**Case C-314/22**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

11 May 2022

**Referring court:**

Varhoven administrativen sad (Bulgaria)

**Date of the decision to refer:**

4 May 2022

**Appellant:**

‘Consortium Remi Group’ AD

**Defendant:**

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite



**Subject matter of the main proceedings**

Possibility of exercising the right to a refund/set-off of VAT on account of full or partial non-payment of the price indicated in invoices issued, where a derogation from Article 90(1) of Directive 2006/112 has been made in accordance with the option under Article 90(2) of that directive. Admissibility of setting a limitation period for the exercise of that right and correct starting date of the period. Conditions for the exercise of that right, having regard to the fact that the taxable entity’s contractual partners have been declared insolvent. Possibility for the taxable entity to rely on the direct effect of Article 90(1) of Directive 2006/112 in those circumstances.

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

## Questions referred for a preliminary ruling

1. In the event of a derogation in accordance with Article 90(2) of the VAT Directive, do the principle of neutrality and Article 90 of that directive allow a provision of national law such as the second sentence of Article 129(1) of the Danachno-osiguritelen protsesualen kodeks (Tax and Social Security Procedure Code), which provides for a limitation period for the submission of an application for a set-off or refund of the tax charged by the taxable entity in respect of the supply of goods or services in the event of total or partial non-payment by the recipient of the supply?

2. Irrespective of the answer to the first question, in the circumstances of the main proceedings, is it a necessary condition for the recognition of the right to a reduction in the taxable amount under Article 90(1) of the VAT Directive that the taxable entity corrects the invoice which it has issued, as regards the VAT charged, on account of total or partial non-payment by the recipient of the price of the supply under the invoice, before submitting the application for a refund?

3. Depending on the answers to the first two questions: How must Article 90(1) of the VAT Directive be interpreted when determining the time at which the ground for a reduction of the taxable amount arises in the event of total or partial non-payment of the price where there is no national provision in place on account of a derogation from Article 90(1)?

4. How must the reasoning in the judgments of 27 November 2017, *Enzo Di Maura* (C-246/16, EU:C:2017:887, paragraphs 21 to 27), and of 3 July 2019, *UniCredit Leasing* (C-242/18, EU:C:2019:558, paragraphs 62 and 65) be applied if Bulgarian law does not contain any specific conditions for the application of the derogation under Article 90(2) of the VAT Directive?

5. Are the principle of neutrality and Article 90 of the VAT Directive consistent with a tax and insurance practice under which, in the event of non-payment, no correction of the tax charged is permitted until the recipient of the supplies or services – provided that the recipient is a taxable entity – has been notified of the cancellation of the tax, so that the deduction initially made by the recipient is corrected?

6. Does the interpretation of Article 90(1) of the directive permit the assumption that a possible right to a reduction of the taxable amount in the event of total or partial non-payment gives rise to a right to a refund of the VAT paid by the supplier, plus interest for late payment, and from what point in time?

## Provisions of European Union law relied on

Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 11 (‘the VAT Directive), in particular Articles 73 and 90

**Case-law of the Court of Justice relied on**

Judgments

of 3 July 1997, *Goldsmiths* (C-330/95, EU:C:1997:339);

of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267);

of 26 January 2012, *Kraft Foods Polska* (C-588/10, EU:C:2012:40);

of 12 July 2012, *EMC-Bulgaria Transport* (C-284/11,EU:C:2012:458);

of 15 May 2014, *Almos Agrárkulkereskedelmi* (C-337/13, EU:C:2014:328);

of 26 March 2015, *Marian Macikowski* (C-499/13, EU:C:2015:201);

of 23 November 2017, *Enzo Di Maura* (C-246/16, EU:C:2017:887);

of 6 December 2018, *Tratave* (C-672/17, EU:C:2018:989);

of 3 July 2019, *UniCredit Leasing* (C-242/18, EU:C:2019:558)

**Provisions of national law relied on**

Zakon za danak varhu dobavenata stoynost (Law on Value Added Tax; 'the ZDDS'), in particular Articles 115 and 116 thereof

