('the Rules'), approved by Decision No 1B-439/VA-71 of the Director of the SND and the Head of the Valstybinės mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos (National Tax Inspectorate, Ministry of Finance, Lithuania) ('the Tax Inspectorate') of 29 April 2004, is worded as follows:

'4. Goods imported into the national territory shall be exempt from VAT if all the following conditions are met:

4.1 it is known at the time of importation that the goods are intended for export and will be transported to another Member State;

4.2 the importer of the goods is registered for the purposes of VAT in the national territory when the customs import declaration is made for customs inspection purposes;

4.3 the supply of goods imported from Lithuania into another Member State under Title VI of the Law on VAT is exempt in so far as a zero rate of VAT is applied;

4.4 the importer supplies to the taxable person of the other Member State the same goods as those he imported into the national territory;

4.5 the goods are transported to the other Member State within a period not exceeding one month from the day of the chargeable event referred to in Article 14(12) or (13) of the Law on VAT or within the extended period for transport to another Member State provided for in paragraph 5 of the Rules.'

16. According to paragraph 7 of the Rules:'7. For customs inspection purposes, in addition to the other documents the following shall be provided with the customs import declaration:

– 7.1 the importer's certificate of registration for the purposes of VAT and a copy thereof (VAT registration certificate which is returned after verification and a copy thereof);

– 7.2 documents establishing that the goods imported into the territory of the country are intended to be transported and will be transported to another Member State (transport documents or contract, in particular).'

17. The Rules were supplemented by a point 7^1 which was added by Decision No 1B-773/VA-119 of 28 December 2010 of the Director of the SND and the Head of the Tax Inspectorate, which entered into force on 1 January 2011. Point 7^1 provides:

'The importer must without delay inform in writing the regional customs service if the place of storage of the goods or their purchaser changes (the taxable person of the other Member State and/or the Member State to which the goods are supplied as specified in the documents provided for customs inspection purposes), by presenting new evidence explaining the reasons for the changes and enclosing copies of the supporting documents.'

18. Point 27.49.1.7 of the 'Instructions for use of the single administrative document', approved by Decision No 1B-289 of 13 April 2004 of the Director of the SND, requires the importer to specify the relevant alphabetical code of the EU Member State to which the goods are exported when the import declaration is made and the personal VAT identification number of the consignee, assigned by the competent authorities of the EU Member State, if non-Community goods which are exempt from VAT under Article 35 of the Law on VAT are released for free circulation and imported into the national market.

III. Facts of the dispute in the main proceedings, questions referred for a preliminary ruling and procedure before the Court

19. Enteco Baltic is a company established in Lithuania. It is active in the wholesale trade in fuel.

20. During the 2010 to 2012 period, Enteco Baltic imported into Lithuania fuels from Belarus. Those fuels were placed under the arrangement known as 'customs procedure 42',[4] which permits their release for free circulation without being subject to import VAT. In the import declarations, that company provided the VAT identification number of a purchaser located in another Member State, to which it intended to supply the goods. It stored those goods in warehouses belonging to other Lithuanian companies for goods subject to excise duties.

21. Enteco Baltic sold those fuels to companies established in Poland, Slovakia and Hungary on the basis of written contracts and individual orders. Those contracts provided for 'ex-works' supply.[5] Accordingly, Enteco Baltic was only required to hand the fuels over to the purchasers in Lithuania and those purchasers were responsible for the continuation of transport to the Member State of destination.

22. The purchasers communicated their specific orders to Enteco Baltic by electronic mail, providing, in particular, the contact details of the representatives who would pick up the goods ordered and information relating to the tax warehouses to which those goods were to be transported.[6] VAT invoices issued by Enteco Baltic were usually sent to the purchasers by electronic mail.

23. For the purposes of their transport, the goods were the subject of electronic transport documents for goods subject to excise duties and CMR consignment notes.[7] The latter were completed by employees with responsibility at the dispatching tax warehouse and specified, inter alia, the place of dispatch of the goods (that is to say the dispatching tax warehouse), as well as the purchaser and place of receipt of those goods (that is to say the receiving tax warehouse).

24. After the supply of the goods to the receiving tax warehouses,[8] Enteco Baltic received an e-ROR confirmation[9] of supply and closure of the electronic transport document. Ordinarily, it also received CMR consignment notes confirming receipt of the goods by the receiving tax warehouses.

25. Enteco Baltic sometimes sold goods to taxable persons other than those whose identification numbers were specified on the import declarations. Information relating to those taxable persons from other Member States, including their VAT identification number, was always provided to the Tax Inspectorate in the monthly reports on the supply of goods to other Member States.

26. In 2012, the Vilniaus teritorinė muitinė (Regional Customs Service, Vilnius, Lithuania) ('the VTM') carried out a partial analysis of the import declarations for the period from 1 April 2010 to 31 May 2012 and found irregularities in the VAT identification numbers. It corrected them.

4 That procedure is called 'customs procedure 42' because, in order to obtain exemption from VAT, the importer of the goods must enter in box 37 of the single administrative document, a code that starts with 42. That procedure allows goods which are subsequently to be the subject of a Community supply to be imported free of VAT, with simplified formalities and lower costs.

5 In such commercial contracts, the seller is obliged only to hand over the goods for export, while the purchaser bears all the risks related to their transport.

6 The reference for a preliminary ruling refers only to warehouses located in Poland.

7 The CMR consignment note [drawn up on the basis of the Convention, signed at Geneva on 19 May 1956, on the Contract for the International Carriage of Goods by Road (CMR), *Treaty Series*, 1961, vol. 399, p. 189] is a land transport document which must be drafted, before the international transport of goods, by one of the parties to the contract of carriage. The CMR consignment note attests in particular the dispatch of the goods from the moment that the carrier affixes his signature to it.

8 See footnote 6 above.

9 It is common ground that an e-ROR is an electronic confirmation of the receipt of goods subject to excise duties, drawn up by the recipient.

27. In 2013, the Tax Inspectorate received information from the Polish, Slovak and Hungarian tax authorities concerning possible fraud in the application of 'customs procedure 42'. In particular, those authorities stated that they could not certify that the fuels at issue had been received by the purchasers and observed that those purchasers had not declared VAT during the period concerned.

28. In view of that information, the Tax Inspectorate carried out a tax inspection in 2013. It found that Enteco Baltic had provided sufficient evidence to show that the goods had left the country and that the right to dispose of those goods as owner had actually been transferred to the purchasers. According to the Tax Inspectorate, it has not been established that Enteco Baltic acted negligently or imprudently in the course of the transactions at issue.

