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RECENT DEVELOPMENTS IN VALUE ADDED TAX 2022

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CJEU – Recent Developments in Value Added Tax 2022

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Preface

The Court of Justice of the European Union (CJEU) is a driving force in the field of European Union indirect taxation. As the significance of VAT as a revenue source continues to grow, it is increasingly valuable and important for business practitioners, government and judiciary representatives, and academics alike to have a forum for the thorough analysis and exchange of opinions on indirect taxation cases pending at the CJEU.

On 19 and 20 January 2023, the WU Vienna University of Economics and Business, Institute for Austrian and International Tax Law hosted the conference: **Court of Justice of the European Union: Recent VAT Case Law**. This conference project began upon the initiative of the Taxation and Customs Union Directorate of the European Commission. This year, the tenth conference in this series was held at the Institute. It was a resounding success and brought together leading academics, judges, government and business representatives from all over the world. The cases presented and the issues raised at the conference are published in this book.

We are very grateful to the authors who not only delivered impressive presentations and articles but also committed themselves to an extremely ambitious schedule, which allowed for vivid exchanges during the conference. This further enabled us to address an extensive number of areas as well as to publish this book. It goes without saying that all opinions expressed in this book can only be attributed to the respective authors themselves and not necessarily to their employers or employees, to the editors involved, or to any other organization or committee.

This publication is supported by funds of the Oesterreichische Nationalbank (Austrian Central Bank, Anniversary Fund, project number: 18715). We would like to express our sincere gratitude for Linde's cooperation and swift realization of this publication project.

Above all, we would like to thank the members of the Institute for Austrian and International Tax Law, in particular Caroline Ristic and Nina Nimmerrichter, who were responsible for the organization and preparation of the conference and getting the book published. Likewise, Jenny Hill contributed greatly to the completion of the book by editing and polishing texts for the authors, many of whom were writing in English as a foreign language. Furthermore, we are also grateful to Camilo Rodríguez Peña who also helped in organizing the conference and editing this book.

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Marcos Álvarez Suso has participated as a teacher/lecturer/Spanish delegate at different seminars, conferences, and technical assistances, both national and international (OECD, EU WP Council group, FISCALIS EU program, Interamerican Bank of Development, IMF, IOTA, Saudi Arabia, Vietnam, Uganda) and for both public entities (Spanish School for Tax Studies) and private companies, law firms, and universities. In 2020, he was chosen by the OECD as one of the seven external world VAT experts assisting in the production of the Toolkit for the VAT in the digital economy for Latin America. In 2021/22, he was appointed by the CIAT and IDB to assist the tax authorities of Panamá, Dominican Republic, and Argentina in the implementation of the VAT to the digital economy. In 1995, he joined the Spanish Tax Administration. Since then, he has been working in different offices of tax administrations in Barcelona and Madrid in the following areas: Combating tax crimes, tax auditing, member of the regional administrative tax court in Madrid, tax collection, and especially the VAT. In the course of these tasks, he headed the Deputy Direction for Legal Assistance in the Tax Auditing Central Department in Madrid from October 2009 till April 2022.

He has published different articles in Spanish specialized magazines about tax fraud and the VAT (Wolters Kluvert, Francis Lefevbre, Thomsom Reuters, etc.). He is also the author of different international articles and courses devoted to European VAT in the International VAT Monitor (IBFD) and Linde Publishers (WU University Austria).

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Giorgio Beretta is an assistant professor in Indirect Taxation at the University of Amsterdam and a member of the Amsterdam Centre for Tax Law (ACTL) research project on "Designing the tax system for a Cashless, Platform-based and Technology-driven society (CPT)". He is an editorial board member of the international tax journals "Intertax", "Highlights & Insights on European Taxation", and "Kluwer International Tax Blog", and an Italian qualified lawyer. In 2021, for his monograph titled "European VAT and the Sharing Economy" (EUCOTAX Series on European Taxation No. 65, Kluwer Law International 2019), Giorgio was awarded the "IFA Maurice Lauré Price" that aims to encourage scientific work on international indirect taxation.

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Emanuele Ceci is a teaching assistant in tax law and PhD researcher at the Université Catholique de Louvain (UCLouvain). His research primarily encompasses VAT, tax litigation, and criminal tax law. His PhD focuses on issues related to combating VAT fraud. Emanuele is also a practicing attorney with the Brussels Bar (partner at Bazacle & Solon).

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Professor Van Doesum has broad experience in national and international VAT law and particular expertise in the complex VAT issues attached to cooperation between organizations. He received his law degree (tax law) at Leiden University, the Netherlands, in 1998. In 2009, he obtained his doctorate with his thesis on "Contractual Cooperative Arrangements and VAT" and was appointed as a university professor at Maastricht University in 2012.

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Prof. Marie Lamensch is a professor of taxation at the UCLouvain and counsel at ARTEO (Brussels). She holds a law degree from the Université Libre de Bruxelles as well as an LL.M. and a PhD degree from the Vrije Universiteit Brussel. She is a member of several expert groups (European Commission, OECD, UN), a member of the board of trustees of the Academy of European Law (ERA), and a member of the European Association of Tax Law Professors (and was general co-rapporteur for the 2020 EATLP Annual Congress). She is also the technical editor of the International VAT Monitor.

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Ine Lejeune is an attorney at Ine Lejeune bv and is specialized in VAT litigation, dispute resolution, and VAT policy. She is an author, researcher, and PhD candidate at the University of Amsterdam, and she co-drives WU Vienna's initiative of its multistakeholder group on global x-border VAT dispute resolution and prevention. She assists clients with tax audits, dispute resolution, and procedures before the Belgian courts including the supreme court, the constitutional court, and the Court of Justice. She has also supported other lawyers/tax advisors in litigations before courts of other Member States and the Court of Justice (e.g. the *ARO Lease bv, C-190/95 and Cabot Plastics Belgium SA, C-232/22* cases). She successfully filed complaints with the EU Commission resulting in infringement procedures and has filed a petition with the European Parliament's Petitions Committee.

From 2014 to 30 June 2019, Ms. Lejeune set up and led the tax litigation, dispute resolution, and tax policy services practice at PwC Legal. Before joining PwC Legal, she began working at PwC Tax Advisors in 1984, and she was appointed as a partner in 1996. She led PwC's European VAT Network from 1998 to 2002. She was PwC's Global Indirect Taxes Leader from 2002 to 2012 and the Global Indirect Taxes Policy Leader from 2002 to 2014. She was the partner in charge of services to EU Institutions from 2013 to 2014. She led more than 40 studies, most of them on taxation and a few on customs, delivered to the EU Commission and the EU Parliament. She advised the UAE (Dubai) on the introduction of the VAT, the GCC (drafting the VAT Framework Agreement), and was appointed as an international expert for the VAT/GST reform in China. Ms. Lejeune was a member of the European Commission's VAT Expert Group from 2012 to 2019 and is a member of the OECD's Consumption Tax Technical Advisory Group. From 2010 to 2020, she lectured in the LLM International Tax Law Program at WU Vienna University of Economics and Business, Institute for Austrian and International Tax Law and, from 2017 to 2021, at the VUB's Diplomatic Academy (Vrije Universiteit Brussel). She has lectured as a guest professor at other Belgian and foreign universities and for conference organizers. She has authored over 30 books and more than 110 articles on global/EU VAT policy and the case law of the European Court of Justice. She is a member of the editorial board of the International VAT Monitor published by IBFD, IFA, and the International VAT Association. Ms. Lejeune was Belgian Taxman 2009 and was elected the 5th Global Most Influential Tax Expert by Tax Business and 1st Indirect Tax Expert in 2006.

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In her research, she specializes on the impact of digitalization on the EU VAT system, as well as sustainability and VAT. Her research contributes to the current societal debate regarding these issues wherein she applies both an interdisciplinary and multidisciplinary approach. She is on the editorial board of FED (a case law journal), Btw-bulletin (a journal focused on VAT) and Maandblad Belastingbeschouwingen (a tax journal that offers peer reviews). She is a regular contributor of several

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Rebecca Millar is, on a part-year basis, a Professor of Law at the University of Sydney Law School. She is also a pro bono academic advisor to OECD Working Party 9, a member of the UN VAT Subcommittee, and an independent academic consultant on VAT law issues. In her 23 years as an academic, she has taught and published extensively on VAT/GST issues and has used her expertise to provide input on VAT/GST law design, drafting, and interpretation to the Australian Taxation Office, Treasury, and Board of Taxation and, through the auspices of various international organizations, to a wide range of countries. From 1999-2002, she worked for EY Australia.

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Melchior Wathelet, born in 1949 in Petit-Rechain (Belgium) where he is still living, holds the qualifications "licencié en droit" (1972), "licencié en Science économique" (1974) (Liège University) and Master of Laws (1976) (Harvard University). After three years as a research fellow at Liège University (European Law and Economics), he was elected as a member of the Belgian House of Representatives in 1977 and was appointed as a member of the Belgian Federal Government between 1980-1981. Between 1981 and 1988, he served both as a member and as president of the Walloon Government and thereafter again as a member of the Belgian Federal Government (specifically as Deputy Prime Minister, Minister of Justice, and Minister of Defence). His career as a university professor began in 1985 at the University of Louvain-la-Neuve.