Danachno-osiguritelen protsesualen kodeks (Tax and Social Security Procedure Code; 'the DOPK'), in particular Articles 128 and 129 thereof

Zakon za zadalzheniata i dogovorite (Law on Obligations and Contracts; 'the ZZD'), in particular Articles 110, 116, 117, 120 thereof

Targovski zakon (Law on Commerce; 'the TZ'), in particular Articles 628a, 629, 685a, 686 thereof

**Succinct presentation of the facts and procedure in the main proceedings**

'Consortium Remi Group' AD ('CRG') with registered office in Varna (Bulgaria) is engaged in the construction of buildings and facilities. It was registered under the ZDDS in 1995, but was deregistered on 7 March 2019 as it was found to have systematically breached its obligations under the ZDDS. By judgment of the Varnenski Okrazhen sad (Regional Court, Varna) of 18 September 2020, the company was declared insolvent and insolvency proceedings were commenced.

1 In 2006 to 2010 and 2012, CRG issued invoices to five Bulgarian companies for the supply of goods and the provision of services. VAT was charged on the

invoices and that tax was paid for most of the taxable periods. The total amount of CRG's VAT receivables according to those invoices is 618 171 leva (BGN).

2 By tax assessment notice dated 31 January 2011, CRG's liabilities under the ZDDS for the period from 1 January 2007 to 1 July 2010 were established, including the VAT charged in the invoices issued to one of the abovementioned companies ( 'Company A'). CRG brought an action against the notice, which was, however, dismissed by a judgment of the administrative court at first instance, whose decision was in turn upheld by a judgment of the Varhoven administrative sad (Supreme Administrative Court).

3 CRG then went on to apply to the revenue authorities to set off an amount of BGN 1 282 582.19 – a principal amount of BGN 618 171.16 (the VAT charged in the invoices to the named recipients) and interest of BGN 664 411.03 (calculated from the first day of the month following the issue of the invoices until 31 July 2019) – against its liabilities under public law.

4 By a set-off and refund notice dated 6 March 2020, the revenue authority at Teritorialna direktsia na Natsionalna agentsia za prihodite, Varna (Territorial Directorate of the National Revenue Agency, Varna) refused to set off the VAT amounts wrongly paid and collected, in the amounts specified. The notice stated that the application for set off was made after the expiry of the limitation period pursuant to Article 129(1) of the DOPK. According to that provision, an application for set-off or refund is to be examined if it is made within a period of five years from 1 January of the year following the year in which the ground for refund arose, unless otherwise provided by law. Furthermore, the notice stated that CRG had neither proved that amounts totalling BGN 1 282 582.19 had been wrongly paid or collected, nor that it had definite (both in terms of the merits and the amount) and due claims against the fiscal authorities in the total amount mentioned.

5 CRG appealed to the administrative authorities against the set-off and refund notice. In support of its claims, it submitted court decisions regarding the commencement of insolvency proceedings against the companies that had received the invoices. Three of the companies had been declared insolvent and the start of the liquidation of their assets had been ordered. In addition, it submitted evidence that the claims in question had been asserted in the insolvency proceedings under the Targovski zakon (Law on Commerce), that they had been accepted by the insolvency administrators of the debtor companies and were listed in the schedules of claims accepted in the insolvency proceedings. The set-off and refund notice was upheld in full by decision of the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' [Varna] pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Directorate 'Appeals and Tax and Social Security Practice' [Varna] at the Central Administration of the National Revenue Agency) ('the Director') of 22 May 2020.

6 After CRG was unsuccessful in its action against the set-off and refund notice before the Administrative Sad Varna (Administrative Court, Varna), it lodged an appeal in cassation with the referring court against the first-instance judgment of 16 February 2020. In the course of the examination of the merits of the appeal in cassation, the Supreme Administrative Court came to the conclusion that the resolution of the dispute required an interpretation of EU law.