29. The VTM carried out a new inspection in 2014 and 2015, the purpose and period of which overlapped partially with those of the tax inspection carried out by the Tax Inspectorate in 2013. At the end of that new inspection, the VTM found that Enteco Baltic had not supplied fuels to the taxable persons specified in the import declarations or had failed to establish that the fuels had been transported and that the right to dispose of them as owner had been transferred to the persons specified in the VAT invoices.

30. Enteco Baltic turned to a Polish economic intelligence company in order to obtain additional information on the transports at issue and requested that the VTM contact the Polish tax warehouses to obtain information which that intelligence company could not obtain. That request was not granted.

31. On 25 November 2015, the VTM adopted an inspection report, in which it found that Enteco Baltic had improperly exempted imports of fuels from Belarus. It ordered Enteco Baltic to pay an amount of EUR 3 220 822 in VAT, plus penalties and default interest.

32. The SND upheld those orders by decision of 16 March 2016. In that decision, the SND stated that the import exemption can be applied only if the right to dispose of the goods is transferred directly to another person liable for payment of VAT from another Member State. In this case, that exemption could not be granted to Enteco Baltic since the fuel had been supplied to Polish tax warehouses, whose VAT identification numbers were not specified on the VAT invoices.

33. Enteco Baltic appealed against that decision to the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission, Government of Lithuania) ('the CLF'). By decision of 1 June 2016, the CLF referred the case back to the SND.

34. Both Enteco Baltic and the SND brought proceedings before the referring court seeking, inter alia, annulment of the decision of the CLF.

35. Before that court, Enteco Baltic and the SND discussed the effect of the supply of fuels to taxable persons from other Member States who were not identified on the import declarations. That court notes that, in the monthly reports on the supply of goods to other Member States, Enteco Baltic had provided the Tax Inspectorate with all the purchasers' data, including their VAT identification numbers, without concealing the identity of the real acquirers.

36. Moreover, the referring court raises the issue of the probative value of the CMR consignment notes, the electronic administrative documents ('the e-AD' or 'e-ADs') [10] and the e-ROR letters.

10 Acronym of 'electronic administrative document'. The electronic administrative document is provided for by Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12) and must comply with the requirements of Commission Regulation (EC) No 684/2009 of 24 July 2009 implementing Council Directive 2008/118/EC as regards the computerised procedures for the movement of excise goods under suspension of excise duty (OJ 2009 L 197, p. 24). That document is required to qualify for the excise duty suspension arrangement.

37. The referring court is also seeking clarification as to the correct definition of a supply of goods, within the meaning of Article 14(1) of the VAT Directive, in a case where the right to dispose of goods as owner was transferred not directly to the purchaser, but to Polish carriers or tax warehouses. The referring court explains that, before it, Enteco Baltic relies on the case-law relating to entitlement to deduct VAT.

38. Moreover, the referring court asks whether, as considered by the CLF, the good faith of the supplier constitutes or may constitute an additional requirement for exemption from import VAT.

39. Lastly, that court seeks clarification concerning the assessment of the relevance of evidence for the purposes of application of the VAT Directive.

40. It was in those circumstances that the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 143(2) of the VAT Directive to be interpreted as prohibiting a tax authority of a Member State from refusing to apply the exemption provided for in Article 143(1)(d) of that directive solely because at the time of importation the goods were planned to be supplied to one VAT payer and therefore its VAT identification number was specified in the import declaration, but later, after a change in circumstances, the goods were transported to another taxable person (VAT payer) and the public authority was provided with full information about the identity of the actual purchaser?

(2) In circumstances such as those of the present case, can Article 143(1)(d) of the VAT Directive be interpreted as meaning that documents that have not been disproved (e-AD [electronic administrative document] consignment notes and e-ROR [electronic report of receipt] confirmations) confirming transport of the goods from a tax warehouse in the territory of one Member State to a tax warehouse in another Member State may be regarded as sufficient proof of transportation of the goods to another Member State?

(3) Is Article 143(1)(d) of the VAT Directive to be interpreted as prohibiting a tax authority of a Member State from refusing to apply the exemption provided for in that provision if the right of disposal was transferred to the purchaser of the goods not directly, but via the persons specified by it (transport undertakings/tax warehouses)?

(4) Does an administrative practice conflict with the principle of neutrality of VAT and of the protection of legitimate expectations where under that practice the interpretation differs as to what is to be regarded as a transfer of the right of disposal, and as to what evidence must be submitted to substantiate such a transfer, according to whether Article 167 or Article 143(1)(d) of the VAT Directive is applicable?

(5) Does the scope of the principle of good faith in relation to the levying of VAT also encompass the right of persons to exemption from import VAT (under Article 143(1)(d) of the VAT Directive) in cases such as that in the main proceedings, that is to say, where the customs office denies the right of a taxable person to exemption from import VAT on the basis that the conditions for further supply of goods within the European Union (Article 138 of the VAT Directive) were not complied with?

(6) Is Article 143(1)(d) of the VAT Directive to be interpreted as prohibiting an administrative practice of Member States under which the assumption that (i) the right of disposal was not transferred to a specific contractual partner and (ii) that the taxpayer knew or could have known about possible VAT fraud committed by the contractual partner is based on the fact that the undertaking communicated with the contractual partners by electronic means of communication

and that it was established when the investigation was carried out by a tax authority that the contractual partners did not operate at the addresses specified and did not declare the VAT on the transactions with the taxable person?

(7) Is Article 143(1)(d) of the VAT Directive to be interpreted as meaning that, although the duty to substantiate the right to a tax exemption falls on the taxpayer, this does not, however, mean that the competent public authority deciding the issue of transfer of the right of disposal has no obligation to collect information accessible only to public authorities?'

41. Enteco Baltic, the Lithuanian Government and the European Commission submitted written observations on those questions. Those parties also presented oral argument at the hearing on 25 January 2018.

IV. Analysis

42. Article 143(1)(d) of the VAT Directive establishes, in essence, an exemption for the importation into a Member State of goods dispatched from a third country where that importation is followed by an intra-Community supply by the importer which is exempt under Article 138 of that directive.

43. In the case in the main proceedings, it is apparent from the explanations provided by the referring court that Enteco Baltic initially benefited from the exemption provided for in Article 143(1)(d) of the VAT Directive as an importer in Lithuania of fuels from Belarus intended to be supplied to purchasers in Poland, Slovakia and Hungary, since such intra-Community supply is exempt from VAT. The period at issue in the main proceedings concerns fuel imports which took place between 1 April 2010 and 31 May 2012.

44. Following various inspections at Enteco Baltic, the consequences of which I shall return to later, the Lithuanian customs authority took the view that that company was, in the final analysis, liable for payment of VAT. As is clear from the order for reference, it is alleged, in essence, that Enteco Baltic specified, at the time of importation, a VAT identification number which ultimately did not tally with that of the actual purchasers and/or failed to establish that the imported fuels were intended to be supplied to another Member State.