In 1995, he left political life to become a judge at the European Court of Justice where he served until 2003. Between 2003 and 2012, he was member of the French Bar (in a tax law firm dealing with European law aspects) and came back to the European Court as Advocate General (2012) and First Advocate General (2014–2018). He was a professor of European Law at Liège and Louvain-la-Neuve universities until September 2020 and has been a visiting or invited professor at several other universities (Paris-Dauphine, Dijon, Paris II, Lyon III universities, France; Bâton Rouge University, the United States; University of Hamburg, Germany; University of Szeged, Hungary; University of Luxemburg, Luxemburg; and now KU Leuven, Belgium.

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Rights and Obligations of Taxable Persons when VAT Fraud is Concerned

Roland Ismer/Elena Fuchs

1. Introduction

VAT fraud cases have kept the European Court of Justice busy. Even when confining the topic of cases to only business to business (B2B), the Court had to decide dozens and dozens of these. This reflects the fact that VAT fraud causes huge losses for governments. One quarter of the EU VAT gap, i.e. the difference between expected VAT revenues and those actually collected, of EUR 93 billion in 2020 was attributed to EU-trade VAT fraud alone; to this, domestic B2B fraud needs to be added. Governments in turn seek to take counter-measures often in fragmented ways that threaten the internal market. However, VAT fraud also poses grave dangers for taxpayers. In theory, the neutrality of the VAT as the cornerstone of tax demands that taxable persons supplying goods and services be relieved of input VAT on purchased supplies. Moreover, insult should not be added to injury. *Bona fide* taxpayers who have fallen prey to fraud should therefore not suffer adverse VAT consequences. In the face of VAT fraud, the Court of Justice,

however, has severely limited the portent of the neutrality principle in two directions.

First, the Court has relied on the prohibition of abuse of law also in the field of VAT. The decisions in *Halifax*,[1] *Italmoda*,[2] and *Cussens*[3] in particular have established that VAT provisions cannot be relied upon for fraudulent or abusive purposes.[4] Since then, the Court has decided numerous cases on when taxable persons can be denied benefits under the VAT Directive. Like unfortunate passersby may be killed in gang shootings, taxable persons may also be hit by stray bullets and be denied relief in fraudulent supply chains even if they did not actively participate in the fraud. It suffices that they knew or should have known that a transaction was fraudulent (knowledge test).[5] VAT exemptions granted for intra-Community supplies or exports can similarly be denied.

Second, the Court has carefully navigated its way between a dogmatic interpretation of the provisions of the directive and the neutrality principle when requirements for input VAT are not fulfilled. For that purpose, it has again resorted to the knowledge test. It protects taxable persons only if they did not and could not have known that the transaction was connected to fraud.

All of this, however, also does not mean that the Court would implement a good faith test that would override any dogmatic considerations. In particular, the statement that the good taxable person enjoys protection while the bad loses all claims[6] is not always true.[7] As a counter-example, good faith protection is limited to exceptional cases when substantive requirements are not fulfilled. Conversely, taxable persons acting in bad faith are not necessarily denied benefits[8]; neither is bad faith a prerequisite for doing so.[9]

1 CJEU, 21 February 2006, C-255/02, *Halifax,* EU:C:2006:121.
2 CJEU, 18 December 2014, C-131/13, C-163/13 & C-164/13, *Italmoda*, EU:C:2015:2455.
3 CJEU, 22 November 2017, C-251/16, *Cussens*, EU:C:2017:881.
4 See on this topic R. de la Feria, *On Prohibition of Abuse of Law as a General Principle of EU Law*, EC Tax Review 2020, pp. 142–146.
5 CJEU, 7 December 2010, C-285/09, *R.*, EU:C:2010:742; see also, e.g. R. Ismer & A. Keyser, *Grenzüberschreitender Vertrauensschutz im Umsatzsteuerrecht*, in: Oestreicher (ed), *Aktuelle Fragen der Unternehmensbesteuerung* (Herne: NWB, 2012) p. 6 with further references; U. Grünwald, *Guter Glaube und üble Gesinnung – Das subjektive Element in der Umsatzsteuer,* MwStR 2013, p. 13; examples for bad faith: M. Robisch, in: Bunjes, *Umsatzsteuergesetz,* 21st Edition (Munich: C.H.Beck, 2022) § 6a, para. 82; in an attempt to categorize good and bad faith in VAT Law J. Lindenberg, J. Klamet & J. Schmidt*, Empfehlen sich gesetzliche Konkretisierungen zur Bösgläubigkeit und Gutgläubigkeit des Leistungsempfängers beim Vorsteuerabzug?*, UR 2015, p. 895, propose a legal basis.
6 C. Höink, *Kein Ausschluss vom Vorsteuerabzug bei Kenntnis von Zahlungsschwierigkeiten des leistenden Unternehmers – UAB „HA. EN.“*, MwStR 2022, p. 807; U. Grünwald, *Guter Glaube und üble Gesinnung – Das subjektive Element in der Umsatzsteuer,* MwStR 2013, p. 13.
7 Also J. Kokott, in: J. Kokott, *Das Steuerrecht der Europäischen Union*, 1st edition Munich: C.H.Beck, 2018) § 8, para. 405.
8 CJEU, 17 December 2020, C-656/19, *BAKATI,* EU:C:2020:1045, para. 89.
9 CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266, para. 31, repeated in CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 58.

Overall, it is fair to say that the topic remains somewhat blurred. In her opinion in HA.EN,[10] Advocate General Kokott aptly described the confusion surrounding the topic by citing a passage from The Sorcerer's Apprentice by Johann Wolfgang von Goethe: *"Sir, my need is sore. Spirits that I've cited My commands ignore*." According to her, the case "*once again highlights the uncertainties and problems that arise when value added tax (VAT) law is understood less conventionally, but rather is also used to combat fraud and abuse in the case-law*".

It is hardly surprising that the extent of rights and obligations of taxable persons when VAT fraud is concerned is disputed in the literature. The denial of rights in fraudulent supply chains has been highly controversial at least since the CJEU's decision in the Italmoda[11] case.[12] While Heuermann,[13] for example, approves of the case law, Wäger advocates for an objectified recipient's view from which the right to deduct input tax is to be assessed.[14] Reiß, on the other hand, objects to the lack of a legal basis.[15] Höink warns that VAT becomes a sanctioning measure under the CJEU's decisions and considers the case law on abuse to be getting out of hand.[16]

10 Opinion of Advocate General Kokott, 5 May 2022, C-227/21, *HA.EN.*, EU:C:2022:364, para. 1.

11 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 & C-164/13, *Italmoda*, EU:C:2015:2455.

12 On the development, see, for example, R. de la Feria & R. Foy, *Italmoda: The Birth of the Principle of Third-Party Liability for VAT Fraud*, BTR 2016, pp. 270 et seq.; C. McCarthy, *The good faith requirement in VAT*, World Journal of VAT/GST Law 2017, p. 63. From the German-language literature, see, for example, T. Ehrke-Rabel, *Missbrauch und Vorsteuerabzug*, in: Umsatzsteuerforum e.V. & Bundesministerium der Finanzen (eds.), *100 Jahre Umsatzsteuer in Deutschland 1918-2018: Festschrift* (Cologne: OttoSchmidt, 2018) especially pp. 740 et seq.; B. Heuermann, *Mit Italmoda auf den Schultern von Larenz*, DStR 2015, p. 1416; B. Heuermann, *Probleme des Vorsteuerabzugsrechts*, MwStR 2017, pp. 735 et seq.; M. Kemper, *Der "Missbrauch" und die Steuerhinterziehung bei der Umsatzsteuer*, UR 2017, p. 449; N. Madauß, *Urteil des EuGH vom 18.12.2014 in Sachen Italmoda – Was ist das Neue für die Praxis?*, NZWiSt 2015, p. 417; C. Wäger, *Das Zeitalter der Absichtsbesteuerung beim Vorsteuerabzug*, UR 2017, p. 41. Regarding intra-Community services M. Hassa, *Vertrauensschutz im Mehrwertsteuerrecht*, UR 2015, p. 809; on the special case of an intra-Community supply following importation see U. Schrömbges, *Zur Betrugsbekämpfungsklausel des EuGH bei der innergemeinschaftlichen Anschlusslieferung*, MwStR 2018, p. 157. Generally, P. Mann, *Der Schutz des guten Glaubens im Umsatzsteuerrecht im Spannungsfeld des Umsatzsteuerbetrugs*, 1st Edition (Lohmar: JOSEF EUL Verlag, 2017).