**The essential arguments of the parties in the main proceedings**

7 In its decision rejecting the appeal against the set-off and refund notice, the **administrative authority** stated that there was an obligation to pay the VAT charged in the invoices to Company A as the corresponding tax liability had been established by a tax assessment notice that had become final. In the second place, the claim for interest in the amount of BGN 664 411.03 from the first day of the month following the month in which the invoices were issued was completely unfounded as there was no ground for 'writing off' debts under the DOPK. The Director's decision was also based on the fact that Bulgaria had derogated from Article 90(1) of the VAT Directive in accordance with Article 90(2) of the directive. The Director stated that Bulgarian law does not provide for the option of reducing the taxable amount in the event of total or partial non-payment. Moreover, the appellant had not provided proof that the invoices had not been paid in whole or in part, but had only made allegations to that effect. Furthermore, all recipients of the invoices in question would have deducted VAT as part of the price of the supplies or services, so that a refund of the tax invoiced by the supplier/service provider would certainly result in a loss of tax.

8 In its legal action before the court of first instance against the refund and set-off notice, the **appellant**, relying on the judgments of the Court of Justice in Cases C-588/10, C-499/13, C-330/95 and C-246/16, argued that the state could not levy more tax than the taxpayer had received. It is clear from the case-law of the Court of Justice that, although Member States are entitled to derogate under Article 90(2) of the VAT Directive, they cannot completely exclude the option of making adjustments to the taxable amount in the event of total or partial non-payment. In the view of the appellant, that would be contrary to the principle of tax neutrality. The appellant argued that the VAT charged, in respect of which it was proved that the company did not receive it, should be set off against the appellant's existing liabilities under public law. The position of the tax authorities that the company had no right to the correction claimed because the recipients of the invoices had claimed tax credit was completely unfounded. If CRG were to carry the burden of the unpaid tax, that would breach the principle of proportionality.

9 The **court of first instance** found that, since the appellant had not produced any evidence of any payments actually made to the fiscal authorities, it must be considered that the ground for the refund of the amount claimed should arise at the time of the reverse charge. The court calculated the time limit set in Article 129 of

the DOPK from the date on which the VAT was charged in the invoices in question, and held that the application for a refund filed on 7 February 2020 was inadmissible because it had been lodged out of time. In the view of the court, there was therefore no need to examine the other objections raised by the appellant.

Before the **Supreme Administrative Court**, CRG argues that the taxable amount should be reduced in accordance with Article 90(1) of the VAT Directive if the taxable entity did not receive the consideration either in whole or in part after effecting the supply. It argues that the provision has direct effect and therefore should be applied since the national provisions are contrary to it.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

10 Having examined the relevant case-law of the Court of Justice, the referring court has concluded that there are no court decisions that take into account all the specific features of the present case and answer all the questions raised as regards the interpretation of EU law.

11 The referring court draws attention to three particular features of the present case. First, Bulgaria has made use of the derogation provided for in Article 90(2) of the VAT Directive. The second feature of the present case is that the appellant asserts the right to set-off/refund of the charged tax on account of non-payment by the recipients of the invoices, without having corrected the invoices issued, and, moreover, is doing so eight to ten years after the invoices were issued. Third, it must be borne in mind that all the recipients of the invoices in question, as well as CRG itself, have been declared insolvent.

12 Regarding the first particular feature of the case, the Supreme Administrative Court states that due to Bulgaria's derogation from Article 90(1) of the VAT Directive, it is clear that the taxable entities cannot rely on that provision and claim a reduction of their taxable amount for the purposes of VAT in case of non-payment of the price. As a result of that derogation, the non-payment of the price under Bulgarian law is not a reason for a correction of the taxable amount. However, the referring court takes into account the reasoning in the judgments of 27 November 2017, *Enzo Di Maura* (C-246/16, paragraphs 21 to 27), and of 3 July 2019, *UniCredit Leasing* (C-242/18, paragraphs 62 and 65). It states in that regard that from the interpretation given by the Court of Justice in those judgments, it can be concluded (as was also argued by the appellant) that the possibility of a VAT refund in the case of non-payment of the price cannot be completely excluded, even if a derogation has been made under Article 90(2) of the VAT Directive. That is particularly the case where the taxable entity demonstrates that, in view of the circumstances, it is likely that the recipient's liability under the invoice will not be paid.