45. It is clear from Article 143(2) of the VAT Directive that the exemption provided for by Article 143(1)(d) of that directive is to apply, in the case of importation followed by an intra-Community supply, only if at the time of importation the importer has provided to the competent authorities of the Member State of importation, inter alia, on the one hand, the VAT identification number issued in another Member State to the customer to whom the goods are supplied in accordance with Article 138(1) of the VAT Directive and, on the other hand, the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State.

46. In the light of the wording of Article 143(2) of the VAT Directive, it would seem at first sight that the case in the main proceedings could be easily resolved. As the Commission suggests in its written observations, it is possible to take the view that the conditions laid down by that article should be regarded not as purely formal requirements but as material requirements for entitlement to exemption from import VAT. It would follow that a failure to fulfil one of those conditions results in a refusal to grant that exemption or, as in the main proceedings in respect of Enteco Baltic, leads to a demand for recovery of VAT from the importer.

47. However, the approach proposed by the Commission in its written observations seems to me to disregard not only the somewhat particular circumstances of the case in the main proceedings but also, and more fundamentally, the difficulties as regards the relationship between the requirements laid down in Article 143(2) of the VAT Directive and the conditions for exemption of an intra-Community supply under Article 138(1) of that directive, in particular with regard to the importer's obligation, at the time of importation, to communicate the VAT registration number of the customer to whom the goods are supplied. Moreover, the Commission itself substantially qualified, if not contradicted, its own position at the hearing before the Court. [11]

48. The seven questions submitted by the referring court are concerned with the nature, scope and the fulfilment of the two abovementioned requirements provided for by Article 143(2) of the VAT Directive, having regard to the facts of the case in the main proceedings, in particular those relating to proof of transport and of transfer of ownership of the fuels and to the conduct of the Lithuanian tax and customs authorities.

49. Whilst taking into account those facts, I shall therefore, first, examine the first question referred, concerning communication of the VAT identification number of the importer's customer, as provided for in Article 143(2)(b) of the VAT Directive (A). Secondly, I shall consider the other six questions raised by the referring court, which relate to Article 143(2)(c) of the VAT Directive, namely the evidence that the imported goods are intended to be supplied to a Member State other than the Member State of importation (B).

A. The requirement to communicate the VAT identification number of the importer's customer, as provided for in Article 143(2)(b) of the VAT Directive (first question referred)

50. As I have already shown, the import exemption provided for in Article 143(1)(d) of the VAT Directive depends on the existence of a subsequent intra-Community supply which is itself exempt, under Article 138 of that directive.

51. Under Article 138(1) of the VAT Directive, Member States are to exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the European Union, 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.

52. It is settled case-law that the exemption of VAT in respect of the intra-Community supply of goods becomes applicable only if three conditions are fulfilled, that is to say when, first, the right to dispose of the goods as owner has been transferred to the purchaser, secondly, the supplier establishes that those goods have been dispatched or transported to another Member State and, thirdly, as a result of that dispatch or that transport, they have physically left the territory of the Member State of delivery. [12]

53. Those three conditions therefore constitute the material requirements which must be fulfilled in order for the supplier to obtain the exemption for an intra-Community supply, in accordance with Article 138(1) of the VAT Directive.

11 See point 72 of this Opinion.

12 See, in particular, to that effect, judgments of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 42); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 31); of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 24) and of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 30).

54. As the Court has already held, those conditions are listed exhaustively in Article 138(1) of the VAT Directive.[13] They therefore do not include an obligation on the part of the supplier to communicate the purchaser's VAT identification number issued to that purchaser in the Member State of destination.

55. Notwithstanding the important role played by the VAT identification number of taxable persons in the proper functioning of the VAT system,[14] the Court found that the requirement imposed by national law on the supplier to communicate the VAT identification number of the purchaser of the supplied goods constituted a formal requirement, the non-fulfilment of which could not, without regard to any failure to satisfy the substantive conditions for an intra-Community supply, call into question, in principle, the right of that supplier to obtain exemption from VAT for that transaction.[15]

56. The Court has made that finding subject to two reservations, which are two situations in which non-compliance with a formal requirement may lead to loss of entitlement to the exemption from VAT.

57. They are, in the first place, the situation where a taxable person has participated in tax evasion which has jeopardised the operation of the common system of VAT and where, accordingly, that taxable person has not acted in good faith and has not taken every step which could reasonably be asked of it to satisfy itself that the transaction which it is carrying out does not result in its participation in such tax evasion.[16]

58. In the second place, non-compliance with a formal requirement may lead to the refusal of an exemption from VAT if that non-compliance would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied.[17]

59. In the case in the main proceedings, it is clear from both the information provided by the referring court and the explanations provided at the hearing by the Lithuanian Government, that the tax authority, that is to say the Tax Inspectorate, responsible for ascertaining, during the inspection carried out in 2013, whether the conditions relating to the *intra-Community supply* had been fulfilled, considered that Enteco Baltic had provided sufficient evidence to show that the goods had left Lithuanian territory and that the right to dispose of those goods as owner had actually been transferred to the purchasers; moreover, it has not been established that Enteco Baltic acted negligently or imprudently in the course of the transactions at issue.

60. In the light of those findings relating to compliance with the conditions of Article 138(1) of the VAT Directive, which must be noted, the errors committed by Enteco Baltic in communicating the identification number of the purchaser or purchasers in the Member States of destination of the fuels therefore did not, according to the information supplied to the Court, prevent the Tax Inspectorate from finding that the substantive requirements for an intra-Community supply had been fulfilled.

13 See judgments of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 59); of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 29) and of 26 July 2017, *Toridas* (C-386/16, EU:C:2017:599, paragraph 47).

14 In that regard, I would point out that Article 214(1)(b) of the VAT Directive invites Member States to take the measures necessary to ensure that taxable persons are identified by means of an individual number, the individual VAT identification number referred to in Article 215 of that directive. Moreover, in addition to Article 143(2) of that directive, several provisions in that measure refer to that number, as is the case with Article 226 concerning the content of invoices and Article 365 concerning the VAT return. In the context of intra-Community transactions, the Court has also pointed out that that number facilitates the determination of the Member State in which the final consumption of the goods delivered takes place: see, in particular, judgment of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 27 and case-law cited).

15 See, to that effect, judgments of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraphs 59 to 63); of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraphs 51 and 52); of 20 October 2016, *Plöckl* (C-24/15, EU:C:2016:791, paragraph 40) and of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 32).