13 B. Heuermann, *Mit Italmoda auf den Schultern von Larenz*, DStR 2015, p.1416.

14 C. Wäger, *Das Zeitalter der Absichtsbesteuerung beim Vorsteuerabzug*, UR 2017, p. 41; C. Wäger, *Gutglaubensschutz im Umsatzsteuerrecht*, in: K. Drüen et al. (eds.), *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018: Festschrift für den Bundesfinanzhof* (Cologne: OttoSchmidt, 2018) p. 1591.

15 W. Reiß, *Steuerstrafrechtliche und (umsatz-)steuerrechtliche Aspekte bei grenzüberschreitenden Warenlieferungen in der Union*, in: M. Fischer (ed.), *Festgabe für Heinrich List zum 100. Geburtstag am 15. März 2015* (Stuttgart, Munich: Boorberg, 2014) pp. 149 et seq.

16 C. Höink, *Kein Ausschluss vom Vorsteuerabzug bei Kenntnis von Zahlungsschwierigkeiten des leistenden Unternehmers – UAB „HA. EN."*, MwStR 2022, p. 808; C. Höink & B. Lüger, *Umsatzsteuerrecht ist nicht allgemeines Sanktionsrecht, Anmerkungen zu BFH v. 12.3.2020 – V R 20/19 und V R 24/19*, MwStR 2020, p. 923; concerning the sanctioning measure also C. Pötters, *EuGH-Vorlage zur Versagung des Vorsteuerabzugs wegen Steuerhinterziehung des ursprünglichen Verkäufers*, MwStR 2022, p. 37 and M. Kemper, *Der "Missbrauch" und die Steuerhinterziehung bei der Umsatzsteuer*, UR 2017, p. 455.

Questions also remain regarding the applicable criteria to determine whether a taxable person "*knew or should have known*" about the VAT fraud.[17] There is no consensus as to how taxable persons can demonstrate that they did not and could not have known that they participated in a fraudulent transaction. The CJEU is very frugal with comments on this issue. Whether taxable persons knew or should have known that they were involved in a fraudulent transaction needs to be determined by the referring court.[18] The VAT Directive does not provide a legal basis or procedures regarding the evidence of fraud. Therefore, this criterion is to be determined according to domestic law. The effectiveness of EU law, however, must not be undermined.[19] In the literature, different suggestions in this regard are made, e.g. by Ramdewar,[20] Nellen,[21] and Lasiński-Sulecki.[22]

The question of the protection of taxpayers acting in good faith is not assessed uniformly in the academic literature, either. Lasiński-Sulecki states that good faith has become an additional requirement for deducting input VAT despite not being mentioned in any provision of the VAT Directive.[23] Friedrich-Vache argues in favour of unrestricted good faith protection even in cases when the wording of the law does not provide for it, given that the taxpayer himself does not commit tax evasion.[24] Van Brederode argued back in 2008 that parties acting in good faith should also be protected if they derived a benefit from the fraud scheme.[25] Reiß, on the other hand, denies full protection of good faith, especially with regard to the absence of substantive requirements for input tax deduction.[26] Finally, Kokott

17 F. Nellen, *On the Liability of the Uninformed Taxable Person in EU VAT*, Intertax 2019, p. 616; J. Kokott, in: J. Kokott, *Das Steuerrecht der Europäischen Union*, 1st Edition Munich: C.H.Beck, 2018) § 8, para. 409; M. Winter, *Einfuhrumsatzsteuerbefreiung auch bei gutem Glauben des Importeurs – Milan Božičevič Ježovnik*, MwStR 2019, p. 107; K. Lasiński-Sulecki, *Looking for Taxable Person's Good Faith – Stehcemp Case*, International VAT Monitor 2016, p. 114.

18 As recently repeated in CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 paras. 31-33; CJEU, 24 November 2022, C-596/21 *Finanzamt M*, EU:C:2022:921, paras. 37-39; CJEU, 15 September 2022, C-227/21 *HA.EN.*, EU:C:2022:687, para. 27; CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 50; CJEU, 17 December 2020, C-656/19, *BAKATI,* EU:C:2020:1045, para. 83; CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673, para. 66; CJEU, 25 October 2018, C-528/17, *Božičevič Ježovnik*, EU:C:2018:868, para. 41.

19 CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673, para. 59 with references.

20 D. Ramdewar, *The Good Faith Doctrine in EU VAT Law: A New Holy Grail for the Taxable Person*, International VAT Monitor 2022, pp. 89–90.

21 F. Nellen, *Information Asymmetries in EU VAT*, 1st Edition (Alphen aan den Rijn: Wolters Kluwer, 2017) pp. 235 et seq.

22 K. Lasiński-Sulecki, *Looking for Taxable Person's Good Faith – Stehcemp Case*, International VAT Monitor 2016, pp. 114–115.

23 K. Lasiński-Sulecki, *Looking for Taxable Person's Good Faith – Stehcemp Case*, International VAT Monitor 2016, pp. 113–114.

24 See e.g. H. Friedrich-Vache, *Schutz des guten Glaubens und damit Vertrauensschutz beim Vorsteuerabzug?*, UR 2015, p. 889.

25 R. van Brederode, *Third-Party Risks and Liabilities in Case of VAT Fraud in the EU*, International Tax Journal 2018, p. 35.

26 W. Reiß, *Vorsteuer(abzug) ohne Erhalt einer tatsächlich ausgeführten Lieferung oder Dienstleistung eines anderen Unternehmers*, MwStR 2018, p. 372; W. Reiß, *Vorsteuerabzug und Steuerschuld aus (An-)Zahlungen an Betrüger für nicht erbrachte Lieferungen – Zu zwei (unvollkommenen) BFH-Vorlagen an den EuGH*, MwStR 2017, p. 444.

points out that formal requirements are in tension between the rights of taxpayers, the principle of proportionality, the uniform application of Union law, and the principle of neutrality.[27]

The following paper discusses the CJEU case law on the rights and obligations of taxable persons in instances of B2B VAT fraud. It argues that the case law can best be understood through a combination of three components, namely, (i) the prohibition of abuse of law in its concretization for VAT purposes, (ii) the formal and substantive requirements under the VAT Directive and domestic law, as well as (iii) the proportionality principle as a limiting factor. Thus, the Court generally grants protection for reasons of proportionality when there is no compliance with formal requirements. Yet, this does not apply if the taxable person fails the knowledge test. The lack of substantive requirements, by contrast, generally results in a denial of benefits regardless of whether the transaction was fraudulent. The only exception is a constellation when the proof of substantive requirements by the Member States is possible solely by means of certain documentation when good faith protection can be granted (2.). The knowledge test is also the relevant criterion when it comes to third parties being held liable in case of fraudulent supply chains, for example, through denial of rights or liability. However, a restriction by the principle of proportionality is demanded in constant case law. Knowledge in this sense hence requires at least gross negligence. In addition, the latest relevant point in time for knowing is when the supply is realized. Finally, a subordination of liability follows from the prohibition of overcompensation (3.). A short summary concludes the chapter (4.).

2. Overcoming deficient formal requirements

Regarding the rights of taxable persons, the CJEU distinguishes in its case law between substantive and merely formal requirements.[28] Thus, the non-fulfilment of formal requirements in principle must not – unless the Directive provides otherwise[29] – entail a loss of rights. Instead, the Court allows alternative evidence provided that the transaction is not fraudulent (2.1.). On the other hand, it was clarified in the SGI[30] decision that the actual supply of goods and services as a substantial prerequisite for the deduction of input tax is indispensable (2.2.). When determining the borderline between formal and substantive requirements, however, it must be borne in mind that case law exceptionally grants protection of good faith if the formal requirement embodies a substantive requirement (2.3.).

27 J. Kokott, *Vom Sinn der Form*, in: Umsatzsteuerforum e.V. & Bundesministerium der Finanzen (eds.), *100 Jahre Umsatzsteuer in Deutschland 1918-2018: Festschrift* (Cologne: OttoSchmidt, 2018) p. 109.

28 See M. Merkx, *Just a Formality!: Substance over Form in EU VAT and the Right to Deduct Input VAT*, Intertax 2022, p. 556; B. Heuermann, *Durchsetzung des Unionsrechts im MwSt-Recht: Euro Tyre, Italmoda, Barlis 06 und die Folgen*, DB 2017, p. 991.

29 Art. 138(1)(b) of the VAT Directive; M. Kemper, *Die Umsatzsteuer-Identifikationsnummer als „materielle Voraussetzung" der Steuerbefreiung innergemeinschaftlicher Lieferungen*, UR 2018, p. 337.