13 If it must be assumed that, notwithstanding the derogation, it is possible, under certain conditions, to obtain a refund or set-off of VAT for non-payment, the referring court recognises that it must be possible to determine the precise date on

which the taxable entity may correct the tax charged. The possibility of exercising the right without any temporal limit would be contrary to the principle of legal certainty, which requires that the tax position of the taxable entity, having regard to its rights and obligations vis-à-vis the tax authority, does not remain open to challenge indefinitely. In the opinion of the Supreme Administrative Court, that is of crucial importance in order, on the one hand, to enable taxable entities to exercise their rights under Article 90(1) of the VAT Directive, a provision with direct effect, and, on the other hand, not to allow the tax situation of the parties to the transaction to remain open to challenge indefinitely.

14 As regards the second particular feature of the case, the referring court states that the correction of the invoices is a condition without which the right to a refund cannot be regarded as having been properly exercised. According to that court, in the present case it is relevant that when CRG filed the application for a refund, it had already been deregistered under the ZDDS at the instigation of the fiscal authorities for systematic failure to fulfil its obligations under that law. Consequently, CRG could not even issue a correction for the tax invoices already issued.

15 The argument that the time limit for filing the refund application must be calculated from the time when the VAT was charged in the invoices at issue is, in the opinion of the Supreme Administrative Court, logically untenable. Assuming that Article 90(1) of the VAT Directive (according to which the taxable amount may be corrected on the basis of a change in the factors and facts occurring after the issue of the invoice in which the VAT was charged) has direct effect, the date of the charging itself cannot be the date on which a possible right to a refund arises. Moreover, it would also not be logical for the time limit for the refund claim to run from the moment the taxable entity corrects the invoices for which it is claiming a refund, as that would postpone the start of the time limit indefinitely, entirely at the will of the taxable entity, and deprive it of its meaning. The referring court is of the opinion that the fact that the prescription period for the fulfilment of the liabilities of the recipients of the invoices in question has expired (although the prescription period is not taken into account ex officio) is an objective indication that the fulfilment of the liabilities is unlikely, which means that it can be assumed that the ground for the correction arose precisely at that time.

16 As regards the third feature, the Supreme Administrative Court states that CRG's claims against its contractual partners are listed in the schedules of claims accepted by the insolvency administrators in the insolvency proceedings. That fact highlights the possibility that the claims might not be recoverable. However, there is a certain likelihood that the CRG's claims would be satisfied when the assets of the companies that had received the invoices are liquidated. It remains unclear to the referring court what standard of proof applies under the VAT Directive when there is evidence that the taxable entity's claim is unlikely to be recovered in the circumstances in question. Moreover, Bulgarian positive law lacks a specific national rule both for the manner in which the correction of the taxable amount is

made where there is a likelihood that the liability will not be fulfilled and for the conditions under which the refund of the tax paid may be claimed.

17 In the light of the foregoing, the Supreme Administrative Court summarises the issues on which it is unsure and on which it considers that an interpretation of the VAT Directive is necessary:

– is making a correction of the charged tax required as a condition for the exercise of the right under Article 90(1) of the VAT Directive before its refund is claimed;

– is it permissible to set a limitation period for the exercise of that right such as that provided for in Article 129(1) of the DOPK;

– how should the point in time at which the taxable entity may make a correction to the charged tax be determined;

– to what extent is a correction of the tax permissible in the event of non-payment before the recipient of the supplies or services – provided that the recipient is a taxable entity – is notified of the cancellation of the tax, so that the deduction initially made is corrected;

– are the circumstances that the recipients of the invoices at issue were declared insolvent and that the VAT claims of the taxable entity have been included in the schedules of claims accepted by the insolvency administrators in the insolvency proceedings sufficient evidence that the claims will not be recovered;

– is there a basis for claiming statutory interest on the amount of tax that might be refundable, and from what date.