16 See, in particular, judgment of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraphs 39 and 40 and case-law cited).

17 Judgment of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 42 and case-law cited).

61. At this stage, it is necessary to examine whether the authorities of a Member State may nevertheless make entitlement to the exemption for the importation of goods which have been supplied, an operation occurring prior to the intra-Community supply, subject to the condition that the importer communicates, at the time of importation, the VAT identification number of the purchaser, that is to say the recipient of the intra-Community supply.

62. As is clear from the information provided by the Lithuanian Government, the national law has imposed such a requirement on the importer since 2004.

63. In my view, until the amendment of Directive 2006/112 by Directive 2009/69, such a requirement, which was in no way laid down by Article 143(1)(d) of the VAT Directive, had to be regarded as a formal requirement within the meaning of the case-law cited in point 55 of this Opinion. As such, it could not constitute a valid ground for refusing the import exemption for goods subsequently supplied to another Member State, without regard to any failure to satisfy the substantive conditions of Article 143(1)(d) and Article 138(1) of the VAT Directive.

64. Was that formal requirement converted into a substantive requirement for entitlement to the import exemption after Directive 2009/69, which inserted Article 143(2)(b) into Directive 2006/112, entered into force (that is to say from 25 July 2009)?

65. I do not believe so.

66. Admittedly, the wording of Article 143(2) of the VAT Directive might suggest that the three categories of information listed in points (a) to (c) constitute requirements, compliance with which is a condition for entitlement to the import exemption set out in Article 143(1)(d) of that directive.

67. However, at the risk of repeating myself, there can be no doubt that the importation of the goods referred to in Article 143(1)(d) of the VAT Directive is intended for consumption not in the Member State of importation but in another Member State, the exemption for which is wholly dependent on the existence of an intra-Community supply that is itself exempt, in accordance with Article 138 of the VAT Directive. Article 143(2)(b) of the VAT Directive also refers, on several occasions, to Article 138 of that directive.

68. It follows, in my view, that the substantive conditions for entitlement to the import exemption are wholly dependent on the conditions laid down in Article 138 of the VAT Directive in relation to the subsequent exemption of the intra-Community supply.

69. Accordingly, since it did not amend the substantive conditions for an intra-Community supply, provided for in Article 138 of the VAT Directive, which do not include at this stage, as I have already shown, communication by the supplier of the purchaser's VAT identification number in the Member State of destination, the EU legislature certainly could not have wished to make entitlement to the import exemption subject to fulfilment of such a requirement.

70. If the opposite were true, taxable persons importing and supplying goods supplied within the European Union would be refused entitlement to exemption from import VAT even if they fulfilled all the substantive conditions for obtaining the exemption of the intra-Community supply, on which exemption of the earlier import operation is entirely dependent.

71. In spite of the legitimate objective of combating tax evasion which led to the adoption of Directive 2009/69, I do not think that the EU legislature intended to establish a system which requires taxable persons to deal with such difficulties and inconsistencies. For the taxable persons concerned in particular, that situation would be irreconcilable with the correct and straightforward application of

the exemptions laid down in Article 131 of the VAT Directive.[18]

72. Moreover, at the hearing before the Court, the Commission stated that it was of less importance to know the precise VAT identification number of the purchaser than to be able to establish in one way or another the purchaser's identity. The Commission therefore appears to have accepted, in a manner which somewhat contradicts the content of its written observations, that the importer's communication, at the time of importation, of the purchaser's VAT identification number, provided for in the Article 143(2)(b) of the VAT Directive, remains a formal requirement.

73. Failure to comply with such a requirement therefore does not result, in my opinion, in loss of entitlement to the exemption from VAT, but could, at most, be penalised by the imposition of a fine in accordance with the provisions of national law.

74. In my view, those considerations are supported by certain elements specific to the case in the main proceedings.

75. In that regard, it is important to note that Enteco Baltic did not, at the time of importation, fail to inform the competent authorities of the purchaser's VAT identification number. On the contrary, according to the information provided by the referring court, it is clear that because of a change in circumstances the number initially specified no longer (or no longer only) tallied with that of the actual purchaser.

76. It is apparent from point 7^1 of the Rules adopted by the Director of the SND and the Head of the Tax Inspectorate that the importer must without delay inform the VTM in writing, in particular in the event of a change relating to the taxable person from the other Member State and/or the Member State to which the goods are supplied, as specified in the documents provided for customs inspection purposes, by submitting new evidence explaining the reasons for the changes and attaching copies of the supporting documents.

77. That requirement, imposed on the importer by the Lithuanian legislation, obliging him to inform the customs authorities of changes in the identity of the purchaser for whom the goods are intended, constitutes, in my view, an indication that the Lithuanian authorities consider that, at the time of importation, omissions or errors relating to the VAT identification number of the purchaser cannot, in themselves, subsequently call into question entitlement to the import exemption. It would indeed make no sense to require the importer to communicate a change relating to the purchaser if, in any event, such a change automatically entailed refusal of entitlement to the import exemption. The automatic nature of the loss of entitlement to the import exemption on account of changes in relation to the VAT identification of the purchaser in the Member State of destination of the goods supplied would also effectively encourage importers never to communicate such changes to the national authorities for fear of losing entitlement to the import exemption.

78. It is also, it seems, under those rules or, at the very least, in accordance with that conception of the merely formal nature of the communication of the purchaser's VAT identification number that, in the context of the first inspection carried out in 2012 in relation to the imports at issue in the main proceedings, the VTM, according to the findings of the referring court, itself corrected errors relating to inconsistencies in those numbers, as provided by Enteco Baltic in its import declarations. Moreover, according to the referring court, that company always communicated to the Tax Inspectorate any changes relating to the identity of the purchasers.

18 See, in particular, to that effect, judgment of 3 September 2015, *Fast Bunkering Klaipėda* (C-526/13, EU:C:2015:536, paragraph 28 and the case-law cited).

79. I therefore consider that the communication by the importer, at the time of importation, of a purchaser's VAT identification number which, on account of a change of circumstances, no longer tallies in whole or in part with that of the real purchaser may lead to refusal of entitlement to the import exemption only in the two situations recognised by the Court, and referred to in points 56 to 58 of this Opinion, concerning non-compliance with a formal requirement in the context of the exemption of the intra-Community supply, under Article 138(1) of the VAT Directive.

80. In those circumstances, I am of the view that the first question raised by the referring court should be answered as follows:

Article 143(2)(b) of the VAT Directive must be interpreted as meaning that, in the light of the circumstances of the case in the main proceedings, it does not allow the competent authorities of a Member State to refuse the exemption provided for in Article 143(1)(d) of that directive merely on the basis that, at the time of importation, the goods were intended to be supplied to a taxable person in another Member State, which explains why the VAT identification number of that taxable person is specified in the import declaration, although, as the result of a subsequent change of circumstances, the goods were supplied to another taxable person (also liable for payment of VAT) and the authorities of the first Member State were provided with full information relating to the identity of the actual purchaser.