30 F. Grube, *SGI, Valériane SNC v Ministre de l'Action et des Comptes publics*, MwStR 2018, p. 712.

2.1. Formal requirements dispensable only if taxable persons meet knowledge test

Ever since 2007, the Court has ruled in numerous cases such as *Collée*,[31] *VStR*,[32] *Mecsek-Gabona*,[33] *Plöckl*,[34] and *Cartrans Spedition*[35] that the principle of proportionality[36] requires that the simple absence of certain formal requirements must not lead to a denial of taxpayer's rights such as the exemption of an intra-Community supply. There are, however, two exceptions to this rule: The failure to meet formal requirements may result in the denial of a right such as a VAT exemption if either the lack of formal requirements frustrates the proof that the substantive requirements were met or in cases of VAT fraud.[37] These two exceptions were – regarding the right to deduct input VAT – recently repeated by the CJEU in *Ferimet*.[38] While stating the name of a fictitious trader on an invoice alone solely concerns a formal requirement, an input VAT deduction may be denied if thereby the tax status of the true trader cannot be determined.[39] Regarding the second exception, the Court stated:

> [T]the taxable person cannot be refused the right to deduct unless it is established on the basis of objective factors that he or she knew or should have known that, through the purchase of the goods or services on the basis of which the right to deduct is claimed, he or she was participating in a transaction connected to such a VAT fraud committed by the supplier or by another trader acting upstream or downstream in the supply chain of those goods or services.[40]

This second statement, of course, applies regardless of whether the formal requirements of a transaction are met.[41] The VAT exemption for exports can, if the substantive requirements are fulfilled and solely the formal requirements are not complied with, also only be denied under the aforementioned two circumstances.[42]

In essence, this means, while formal requirements are, in principle dispensable for accommodating the proportionality principle, this applies in fraud cases only if the taxable person knew or should have known about the VAT fraud.

31 CJEU, 27 September 2007, C-146/05, *Collée*, EU:C:2007:549.
32 CJEU, 27 September 2012, C-587/10, *VSTR*, EU:C:2012:592.
33 CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547.
34 CJEU, 20 October 2016, C-24/15, *Plöckl*, EU:C:2016:791.
35 CJEU, 8 November 2018, C-495/17, *Cartrans Spedition*, EU:C:2018:887.
36 CJEU, 8 November 2018, C-495/17, *Cartrans Spedition*, EU:C:2018:887, para. 38; CJEU, 20 October 2016, C-24/15, *Plöckl*, EU:C:2016:791, para. 23; CJEU, 27 September 2012, C-587/10, *VSTR*, EU:C:2012:592, para. 52; CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 64; CJEU, 27 September 2007, C-146/05, *Collée*, EU:C:2007:549, para. 29.
37 CJEU, 8 November 2018, C-495/17, *Cartrans Spedition*, EU:C:2018:887, paras. 40-42 with references.
38 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910.
39 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 27-48.
40 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 48 with references.
41 As will be described in section 3.
42 CJEU, 17 December 2020, C-656/19, *BAKATI,* EU:C:2020:1045, para. 89; CJEU, 17 October 2019, C-653/18, *Unitel*, EU:C:2019:876, paras. 29-30.

2.2. Generally no protection in the absence of substantive requirements

By contrast, the Court has decided that this approach cannot be transferred to cases when the substantive requirements are not met.[43] Thus, no input VAT can be deducted if goods or services were not actually supplied. For the deduction of input tax, this follows e contrario from the decisions in the cases PPUH Stehcemp[44] and Tóth.[45] The referring court in *PPUH Stehcemp* considered the supplier to be a non-existent trader[46] and, *in Tóth*, the supplier's licence had been withdrawn.[47] In both cases, the Court came to the conclusion that the substantive conditions for an input VAT deduction were fulfilled[48] and, thus, it could only be denied in the case that the taxable person knew or should have known that the transaction concerned VAT fraud.[49]

This approach – that an input VAT deduction cannot be granted if no service was actually rendered or good supplied, even if the alleged recipient of the supply assumed this in good faith – was then explicitly confirmed in *SGI* and *Valériane*.[50] As the Court simply put it: "*It follows that the existence of a right to deduct of VAT is conditional on the corresponding transactions having actually been carried out*."[51] The same should apply if the supply was not realized by a taxable person. This is again illustrated by the decision in the *SGI* case.[52] SGI and Valériane wanted to purchase equipment that was intended to be leased to operators. Since the items were not actually delivered, the input tax that had initially been deducted was reclaimed after a tax audit. The question here was whether it was sufficient to prove that no delivery had been made or whether it was also necessary to prove that the taxable person claiming the input tax deduction should have known that the transaction was connected with VAT fraud.[53] The CJEU ruled that the right to deduct VAT arises at the time when the VAT becomes chargeable. Thus, the time at which the supply of the goods took place is decisive. The term "supply of goods"[54] is objective in nature. The intention of the taxable person or

43 See W. Reiß, *Vorsteuerabzug und Steuerschuld aus (An-)Zahlungen an Betrüger für nicht erbrachte Lieferungen – Zu zwei (unvollkommenen) BFH-Vorlagen an den EuGH*, MwStR 2017, pp. 451 et seq.; also: C. Wäger, *Das Zeitalter der Absichtsbesteuerung beim Vorsteuerabzug*, UR 2017, p. 45.

44 CJEU, 22 October 2015, C-277/14, *PPUH Stehcemp*, EU:C:2015:719.

45 CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549.

46 CJEU, 22 October 2015, C-277/14, *PPUH Stehcemp*, EU:C:2015:719, paras. 18-20.

47 CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549, para. 16.

48 CJEU, 22 October 2015, C-277/14, *PPUH Stehcemp*, EU:C:2015:719, para, 43; CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549, para. 27.

49 CJEU, 22 October 2015, C-277/14, *PPUH Stehcemp*, EU:C:2015:719, para. 53; CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549, para. 53.

50 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501.

51 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, para. 40.

52 See also the lucid first classification of F. Grube, *Tatsächlich ausgeführte Lieferung als materielle Voraussetzung für begehrten Vorsteuerabzug/kein Gutglaubensschutz für Leistungsempfänger – SGI und Valériane SNC*, MwStR 2018, p. 715.

53 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, paras. 13-22.

54 Art. 5(1) Directive 77/388/EEC, now Art. 14(1) of the VAT Directive.

any other participant in the supply chain is not to be determined or taken into account.[55] The right to deduct input VAT is thus linked to the actual supply of goods. It does not arise if there is no supply regardless of the reason. An input tax deduction solely for the reason that VAT is shown on the invoice is therefore not possible.[56] The good or bad faith of the invoice recipient is irrelevant for the question of whether a supply was actually carried out. However, the Court somewhat surprisingly seems to have suggested in *Stroy trans* and *LVK*[57] that the tax authorities should bear the burden of proof.[58] In that case, the actual realization of the supplies was questionable but also could not be disproven.

The *Kollroß* and *Wirtl* cases do not contradict the approach either as they do not allow the deduction of input VAT for supplies that were not carried out as such. Instead, the outcome was determined by the special fact that they concerned advance payments.[59] In both cases, combined heat and power (CHP) plants were ordered and advance payments including VAT were made. The delivery date was not yet fixed at the time of payment. However, the orders were never delivered. Insolvency proceedings were opened against the suppliers, rejected for lack of assets, and the persons involved were convicted of fraud. No tax evasion resulted from the order for reference. Kollroß and Wirtl each wanted to deduct the input tax from the payment on account, which was rejected by the tax offices.[60]

The CJEU first ruled that the tax on supplies in the case of payments on account arises at the time of receipt of the amount of money if the decisive elements of the future supply, including the actual effect thereof, are already known at that time. If this is not the case, no tax claim arises under Art. 65 of the VAT Directive.[61] The right to deduct input tax arises in the case of payments on account at the time the payment is made. This is the point in time at which the acquirer assumes all financial risks in advance. Facts that subsequently become known do not prevent the right to deduct input tax.[62] Since, in both cases – despite the lack of delivery dates – it could be assumed at the time of the down payment that the CHP units

55 CJEU, 15 October 2015, C-494/12, *Dixons Retail*, EU:C:2013:758, paras. 19, 21 and the case law cited; CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, para. 38.

56 CJEU, 4 July 2013, C-572/11, *Menidzherski biznes reshenia*, EU:C:2013:456, paras. 19-20 and the case law cited; CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, paras. 33-37.

57 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, paras. 40-46.

58 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, para. 30 and paras. 45-47; in the same sense also: F. Huschens, *Nachweispflichten der Finanzverwaltung bei Versagung des Vorsteuerabzugs*, EU-UStB 2018, pp. 79 et seq. However, the decision does not appear to be free of contradictions as, in para. 39, the burden of proof is placed on the person who wants to claim the input tax deduction: "In that regard, it must be remembered that it is for the person seeking deduction of VAT to establish that he meets the conditions for eligibility".

59 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372.

60 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, paras. 16-34.

61 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, paras. 38-42 with reference to CJEU, 13 March 2014, C-107/13, C-107/13, *FIRIN*, EU:C:2014:151.

62 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, paras. 47-48 with reference to CJEU, 21 February 2006, *BUPA Hospitals and Goldsborough Developments*, C-419/02, EU:C:2006:122.

would be delivered and no circumstances were known that would constitute tax evasion, the input tax deduction was initially to be granted. The deduction, however, could be denied if the purchaser "*knew or should reasonably have known that the supply was uncertain*".[63]

The CJEU also ruled that the VAT Directive itself does not require good faith protection on the deduction of input tax on payments on account. However, it interpreted the Directive as allowing Member States to waive an input tax adjustment in such cases. The second guiding principle of its decision reads literally:

> Arts. 185 and 186 of Directive 2006/112 must be interpreted as not precluding, in circumstances such as those of the main proceedings, national legislation or practice under which the adjustment of the deduction of input tax in respect of an advance paid for the supply of goods is conditional on that advance being repaid by the supplier.[64]

The German Federal Fiscal Court (Bundesfinanzhof) seized this opportunity and, in this author's opinion, in a somewhat questionable manner, decided that German law indeed prohibited an input tax adjustment.[65]

2.3. Exceptionally, substantive requirements can be overcome by protection of good faith in the case of formal embodiment

At first glance, there is a certain tension between the results reached so far and the original decisions in the *Teleos* and *Netto Supermarkt* cases.[66] In both cases, there was no transfer abroad (as a material prerequisite for the tax exemption of the cross-border supply), but the CJEU nevertheless granted good faith protection. The explanations on the special situation of intra-Community supplies where proof of shipment abroad cannot be provided in any other way than in paper form according to the conditions set by the national legislator offer clues to resolving this supposed contradiction.[67] As the decision in the *Mecsek-Gabona* case shows, the fact that the tax authorities did not initially object to the export document after examination is not crucial.[68] Rather, the supplier's lack of evidence is decisive.[69]

63 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, para. 51.
64 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, para. 69.
65 Critically also W. Reiß, *Vorsteuerabzug und Vorsteuerberichtigung bei Anzahlungen für nicht erbrachte Lieferungen*, MwStR 2018, p. 643.
66 CJEU, 27 September 2007, C-409/04, *Teleos*, EU:C:2007:548; CJEU, 21 February 2008, C-271/06, *Netto Supermarkt*, EU:C:2008:105.
67 Correspondingly for the intra-community delivery of new vehicles CJEU, 14 June 2017, C-26/16, *Santogal*, EU:C:2017:453, para. 75.
68 CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 41.
69 CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 41: "On that point, the Court has observed that, where there appears to be no tangible evidence to substantiate the conclusion that the goods concerned have been transferred out of the territory of the Member State of supply, to oblige taxable persons to provide conclusive proof of this does not ensure the correct and straightforward application of the exemptions." Similar also W. Reiß, *Materielle und formelle Voraussetzungen für die Befreiung der innergemeinschaftlichen Lieferung nach Art. 138, 131 MwStSystRL einschließlich postfaktischer Erweiterungen nach der Rechtsprechung des EuGH*, UR 2017, p. 259.

In other words, in a situation in which the national legislature provides proof of the substantive requirements by means of a document, there is an exception to the principle that substantive requirements must be met. In such situations, the taxpayers are protected against falsification of this document if they act in good faith. Since the rulings in the *Teleos* and *Netto Supermarkt*, it has been recognized for intra-Community supplies and export supplies that taxable persons acting in good faith must be protected under certain circumstances. Protection is only granted if, even when exercising due commercial care, they could not have been aware that the conditions for exemption were not in fact fulfilled because the export documents provided by the buyer were falsified.[70] In *Božičevič Ježovnik,* this was confirmed for the exemption of importations followed by an intra-Community supply.[71] Protection cannot be granted, however, if the taxable person knew or should have known that a supply involved VAT fraud.[72]

The exact prerequisites for the protection of good faith and the required procedure[73] have not yet been finally clarified. However, the jurisprudence of the CJEU suggests that a stricter standard of care applies here; it is not a question of formal requirements but rather the exceptional overcoming of the non-existence of substantive requirements. Therefore, it is not sufficient if the taxpayers were merely unaware of the tax fraud. Rather, they must exercise due commercial care. The scope of this exception has also not yet been clarified: If, in accordance with the case law of the CJEU,[74] the existence of an invoice is considered as an indispensable requirement for the deduction of input tax, an unrecognizably forged invoice could possibly be sufficient even though this is a requirement of EU law and not of the Member States.

70 CJEU, 21 February 2008, C-271/06, *Netto Supermarkt*, EU:C:2008:105, para. 27 and CJEU, 27 September 2007, C-409/04, *Teleos*, EU:C:2007:548, para. 68. Accordingly for the intra-Community supply of new vehicles: CJEU, 14 June 2017, C-26/16, *Santogal*, EU:C:2017:453, para. 75.

71 CJEU, 25 October 2018, C-528/17, *Božičevič Ježovnik*, EU:C:2018:868, para. 46.

72 CJEU, 25 October 2018, C-528/17, *Božičevič Ježovnik*, EU:C:2018:868, para. 47; CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 54.

73 R. Weymüller, *Kein Schutz des guten Glaubens an das Vorliegen der Voraussetzungen des Vorsteuerabzugs im Feststellungsverfahren*, MwStR 2015, p. 816, does not want to grant good faith protection in the declaratory proceedings but in the special equitable procedure. The submission of BFH, M. Kemper, *EuGH-Nachfolgeentscheidung: Änderung der Rechtsprechung zu den Rechnungsanforderungen*, MwStR 2018, p. 802 and J. Scharrer, *Zum Rechnungsmerkmal "vollständige Anschrift" bei der Ausübung des Rechts auf Vorsteuerabzug*, MwStR 2018, p. 933 to the CJEU, on the other hand, asked whether a grant in declaratory proceedings was required; however, the question did not need to be answered by the CJEU. The Advocate General had concerns to grant good faith protection in the special equitable procedure, T. Hartmann, in: Musil/Weber-Grellet, *Europäisches Steuerrecht*, 2nd Edition (Munich: C.H.Beck, 2022) § 15 UStG, para. 33 with reference to Opinion of Advocate General Wahl, 5 July 2017, C-374/16 & C-375/16, *Geissel*, EU:C:2017:515, paras. 70 et seq. and further references.

74 CJEU, 29 April 2004, C-152/02, *Terra Baubedarf-Handel*, EU:C:2004:268.

3. Denial of rights in fraudulent supply chains

Conversely, in order to protect tax revenue, the CJEU derives from Union law a general prohibition of abuse that also encompasses the fight against VAT fraud and can be detrimental to the interests of third parties (3.1.). The prerequisite for this, however, is that the taxable person knew or should have known about the fraud (3.2.). The proportionality principle demands that the requirements for knowledge must not be overstretched. It must therefore be assumed that gross negligence is required (3.3.). The threat of fiscal overcompensation is to be taken into account by a fundamental subordination of liability (3.4.). Finally, the fact that the issuance of the liability notice is at the discretion of the tax authorities does not avert the unlawfulness of the proposed liability rule under EU law (3.5.).

3.1. Objective of combating VAT fraud as a legitimate basis for liability of third parties

The starting point for the following analysis is that the provisions of the VAT Directive are subject to a general unwritten prohibition of abuse. This was first established in the fundamental decision in the *Halifax* case from 2006.[75] The principles of this decision were subsequently confirmed again and again.[76] Dogmatically, it is noteworthy that the CJEU – more recently in *Cussens*[77] – considers the prohibition of abuse to be a general legal principle of Union law.[78] This is directly applicable even without a written provision to this effect and without implementation by the Member States. The so-called "*Danish cases*" have extended the applicability of this principle to direct taxation.[79] For an abuse of rights, two conditions must be met: The transaction must result in a tax advantage that is contrary to the purpose of the provisions and the essential aim of the transaction is to gain this advantage.[80] A purchaser being aware of a seller's financial difficulty that results in the latter not being able to pay the VAT due, however, does not constitute abuse whereby the right to deduct VAT could be denied.[81]

75 CJEU, 21 February 2006, C-255/02, *Halifax,* EU:C:2006:121, paras. 70 et seq.

76 CJEU, 15 September 2022, C-227/21 *HA.EN.*, EU:C:2022:687, paras. 34-35; CJEU, 16 December 2010, C-430/09, *Euro Tyre*, EU:C:2010:786; CJEU, 6 July 2006, C-439/04, 439/04 & 440/04, *Kittel* and *Recolta Recycling*, EU:C:2006:446, para. 54; CJEU, 21 June 2012, C-80/11 & 142/11, *Mahagében and Dávid*, EU:C:2012:373, para. 41.

77 CJEU, 22 November 2017, C-251/16, *Cussens*, EU:C:2017:881.

78 See, on this topic, R. de la Feria, *On Prohibition of Abuse of Law as a General Principle of EU Law*, EC Tax Review 2020, pp. 142-146 and L. de Broe & S. Gommers, *Danish Dynamite: The 26 February 2019 CJEU Judgments in the Danish Beneficial Ownership Cases*, EC Tax Review 2019, p. 270.