B. The requirement to provide the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State, as laid down in Article 143(2)(c) of the VAT Directive (second to seventh questions referred)

81. The second to seventh questions raised by the referring court essentially concern the interpretation of Article 143(1)(d) of the VAT Directive and fulfilment of the requirement, as specified in Article 143(2)(c) of the VAT Directive, that it is necessary to provide, at the time of importation, 'the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State', together with, inter alia, the interpretation of Article 138(1) and Article 14(1) of that directive, as well as the principle of legal certainty.

82. Before examining those questions, it is important to observe that the evidence which is required from the importer, in accordance with Article 143(2)(c) of the VAT Directive, relates to the purpose of the importation into the European Union, that is to say, that that operation is intended to be followed by an intra-Community supply, in accordance with Article 138(1) of that directive.

83. The importer must therefore demonstrate, at the time of importation, that he intends to fulfil the substantive conditions for entitlement to the exemption of the intra-Community supply, as provided for in Article 138(1) of the VAT Directive.

84. As I have already demonstrated in point 52 of this Opinion, that article lays down three conditions for entitlement to the exemption from VAT when carrying out an intra-Community supply. I would recall that it is necessary to demonstrate, first, that the right to dispose of the goods as owner has been transferred to the purchaser, secondly, that those goods have been dispatched or transported to another Member State and, thirdly, that, as a result of that dispatch or transport, those goods physically left the territory of the Member State of supply.

85. Those conditions are, in essence, indissociable from fulfilment of the condition imposed on the importer in the context of Article 143(1)(d) and (2) of the VAT Directive, except that, in the latter case, the importer must demonstrate that, 'at the time of importation', the goods imported into the European Union are 'intended' for intra-Community supply.

86. Thus, as the referring court fully understood, in the context of Article 143(1)(d) and (2) of the VAT Directive, the importer must, at the time of importation, provide evidence, first, that the right to dispose of the imported goods as owner is intended to be transmitted to the purchaser and, secondly, that those goods are intended to be dispatched or transported to another Member State, that is to say that they are also intended physically to leave the territory of the Member State of importation.

87. While the third to seventh questions raised by the referring court concern the right, which is intended to be transferred to the purchaser, to dispose of the imported goods as owner, in the light of the circumstances of the case in the main proceedings, in particular in the light of the conduct of Enteco Baltic and that of the Lithuanian authorities, the second question is concerned, for its part, with the evidence establishing that, at the time of importation, the imported goods are intended to be dispatched or transported to another Member State. I shall examine those two issues in turn.

1. The right, which is intended to be transferred to the purchaser, to dispose of the imported goods as owner (third to seventh questions)

88. By its third question, the referring court asks whether it is possible to find that the right to dispose of the goods as owner was intended to be transferred to the purchaser, even though that right was intended to be transferred to the purchaser not directly but to persons specified by the latter, namely transport undertakings or tax warehouses.

89. That question relates, in my view, to the content of the autonomous and uniform [19] concept of 'supply of goods', within the meaning of Article 14(1) of the VAT Directive, which in fact states that 'supply of goods' is to mean the transfer of the right to dispose of tangible property as owner.

90. According to the settled case-law of the Court, that concept does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner. [20]

91. It follows that a transaction may be categorised as a 'supply of goods' for the purposes of Article 14(1) of the VAT Directive if, by that transaction, a taxable person makes a transfer of tangible property authorising the other party to hold that property de facto as if it were the owner, without the form by which a right of ownership of that property was acquired having any bearing in that regard. [21]

92. So as to dispel any uncertainty on the part of the referring court in the light of the wording of its fourth question, it should be stated that uniformity of the concept and definition of 'supply of goods' in the VAT Directive means that the transfer by the purchaser of the right to dispose of tangible property as owner is also applicable in the context of the interpretation of Article 143(1)(d) and (2) of the VAT Directive, which governs the exemption for the importation into the European Union of goods followed by an exempt intra-Community supply. [22] The transfer to the purchaser of the right to dispose of tangible property as owner is actually an inherent condition for any supply of goods. [23]

19 See judgment of 3 June 2010, *De Fruytier* (C-237/09, EU:C:2010:316, paragraph 22).

20 See, in particular, judgments of 21 November 2013, *Dixons Retail* (C-494/12, EU:C:2013:758, paragraph 20) and of 3 September 2015, *Fast Bunkering Klaipėda* (C-526/13, EU:C:2015:536, paragraph 51).

21 Judgment of 18 July 2013, *Evita-K* (C-78/12, EU:C:2013:486, paragraph 35).

22 In its fourth question, the referring court seems to suggest that the Lithuanian authorities rely on a different interpretation of the concept of the transfer of the right of disposal of goods, depending on whether they are applying the rules relating to the right of deduction of VAT (Article 167 of the VAT Directive) or those concerning the exemption for importation followed by an intra-Community supply (Article 143(1)(d) and (2) of the VAT Directive). As I have indicated, such a difference of interpretation, which is not clearly set out in the grounds of the order for reference, is, in any event, by no means justified in the light of the autonomy and uniformity of the definition of 'supply of goods', within the meaning of Article 14(1) of the VAT Directive.

23 Judgment of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 32).

93. As the Court has held, that concept of 'supply of goods' is objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary to determine the intention of the taxable person.[24] That assertion also applies, in my view, in the context of the interpretation of Article 143(1)(d) and (2) of the VAT Directive, that is to say that it is necessary to ascertain, in the light of objective evidence, that, at the time of importation, the imported goods were 'intended' for subsequent intra-Community supply, without its being necessary to determine the exact intention of the importer at that time.

94. Moreover, in the context of the application of Article 267 TFEU, it is for the national court to assess in each individual case, on the basis of the facts of the dispute before it, whether there has been a transfer of the right to dispose of the property as owner.[25]

95. In that regard, the wording of the third question submitted by the referring court can only raise uncertainties. That court states that the right to dispose of the fuel was transferred not directly to the purchasers specified in Enteco Baltic's declarations, but to transport undertakings and tax warehouses.

96. If that is indeed true, the latter operators must therefore be regarded as the actual purchasers of the fuel imported by Enteco Baltic, as the Commission suggests. However, if those transport undertakings and those tax warehouses are located on Lithuanian territory, it is not possible, in my view, to grant the VAT exemption for importation to Enteco Baltic, since that operation was followed not by an intra-Community supply but only by an internal supply.