79 R. Danon et al., *The Prohibition of Abuse of Rights After the ECJ Danish Cases*, Intertax 2021, p. 484; W. Schön, *The Concept of Abuse of Law in European Taxation: A Methodological and Constitutional Perspective*, Max Planck Institute for Tax Law and Public Finance Working Paper 2019, pp. 11-15.

80 CJEU, 15 September 2022, C-227/21 *HA.EN.*, EU:C:2022:687, para. 35 with references. See on this issue also the current referral in CJEU, C-114/22, *Dyrektor Izby Administracji Skarbowej w warszawie*.

81 CJEU, 15 September 2022, C-227/21 *HA.EN.*, EU:C:2022:687, para. 41.

In order to combat VAT fraud, the CJEU has made third parties liable in a number of rulings by denying them, under certain conditions, rights and benefits to which they would be entitled under the VAT Directive. This approach, which is sometimes seen as an expression of a general trend towards "*responsibilization*",[82] began with the *Kittel* and *Recolta Recycling* cases.[83] Accordingly, the right to deduct input VAT under the Sixth Directive 77/388/EEC was denied if it was established, on the basis of objective circumstances, that it was fraudulently claimed.[84] Later, in addition to the denial of the right to deduct input tax, the VAT exemption for an intra-Community supply was denied in the decisions in the *R.* and *Mecsek-Gabona* cases.[85] Going even further, it is not completely ruled out that Member States may create independent taxable events that make third parties not directly involved in the transaction liable.[86]

In the Cussens decision, the CJEU also declared that the case law on the denial of rights and benefits in connection with VAT fraud is a sub-category of abuse.[87] This means, on the one hand, that the case law concerning the fight against VAT fraud can, in principle also be used in cases of abuse. On the other hand, it imposes requirements on the structure of the offence of abuse. In its recent decision in *Finanzamt Wilmersdorf*, however the Court also made clear that, for a participation in fraud, it is not relevant that the taxable persons gained a tax advantage themselves.[88] In a similar vein, the Court noted in *Ferimet* that

> unlike rulings issued in relation to abusive practices, a finding that the taxable person participated in VAT fraud is not subject to the condition that that transaction has conferred on that person a tax advantage the grant of which is contrary to the objective pursued by Directive 2006/112/EC.[89]

It should be noted that the liability serves to protect the EU VAT system. Thus, VAT fraud is only relevant when it is "*committed to the detriment of the common system of VAT*".[90] The taxation of a supply otherwise exempt under Art. 146 et

82 R. de la Feria, *Tax Fraud and the Rule of Law*, Oxford University Centre for Business Taxation 2018, pp. 29 et seq.

83 CJEU, 6 July 2006, C-439/04 & 440/04, *Kittel* and *Recolta Recycling*, EU:C:2006:446.

84 See also CJEU, 28 July 2016, C-332/15, *Astone*, EU:C:2016:614, para. 50; CJEU, 13 February 2014, C-18/13, *Maks Pen*, EU:C:2014:69, para. 26; CJEU, 6 December 2012, C-285/11, *Bonik*, EU:C:2012:774, para. 37; CJEU, 6 July 2006, C-439/04, 439/04 & 440/04, *Kittel* and *Recolta Recycling*, EU:C:2006:446, para. 54.

85 CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 54; CJEU, 7 December 2010, C-285/09, *R.*, EU:C:2010:742, para. 55.

86 CJEU. 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij*, EU:C:2011:871; CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries and Others,* EU:C:2006:309, where, however, in each case, the Member States' legal requirements were discarded; see also: CJEU, 17 November 2011, C-454/10, *Oliver Jestel*, EU:C:2011:752 (from customs law).

87 CJEU, 22 November 2017, C-251/16, *Cussens*, EU:C:2017:881.

88 CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266, para. 35.

89 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 57 with reference to CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266.

90 CJEU, 17 October 2019, C-653/18, *Unitel*, EU:C:2019:876, para. 38.

seq. of the VAT Directive can, according to the Court's decision in *Unitel*, only be justified if the risk of tax loss regarding the EU VAT system exists.[91] The case concerned potential VAT evasion committed in Ukraine.[92] The denial of rights thus depends on the EU VAT system being jeopardized. After all, VAT law is tax, and not criminal, law.[93] A potential loss of direct taxes also does not suffice for a denial of input VAT.[94]

3.2. The liability of third parties requires that they knew or should have known of the VAT fraud

The prerequisite for such a denial of rights and benefits is that the taxable person knew or should have known about the VAT fraud.[95] The mere fact that VAT was lost due to VAT fraud conducted by a third person cannot justify a taxable person's liability.[96] By contrast, knowledge of a third party acting on behalf of a taxable person can be attributed to this person.[97] An active participation in the fraud or deriving a financial or economic profit from the fraud is also not relevant.[98] In *Finanzamt M*, the Court ruled that the denial of an input VAT deduction is not limited to the immediate purchaser. The second buyer in the chain can be denied this advantage, too, if he knew or should have known about the fraud and despite the original purchaser knowing about the fraud as well.[99]

A no-fault denial of rights and benefits is excluded – as is a no-fault inclusion in a joint and several liability.[100] Thus, in the *Optigen*[101] and *Mahagében and Dávid*[102]

91 P. Mikuła & F. Zawodsky, *EU VAT in Jeopardy: Clues from the Unitel Case (C-653/18)*, Intertax 2020, pp. 462-463; also C. Höink & B. Lüger, *Umsatzsteuerrecht ist nicht allgemeines Sanktionsrecht, Anmerkungen zu BFH v. 12.3.2020 – V R 20/19 und V R 24/19*, MwStR 2020, pp. 918-919, and R. Prätzler, *Ausfuhrlieferung auch bei nicht identifiziertem Empfänger steuerfrei („Unitel")*, jurisPR-SteuerR 4/2020, note 6.

92 CJEU, 17 October 2019, C-653/18, *Unitel*, EU:C:2019:876, para. 15.

93 C. Höink & B. Lüger, *Umsatzsteuerrecht ist nicht allgemeines Sanktionsrecht, Anmerkungen zu BFH v. 12.3.2020 – V R 20/19 und V R 24/19*, MwStR 2020, p. 913; P. Mikuła & F. Zawodsky, *EU VAT in Jeopardy: Clues from the Unitel Case (C-653/18)*, Intertax 2020, pp. 462-463.

94 S. Schrader, *Rechnung mit Angabe eines fiktiven Lieferers – Ferimet SL*, MwStR 2022, p. 67.

95 See the recent judgements CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266, para. 38; CJEU, 17 December 2020, C-656/19, *BAKATI,* EU:C:2020:1045, para. 89; CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673, para. 66; CJEU, 3 October 2019, C-329/18, *Altic*, EU:C:2019:831, para. 30. Regarding the burden of proof: CJEU, 13 February 2014, C-18/13, *Maks Pen*, EU:C:2014:69, para. 30; CJEU, 13 March 2014, C-107/13, *FIRIN*, EU:C:2014:151, para. 44 with further references.

96 CJEU, 17 October 2019, C-653/18, *Unitel*, EU:C:2019:876, para. 34 with reference to CJEU, 21 February 2008, C-271/06, *Netto Supermarkt*, EU:C:2008:105.

97 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 para. 68.

98 CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266, paras. 26 and 35.

99 CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266, paras. 29-32.

100 As, e.g. ruled in CJEU, 13 October 2022, C-1/21, *Direktor na Direktsia "Obzhalvane I danachno-osiguritelna praktika"*, EU:C:2022:788, paras. 85 and 96. Member States may hold a person jointly and severally liable for a VAT debt if acts were committed in bad faith.

101 CJEU, 12 January 2003, C-354/03, 355/03 & 484/03, *Optigen*, EU:C:2006:16, para. 52.

102 CJEU, 21 June 2012, C-80/11 & 142/11, *Mahagében and Dávid*, EU:C:2012:373, para. 48.

cases, the CJEU clarified that the right of a taxable person who carries out such transactions to deduct input tax is not affected by the fact that another taxable person in the supply chain is connected with VAT fraud as long as that taxable person did not and could not have known about this. This applies to transactions preceding or following the taxable person's own supply.

Regarding the question of how knowledge or a need-to-know could be established by the Member States, in its decision in the *Federation of Technological Industries* case,[103] which it later confirmed in the *Vlaamse Oliemaatschappij NV* case,[104] the CJEU initially expressly stated that Member States may rely on presumptions although they must not be irrebuttable.[105] Even further, they must not be formulated in such a way as to make it practically impossible or excessively difficult for the taxpayer to disprove them. Otherwise, they would de facto introduce a system of unconditional liability that would be disproportionate as it would go beyond what is necessary to protect the state's claims.[106] In its later judgements of *Ferimet*, *Crewprint*, and *Aquila*, however, the CJEU deviated from this line and stated that the decision of whether a taxable person knew or should have known about the fraud cannot be determined on the basis of assumptions. Instead, the Member States need to establish the facts to a sufficient legal standard by means other than presumptions.[107]

The knowledge or the need to know must relate to the VAT fraud. Benefits and rights are not comprehensively denied if there is knowledge of a breach of the law. In the *Schmeink & Cofreth* case, for example, the CJEU allowed a correction of an invoice if the issuer of the invoice eliminated the risk of the loss of the tax revenue irrespective of whether the issuer of the invoice acted in bad faith.[108] This was recently repeated in *EN.SA* that concerned fictitious supplies.[109] In the *Collée* decision, the tax exemption of the intra-Community supply was also allowed despite a deliberate breach of the formal obligations since there was no longer any risk of tax loss and there was no unjustified tax advantage.[110] Unlawful behaviour per se cannot justify the denial of rights.[111]

103 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries and Others,* EU:C:2006:309. See C. Sanò, National Tax Law Presumptions and EU Law, EC Tax Review 2014, p. 200.

104 CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij*, EU:C:2011:871.

105 F. Nellen, *VAT information asymmetries in the context of Intra-EU trade in goods*, World Journal of VAT/GST Law 2018, p. 40 is in favour of this approach.

106 CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries and Others,* EU:C:2006:309, para. 32.

107 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 para. 32; CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 52; CJEU, 3 September 2019, C-611/19, *Crewprint*, EU:C:2020:674.

108 See also CJEU, 19 September 2000, C-454/98, *Schmeink & Cofreth and Strobel*, EU:C:2000:469.

109 CJEU, 8 May 2019, C-712/17, *EN.SA.*, EU:C:2019:374, paras. 33-36.

110 CJEU, 27 September 2007, C-146/05, *Collée*, EU:C:2007:549, paras. 34 et seq.; also: CJEU, 20 October 2016, C-24/15, *Plöckl*, EU:C:2016:791, para. 55.

111 P. Mikuła & F. Zawodsky, *EU VAT in Jeopardy: Clues from the Unitel Case (C-653/18)*, Intertax 2020, p. 462 with reference to CJEU, 3 October 2019, C-329/18, *Altic*, EU:C:2019:831.

3.3. Proportionality implies restrictive interpretation: Knowledge requires at least gross negligence

In the requirements for knowledge, the CJEU uses the formulation that the person other than the person liable for the tax may be required to have "*to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion*".[112] At first glance, this sounds like stringent requirements being imposed ("to take every step"). However, the decision puts the statement into perspective by adding that the measures can "reasonably" be required of the person. This indeterminate legal term is open to interpretation and in need of concretization.

In the case law of the CJEU, the tendency can be discerned that the standards must not be overstretched.[113] The sole fact that the taxable persons in the chain knew each other is, e.g. not sufficient to prove that a taxable person was involved in a fraudulent transaction. It is, however, one factor to be considered.[114] In *Mahagében and Dávid*,[115] which was subsequently confirmed on several occasions,[116] the CJEU pointed out that, in principle, it is up to the tax authorities, "*to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud as well as to impose penalties on the taxable person who has committed those irregularities or fraud*".[117] Taxable persons themselves, on the other hand, are not required to carry out complex and comprehensive checks as is the standard of tax authorities.[118] In *Ferimet*, the Court, in principle, relieved taxable persons from checking the tax status of a supplier – if, however, the tax status of a

112 CJEU, 17 December 2020, C-656/19, *BAKATI,* EU:C:2020:1045, para. 80; CJEU, 17 October 2019, C-653/18, *Unitel*, EU:C:2019:876, para. 32, the Court however used the wording "the measures"; CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij*, EU:C:2011:871, para. 25; CJEU, 21 February 2008, C-271/06, *Netto Supermarkt*, EU:C:2008:105, para. 24; CJEU, 27 September 2007, C-409/04, *Teleos*, EU:C:2007:548, para. 65; CJEU, 6 July 2006, C-439/04, 439/04 & 440/04, *Kittel* and *Recolta Recycling*, EU:C:2006:446, para. 51; CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries and Others,* EU:C:2006:309, para. 33.

113 Also D. Ramdewar, *The Good Faith Doctrine in EU VAT Law: A New Holy Grail for the Taxable Person*, International VAT Monitor 2022, p. 84, who argues that the standards were lowered by the CJEU over time.

114 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 para. 44.

115 CJEU, 21 June 2012, C-80/11 & 142/11, *Mahagében and Dávid*, EU:C:2012:373.

116 See CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673, para. 56; CJEU, 19 October 2017, C-101/16, *Paper Consult*, EU:C:2017:775, para. 52; CJEU, 22 October 2015, C-277/14, *PPUH Stehcemp*, EU:C:2015:719, para. 52; CJEU, 6 February 2014, C-33/13, *Jagiełło*, EU:C:2014:184; CJEU, 13 February 2014, C-18/13, *Maks Pen*, EU:C:2014:69, para. 31; CJEU, 31 January 2013, C-643/11, *LVK – 56*, EU:C:2013:55; CJEU, 6 December 2012, C-285/11, *Bonik*, EU:C:2012:774; not containing any further benchmarks: CJEU, 9 October 2014, C-492/13, *Traum*, EU:C:2014:2267; CJEU, 31 January 2013, C-642/11, *Stroy trans EOOD*, EU:C:2013:54.

117 CJEU, 21 June 2012, C-80/11 & 142/11, *Mahagében and Dávid*, EU:C:2012:373, paras. 59 et seq.

118 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 para. 52. "It is, however, unreasonable to oblige a taxable person to carry out in-depth or time-consuming checks on the accuracy and correctness of the formal data included in each invoice of all of his suppliers. That would be neither practical nor economically feasible", Opinion of Advocate General Wahl, 5 July 2017, C-374/16 & C-375/16, *Geissel*, EU:C:2017:515, para. 59.

supplier is relevant to determine whether the substantive requirements for an input VAT deduction are fulfilled, the taxable person needs to prove the tax status unless tax authorities have the relevant information to verify whether the requirements are fulfilled.[119]

The procedural approach taken also speaks for the fact that the restrictive decisions can be understood as established case law: The subsequent decisions were mainly[120] taken without an advocate general's opinion.[121] According to Art. 20(5) of the statute,[122] an advocate general's opinion is only mandatory if the referral raises new questions of law. This is the case if the CJEU has to interpret Union law in a way that is not immediately obvious, for example, because various interpretations are possible.[123] In other words, decisions that are handed down without the advocate general are to be regarded as a harmonious continuation of the line of jurisprudence. The decisions in the *Marcin Jagiełło*[124] and *Crewprint* [125] cases are even no longer translated and are only available in French and Polish or Hungarian, respectively.

This restrictive reading also appears to be necessary in view of the limited legal possibilities of the taxpayers to obtain necessary information. Tax secrecy protects the supplying trader.[126] The powers to obtain information are also basically vertical, i.e. provided for in the state-entrepreneur relationship, and not horizontally between traders.[127] As long as this does not change[128] and there are no information obligations between different traders,[129] knowledge can only be assumed under strict conditions.

119 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 42-43.

120 An opinion was only issued in the following cases: Opinion of Advocate General Kokott, 5 May 2022, C-227/21, *HA.EN.*, EU:C:2022:364; Opinion of Advocate General Campos Sánchez-Bordona, 16 July 2020, C-656/19, *BAKATI,* EU:C:2020:599, and Opinion of Advocate General Kokott, 17 January 2019, C-712/17, *EN.SA.*, EU:C:2019:35.

121 See CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950; CJEU, 24 November 2022, C-596/21 *Finanzamt M*, EU:C:2022:921; CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910; CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266; CJEU, 3 September 2019, C-611/19, *Crewprint*, EU:C:2020:674; CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673; CJEU, 17 October 2019, C-653/18, *Unitel*, EU:C:2019:876; CJEU, 28 March 2019, C-275/18, *Vinš*, EU:C:2019:265; CJEU, 25 October 2018, C-528/17, *Božičevič Ježovnik*, EU:C:2018:868.

122 The provision based on Art. 252 TFEU (ex Art. 222(2) EC) reads: "Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General."

123 Cf. U. Karpenstein & K. Dingemann, in: Grabitz/Hilf/Nettesheim, *Das Recht der EU* (Munich: C.H.Beck, 2022) *AEUV Art. 252,* para. 19.

124 CJEU, 6 February 2014, C-33/13, *Jagiełło*, EU:C:2014:184.

125 CJEU, 3 September 2019, C-611/19, *Crewprint*, EU:C:2020:674.

126 Also P. Fischer, *Recht auf Vorsteuerabzug – Nachweis eines Betrugs in der Lieferkette*, jurisPR-SteuerR 4/2021, note 6.

127 Different *de lege ferenda* F. Nellen, *Unpaid Tax Collectors: The 'Public' Function of Private Parties in EU VAT*, European Public Law 2018, p. 491.