97. On the other hand, if neither the transport undertakings nor the tax warehouses, whether they are established in Lithuania or in one of the other three Member States mentioned by the referring court, have obtained the right to dispose of the fuels as owners, that is to say that they have simply served, respectively, as transport and storage intermediaries which were not acting in their own name, with the result that the purchaser specified in Enteco Baltic's declarations at the time of importation of the fuels may dispose of them, I am of the view that it should be possible to grant the import exemption to Enteco Baltic, provided that the other substantive conditions for entitlement to the exemption from VAT are respected.

98. Accordingly, it is for the referring court, in the light of all the circumstances of the case in the main proceedings, to determine which of those two situations exists.

99. I would add, however, that among the circumstances which must be taken into account by the referring court in the case in the main proceedings is, in particular, the conduct of Enteco Baltic and that of the Lithuanian authorities, both of which are referred to in the fifth to the seventh questions referred by that court.

100. With regard to Enteco Baltic's conduct, it should be recalled that it is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of it to satisfy itself that the transaction which it is carrying out does not result in its participation in tax fraud.[26] If the taxable person concerned knew or should have known that the transaction which it had carried out was part of a fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, that person would have to be refused a VAT exemption.[27]

24 See, to that effect, judgment of 21 November 2013, *Dixons Retail* (C-494/12, EU:C:2013:758, paragraph 21 and case-law cited).

25 See, to that effect, judgment of 18 July 2013, *Evita-K* (C-78/12, EU:C:2013:486, paragraph 34).

26 See, in particular, judgment of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 48).

27 See, in particular, judgments of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 54) and of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 42).

101. It is for the national court to verify, on the basis of an overall assessment of all the facts and circumstances of the case in the main proceedings, whether Enteco Baltic acted in good faith and took every step which could reasonably be asked of it to satisfy itself that the transaction carried out had not resulted in its participation in tax evasion. [28]

102. In that regard, the fact, mentioned by the referring court in its sixth question, that Enteco Baltic communicated with its customers using electronic means of communication, in particular for the purpose of exchanging contractual documents, certainly cannot constitute proof of the importer's lack of good faith or negligence as to the measures which can reasonably be expected of such an operator to prevent its participation in tax evasion.

103. I certainly do not rule out the possibility that if an importer *fails*, at the time of importation of the goods concerned, to communicate to the competent national authorities the information listed in Article 143(2) of the VAT Directive, those authorities may presume, in view of the purpose for which that provision was inserted into that directive, that that importer knew or ought to have known that it was participating in tax evasion.

104. However, I consider that it must be possible for the importer to rebut such a presumption using all the forms of evidence permitted under national law.

105. Nonetheless, in the light of the information provided by the referring court, the case in the main proceedings is distinguished, in particular, not by Enteco Baltic's failure to provide the information listed in Article 143(2) of the VAT Directive, but by the different ways in which the customs and tax authorities assessed the information provided by that operator, in a context in which that operator appears to have cooperated in good faith with those authorities.

106. Indeed — and this remark leads me to consider the question of the conduct of the national authorities — the factual information provided by the referring court and the wording of the fifth question which it has submitted strongly suggest that the VTM, during the inspection carried out in 2014 and 2015, cast doubt on the outcome of the inspection carried out in 2013 by the Tax Inspectorate concerning fulfilment of the conditions relating to the existence of an exempt intra-Community supply, for the purposes of Article 138(1) of the VAT Directive.

107. I am not convinced by the explanation, provided by the Lithuanian Government at the hearing before the Court, that those two authorities carry out inspections having distinct scopes, in that the customs authority verifies compliance with the conditions of Article 143(1)(d) and (2) of the VAT Directive, while the tax authority checks compliance with the conditions of Article 138 of that directive. As I have already said, the import exemption granted under Article 143(1)(d) of the VAT Directive is entirely dependent on fulfilment of the conditions for exemption of the intra-Community supply which follows that importation, in accordance with Article 138(1) of that directive. The inspections of the national authorities overlap, therefore, at least partially. Moreover, in its fifth question, the referring court refers to the fact that the customs authority (the VTM and/or the SND) denied entitlement to the exemption from import VAT on the basis that the conditions for further (exemption of) supply of goods within the European Union were not complied with, namely those laid down in Article 138 of the VAT Directive which were the subject of the inspection by the Tax Inspectorate in 2013.

108. In those circumstances, it is important, in my view, to recall the considerations set out by the Court, concerning the conduct of the national authorities in the context of application of the exemption for intra-Community supplies, in the judgments of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 50) and of 14 June 2017, *Santogal M-Comércio e Reparação de*

28 See, in particular, by analogy, judgments of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 53) and of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 41).

Automóveis (C-26/16, EU:C:2017:453, paragraph 75). In those judgments, the Court held that the principle of legal certainty precludes a Member State which has accepted, initially, the documents submitted by the supplier/vendor as evidence establishing entitlement to the exemption from subsequently requiring that supplier/vendor to account for the VAT on that supply, because of the purchaser's fraud, of which the supplier/vendor had and could have had no knowledge.

109. The referring court must therefore carefully ascertain whether that was actually the situation in the case in the main proceedings.

110. I would add, so far as is relevant, that a Member State cannot rely on failings which affect the coordination and cooperation of the activities of its own national authorities in order to refuse to grant entitlement to exemption from VAT to a taxable person who acts in good faith and with respect to whom there is no conclusive evidence indicating that he knew or could know that he was participating in fraud. In that regard, it is quite revealing to note that the two reports of the Court of Auditors of the European Union, drawn up, respectively, in 2011 and 2015 following audits carried out in several Member States,[29] to which reports the Commission referred in its written observations, demonstrate, in particular, that 'customs and tax controls are not working effectively' and that 'the management of the VAT exemption by two different authorities (customs and tax) hinders [that] effectiveness … as there is no seamless communication between them concerning imports under [customs] procedure [42]'.[30] In the light of the factors and circumstances emphasised by the referring court, the case in the main proceedings seems, in my view, to illustrate the uncertainties, or even shortcomings, affecting the flow of communication between customs and tax authorities within a single Member State, as identified in the reports of the Court of Auditors.

111. By contrast — and as regards the seventh question submitted by the referring court, relating to the possible obligation of the Lithuanian authorities to collect information from undertakings of other Member States with the aim of establishing that the right to dispose of the goods supplied by Enteco Baltic had been transferred — it should be recalled that, according to the case-law, it is for the operator who relies on an exemption from VAT to establish that the substantive conditions for that exemption are fulfilled.[31] In my view, that case-law applies, by analogy, to an importer covered by Article 143(1)(d) of the VAT Directive.

112. As regards the role of the national authorities, the Court has already found, in essence, that measures adopted at EU level establishing a system for exchanging information between the tax authorities of the Member States[32] were not put in place to replace the taxable person's obligation to establish the intra-Community nature of the operations carried out where that taxable person is not himself able to provide the necessary evidence for that purpose.[33]

29 See, respectively, Court of Auditors, Special Report No 13, *Does the control of customs procedure 42 prevent and detect VAT evasion*?, Luxembourg, 2011, and Special Report No 24, *Tackling intra-Community VAT fraud: More action needed*, Luxembourg, 2015.

30 See Special Report No 13, paragraphs 55 and 56. See also paragraphs 36 to 38 of that report and paragraphs 78 and 79 of Special Report No 24.

31 See, in particular, judgments of 27 September 2007, *Twoh International* (C-184/05, EU:C:2007:550, paragraph 26) and of 7 December 2010, *R.* (C-285/09, EU:C:2010:742, paragraph 46).

32 Those are, respectively, Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) and Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1). Those two measures were, respectively, replaced by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (OJ 2011 L 64, p. 1), the deadline for the transposition of which was 1 January 2013, and by Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1), which entered into force on 1 January 2012.

33 See, to that effect, judgments of 27 September 2007, *Twoh International* (C-184/05, EU:C:2007:550, paragraph 34) and of 22 April 2010, *X and fiscale eenheid Facet-Facet Trading* (C-536/08 and C-539/08, EU:C:2010:217, paragraph 37).

113. Those measures therefore do not confer on a taxable person [34] specific rights which, in particular, allow him to secure the use by a competent authority of the mechanism for exchanging information which those measures established.

114. A fortiori, I consider that EU law on the exchange of information and administrative cooperation between Member States in the field of VAT does not require national authorities to collect, at the request of a taxable person, information from undertakings of other Member States, where that taxable person cannot himself provide the evidence necessary to demonstrate that the right to dispose, as owner, of the goods which have been imported and supplied has been transferred to the purchaser and, more generally, to demonstrate that the importations or supplies by that taxable person are exempt from VAT.

115. I therefore propose that the third to seventh questions referred for a preliminary ruling should be answered as follows:

— Article 143(1)(d) of the VAT Directive must be interpreted as meaning that it does not allow the competent authorities of a Member State to refuse the exemption from import VAT where the right to dispose, as owner, of the goods which have been imported and supplied has not been directly transferred to the purchaser, provided that that right has indeed been transferred to that taxable person and not to other persons, which it is for the referring court to ascertain;

— the principle of legal certainty must be interpreted as meaning that it prevents the customs authority of a Member State from refusing to grant entitlement to exemption from import VAT to a taxable person, acting in good faith and without its having been established that he knew or ought to have known that he was participating in tax evasion, on the ground that one of the substantive conditions for the VAT exemption for an intra-Community supply following importation is no longer fulfilled, even though that condition had already been regarded as having been fulfilled by the competent authority of the same Member State following an inspection of the evidence and documents provided by the taxable person. It is for the referring court to ascertain whether the facts of the case in the main proceedings make it possible to find that all those circumstances apply and all those conditions are fulfilled, it being understood that the mere fact that the taxable person used electronic means to communicate with the other parties to the contract cannot give rise to an assumption of negligence or bad faith on the part of that taxable person.

— Article 143(1)(d) and (2) of the VAT Directive must be interpreted as meaning, first, that it is for the taxable person who relies on the exemption from import VAT to establish that the substantive conditions for that exemption are fulfilled and, secondly, that that taxable person cannot require that the competent authorities of the Member State of importation, when examining whether the right to dispose of the goods supplied as owner was transferred to the purchaser, collect from other taxable persons information accessible only to the public authorities.'

2. Evidence capable of demonstrating that, at the time of importation, the imported goods are intended to be dispatched or transported to another Member State (second question)

116. By its second question, the referring court asks the Court about the probative value of certain documents, such as e-ADs and e-ROR letters, confirming the transport of fuels from tax warehouse located in the Member State of importation (in this case Lithuania) to a tax warehouse located in the Member State of destination (Poland, to all appearances, in the case in the main proceedings).

34 See, as regards Directive 77/799, judgments of 27 September 2007, *Twoh International* (C-184/05, EU:C:2007:550, paragraph 31) and of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 36). See also, to that effect, as regards Directive 2011/16, which pursues an objective similar to that of Directive 77/799, which it replaced, judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 46, 47 and 58).

117. Neither Article 143(1)(d) and (2)(c) of the VAT Directive nor Article 138 thereof states what evidence taxable persons must provide in order to be granted the exemption from VAT. It follows that, in accordance with Article 131 of the VAT Directive, that issue falls within the competence of the Member States, in accordance with the general principles of law which form part of the European Union legal order, which include, in particular, the principles of legal certainty and proportionality. [35]

118. In the first place, with regard to the interpretation of Article 143 of the VAT Directive, as has been pointed out by the referring court and as the Commission has argued, e-ROR letters are electronic documents, specific to goods subject to excise duties, which are drawn up following the dispatch and/or transport of the goods, confirming that those operations have been carried out.

119. However, in order to fulfil the requirement set out in Article 143(2)(c) of the VAT Directive, the importer must provide proof, 'at the time of importation', that the imported goods are intended to be dispatched or transported to another Member State.

120. In my view, therefore, e-ROR letters cannot constitute sufficient evidence to demonstrate that, at the time of importation, the imported goods were intended for intra-Community supply.

121. By contrast, and as the Commission has also argued in its written observations, commercial documents, such as CMR consignment notes, which are drawn up prior to the dispatch or transport of the imported goods to the Member State of destination are capable of objectively establishing the intention, at the time of importation, to dispatch or transport those goods to another Member State.

122. As regards e-ADs, which are governed by the provisions of Directive 2008/118 and Regulation No 684/2009, those documents must accompany movements of goods under suspension of excise duty. Thus, in accordance with Article 21(2) of Directive 2008/118 and Article 3 of Regulation No 684/2009, a draft electronic administrative document must be submitted by the consignor to the competent authorities of the Member State of dispatch, no earlier than 7 days before the date indicated on that document as date of dispatch of the goods concerned. Such a formality enables those authorities to check the validity of the information provided on the document, which includes, in particular, according to Table 1 of Regulation No 684/2009, information concerning the goods dispatched, the operator of the place of dispatch and the operator of the place of destination of the goods. It is therefore quite conceivable that, at the time of importation of goods from a third country, the importer or a person acting on his behalf may send the draft e-AD to the competent authorities of the Member State from which the goods will be transported under suspension of excise duty, for the purpose of validating that information.

123. In the case in the main proceedings, the information provided to the Court does not identify the circumstances in which the various e-ADs were sent to the competent Lithuanian authorities or indicate the content of those documents (or draft documents) or the way in which they were processed by the national authorities.

124. Nevertheless, in my view, it is possible to assert that an e-AD is capable of constituting evidence establishing that, at the time of importation, the imported goods were intended to be dispatched to another Member State, for the purposes of Article 143(2)(c) of the VAT Directive.

125. It is for the referring court, on the one hand, to ascertain whether, at the time of importation, the national authorities had draft e-ADs at their disposal and whether those authorities had sufficient information available to them and, on the other hand, to review the way in which those documents were processed by those authorities.

35 See, to that effect, judgments of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 36); of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 27) and of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 33).

126. In the second place, with regard to the requirement for the goods which are the subject of an intra-Community supply actually to be dispatched or transported, a condition that, as I have already shown, must be fulfilled under Article 138 of the VAT Directive, on which the import exemption under Article 143(1)(d) of that directive depends entirely, I consider that e-ROR letters, issued by a tax warehouse located in the Member State of destination, may constitute evidence of the actual physical movement of the goods supplied beyond the borders of the Member State of supply. As regards the e-AD, Article 24 of Directive 2008/118 provides that, on receipt of goods, the consignee must, no later than five working days after the end of the movement, submit a report of receipt to the competent authorities of the Member State of destination, which are to carry out a verification of the data thus communicated and may validate and then send the data to the competent authorities of the Member State of dispatch. In accordance with Article 7 and Table 6 of Regulation No 684/2009, the report of receipt must include, in particular, the administrative code of the e-AD. All that information is therefore capable of showing that the goods concerned left the territory of the Member State of dispatch.

127. In that regard, neither the wording of Article 138(1) of the VAT Directive nor the case-law interpreting that provision requires that the documents sent by the supplier show that the goods were dispatched or transported to the purchaser.[36] It is sufficient, as is also confirmed by the wording of Article 143 of the VAT Directive, that the imported goods physically left the territory of the Member State of supply for the Member State of destination.

128. It is for the referring court to ascertain, on the one hand, whether, at the time of importation, Enteco Baltic provided sufficient evidence that the imported fuels were intended for intra-Community supply, within the meaning of Article 143(2)(c) of the VAT Directive and, on the other hand, whether that company sufficiently demonstrated, in accordance with Article 138 of that directive, that those fuels physically left Lithuanian territory, in the light, as I have already noted, of the conduct of that company and of the competent national authorities.

129. I therefore suggest that the answer to the second question referred should be as follows:

Article 143(1)(d) and (2)(c) of the VAT Directive must be interpreted as meaning that documents, such as the electronic administrative document ('the e-AD') and the consignment note drawn up on the basis of the Convention, signed at Geneva on 19 May 1956, on the Contract for the International Carriage of Goods by Road ('the CMR consignment note'), may be regarded as evidence establishing that, at the time of importation, the goods imported are intended to be dispatched or transported to another Member State. Article 138 of the VAT Directive, to which Article 143(1)(d) of that directive refers, must be interpreted as meaning that reports of receipt of e-ADs and 'e-ROR' confirmation letters may be regarded as evidence establishing that the imported goods, which were the subject of the intra-Community supply, left the territory of the Member State of importation and supply and were dispatched to the Member State of destination.

V. Conclusion

130. In the light of all the foregoing considerations, I propose that the Court should reply as follows to the questions referred by the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania):

(1) Article 143(2)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/69/EC of 25 June 2009, as regards tax evasion linked to imports, must be interpreted as meaning that, in the light of the circumstances

36 See, in particular, to that effect, judgments of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 31); of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 24) and of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 25).

of the case in the main proceedings, it does not allow the competent authorities of a Member State to refuse the exemption provided for in Article 143(1)(d) of that directive merely on the basis that, at the time of importation, the goods were intended to be supplied to a taxable person in another Member State, which explains why the value added tax (VAT) identification number of that taxable person is specified in the import declaration, although, as the result of a subsequent change of circumstances, the goods were supplied to another taxable person (also liable for payment of VAT) and the authorities of the first Member State were provided with full information relating to the identity of the actual purchaser.

(2) Article 143(1)(d) and (2)(c) of Directive 2006/112, as amended by Directive 2009/69, must be interpreted as meaning that documents, such as the electronic administrative document ('the e-AD') and the consignment note drawn up on the basis of the Convention, signed at Geneva on 19 May 1956, on the Contract for the International Carriage of Goods by Road ('the CMR consignment note'), may be regarded as evidence establishing that, at the time of importation, the goods imported are intended to be dispatched or transported to another Member State. Article 138 of Directive 2006/112, as amended by Directive 2009/69, to which Article 143(1)(d) of Directive 2006/112, as amended, refers, must be interpreted as meaning that reports of receipt of e-ADs and 'e-ROR' confirmation letters may be regarded as evidence establishing that the imported goods, which were the subject of the intra-Community supply, left the territory of the Member State of importation and supply and were dispatched to the Member State of destination.

(3) Article 143(1)(d) of Directive 2006/112, as amended by Directive 2009/69, must be interpreted as meaning that it does not allow the competent authorities of a Member State to refuse the exemption from import VAT where the right to dispose, as owner, of the goods which have been imported and supplied has not been directly transferred to the purchaser, provided that that right has indeed been transferred to that taxable person and not to other persons, which it is for the referring court to ascertain.

(4) The principle of legal certainty must be interpreted as meaning that it prevents the customs authority of a Member State from refusing to grant entitlement to exemption from import VAT to a taxable person, acting in good faith and without its having been established that he knew or ought to have known that he was participating in tax evasion, on the ground that one of the substantive conditions for the VAT exemption for an intra-Community supply following importation is no longer fulfilled, even though that condition had already been regarded as having been fulfilled by the competent authority of the same Member State following an inspection of the evidence and documents provided by the taxable person. It is for the referring court to ascertain whether the facts of the case in the main proceedings make it possible to find that all those circumstances apply and all those conditions are fulfilled, it being understood that the mere fact that the taxable person used electronic means to communicate with the other parties to the contract cannot give rise to an assumption of negligence or bad faith on the part of that taxable person.

(5) Article 143(1)(d) and (2) of Directive 2006/112, as amended by Directive 2009/69, must be interpreted as meaning, first, that it is for the taxable person who relies on the exemption from import VAT to establish that the substantive conditions for that exemption are fulfilled and, secondly, that that taxable person cannot require that the competent authorities of the Member State of importation, when examining whether the right to dispose of the goods supplied as owner was transferred to the purchaser, collect from other taxable persons information accessible only to the public authorities.