128 See Nellen, *Unpaid Tax Collectors: The 'Public' Function of Private Parties in EU VAT*, European Public Law 2018, pp. 506 et seq.

129 As proposed by F. Nellen, *VAT information asymmetries in the context of Intra-EU trade in goods*, World Journal of VAT/GST Law 2018, pp. 39-40.

The restraint in the assumption of a need to know also takes into account the requirement of legal certainty to which the CJEU already referred in the fundamental decision in the *Halifax* case. This requirement applies in particular to provisions that can be financially burdensome because the persons concerned must be able to precisely identify the extent of the obligations imposed on them.[130]

Finally, such a restrictive reading is consistent with the dogmatic construction that the denial of benefits in connection with VAT fraud is a sub-case of the prohibition of abuse. The element of abuse is conceived in two parts in Union law. On the one hand, there must be a tax advantage that runs counter to the objectives of the Directive, which is certainly the case for VAT fraud. On the other hand, in the case of the prohibition of abuse as the upper case, the transactions in question must essentially be aimed at a tax advantage. A participation in fraud, however, does not necessarily require these conditions to be fulfilled by the taxable person itself.[131]

Against this background, it must be assumed at the same time that knowledge is not already given in the case of simple negligence but that gross negligence is required.[132] The statements of Advocate General Wahl in his opinion in the *Geissel* and *Butin* cases also speak in favour of gross negligence as a standard. Literally, it states: "*Consequently, a taxable person can be refused the right to deduction if it is shown that he acted recklessly, without showing the diligence that can be expected from a reasonably circumspect trader.*"[133]

More specifically,[134] according to the case law of the CJEU, the fact that the importer has communicated with its customers electronically does not constitute a lack of good faith or negligence. Nor does it permit the presumption that the taxable person knew or should have known that he was participating in tax evasion.[135] The required scrutiny of a taxable person regarding the communication with the supplier is part of the questions referred to the CJEU within the currently pending case *Global Ink Trade*.[136] As a recipient of construction services, a taxable person does not have to check whether a legal relationship exists between the

130 CJEU, 21 February 2006, C-255/02, *Halifax,* EU:C:2006:121, para. 72.

131 See section 3.1.

132 Also M. Kemper, *Der „Missbrauch" und die Steuerhinterziehung bei der Umsatzsteuer*, UR 2017, p. 453; undecided F. Bärenweiler, *Zum "wissen" oder "hätte wissen müssen" der Beteiligung an einer Umsatzsteuerhinterziehung*, UStB 2018, p. 244; A. Treiber, *Die Bekämpfung von Steuerhinterziehungen als Rechtfertigungsgrund für die Einschränkung nationaler umsatzsteuerrechtlicher Vorschriften*, MwStR 2015, p. 635, who demands on p. 634, however, that, when determining the need to know, attention should be paid to compliance with the principle of proportionality.

133 Opinion of Advocate General Wahl, 5 July 2017, C-374/16 & C-375/16, *Geissel*, EU:C:2017:515, paras. 57 et seq.

134 See also the compilation in N. Madauß, *Steuerhinterziehung des Leistungsempfängers bei Einbindung in eine Steuerhinterziehung – Kriterien der Gut- bzw. Bösgläubigkeit*, NZWiSt 2017, p. 177.

135 CJEU, 20 June 2018, C-108/17, *Enteco Baltic*, EU:C:2018:473, para. 96.

136 Question 3 of CJEU, C-537/22 *Global Ink Trade* (pending).

workers employed on the construction site and the invoice issuer as well as whether the latter has registered these workers.[137] The mere fact that

> a supply made to Maks Pen was not actually made by the supplier mentioned on the invoices or by its sub-contractor, inter alia because they did not have the personnel, equipment or assets required, there was no record of the costs of making the supply in their accounts and the identification of persons signing certain documents as suppliers was shown to be inaccurate, that would not, in itself, be sufficient ground to exclude the right to deduct relied on by Maks Pen.[138]

On the other hand, the CJEU has declared it reasonable for the taxpayer to consult the list of taxpayers declared to be inactive that is posted at the residence of the tax administration and is published on their website.[139] However, for reasons of proportionality, it is necessary to allow the customer of the inactive taxable person the deduction if the supplier has paid the VAT.[140]

The fact that a taxable person mentioned the name of a fictitious supplier on an invoice was considered as an indicator that the taxable person was aware that it was participating in a supply connected with fraud.[141] Non-compliance with requirements of food law, namely identifying suppliers of foodstuff, cannot be the sole but one of more indicators proving that the taxable person knew or should have known that it was involved in a fraudulent transaction.[142] A taxable person not checking whether suppliers have fulfilled their registration obligations as required by EU law on the regulation of foodstuffs, however, is not a factor to be taken into account.[143]

An economically irrational supply chain, implausible invoices, non-compliance with national accounting rules, and irregularities regarding previous transactions within the supply chain may not be used by tax authorities as reasons to deny an input VAT deduction. Instead, it must be established that the taxable person knew or should have known about being involved in a fraudulent transaction (thereby being passively involved)[144] or actively participating in it.[145]

As can be derived from the cases presented above, the Court rarely answers concretely which measures a taxable person should take and rather determines which criteria are not sufficient or can only be regarded as relevant in conjunction with other indicators.[146]

137 CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549, para. 45.
138 CJEU, 13 February 2014, C-18/13, *Maks Pen*, EU:C:2014:69, para. 31.
139 CJEU, 19 October 2017, C-101/16, *Paper Consult*, EU:C:2017:775, para. 54.
140 CJEU, 19 October 2017, C-101/16, *Paper Consult*, EU:C:2017:775, paras. 59–60.
141 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 53.
142 CJEU, 3 October 2019, C-329/18, *Altic*, EU:C:2019:831, paras. 35-41, repeated in CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 paras. 57-58 regarding the safety of the food chain.
143 CJEU, 3 October 2019, C-329/18, *Altic*, EU:C:2019:831, paras. 46-48.
144 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 para. 40.
145 CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673, para. 66.
146 Also F. Nellen, *On the Liability of the Uninformed Taxable Person in EU VAT*, Intertax 2019, p. 616.

3.4. Relevant point in time for need to know

The relevant point in time for the need to know has not yet been conclusively clarified. However, certain starting points already exist. For example, in the joined cases of *Kollroß* and *Wirtl*, the deduction of input tax is based on the time of receipt of the payment on account. The right may be exercised at this time "*without it being necessary to take other elements of fact, known of after that moment, which would render the supply in question uncertain, into account*".[147] However, there is no right of deduction "*if it is established, having regard to objective elements, that, at the time the payment on account was made, that person knew or should reasonably have known that it was likely that the supply would not take place*".[148]

Advocate General Kokott, who quotes this decision approvingly, argues in her Opinion in the *Vetsch* case in the opposite direction. For a supply (transfer), the time of the supply (transfer) is the decisive factor.[149] In the underlying facts, perfumery goods were first imported from Switzerland to Austria by Bulgarian traders and then brought to Bulgaria. The items were imported into free circulation in Austria by a third party (Vetsch). This third party complied with all obligations to provide evidence and declared a tax-free import in accordance with Art. 143(1)(d) of the VAT Directive. The Bulgarian companies then brought the goods to Bulgaria and declared a VAT exempt intra-Community supply in Austria and an intra-Community acquisition in Bulgaria. It can be assumed that the goods were actually brought to Bulgaria. So far, the VAT treatment of the transaction was correct. However, the taxable resale of the goods in Bulgaria was declared incorrectly, and no VAT was paid in Bulgaria. Vetsch was subsequently denied the tax exemption for import VAT because the conditions were not met. The Opinion does not attribute any retroactive influence to the subsequent fraudulent intent on the part of the Bulgarian entrepreneurs.[150] Unfortunately, the Court dismissed the question regarding the relevant point in time in its decision in *Vetsch* as hypothetical.[151]

Recently, in *Aquila*, the Court stated that irregularities or indications of tax evasion are relevant if they are known by the taxable person at the time the acquisition is made.[152] It is not relevant, however, if the fraud concerning a preceding

147 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, para. 48.

148 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, para. 49.

149 Opinion of Advocate General Kokott, 6 September 2018, Case C-531/17, *Vetsch Int. Transporte GmbH*, EU:C:2018:677, para. 57: "*It would be contrary to the principles of legal certainty and proportionality to make exemption for a taxable person dependent on the (subsequent) conduct of a third party, over which the taxable person has no influence*" as well as para. 67: "*The existence of a perpetrated or intended fraud, and thus fault in individual conduct at the time of the supply (here the transfer), constitutes a crucial element in refusing the perpetrator (and all 'accomplices', that is, anyone who knew or should have known about the fraud) exemption and/or deduction.*"

150 For a detailed statement of reasons with references to case law, see Opinion of Advocate General Kokott, 6 September 2018, Case C-531/17, *Vetsch Int. Transporte GmbH*, EU:C:2018:677, paras. 48-67.

151 CJEU, 14 February 2019, Case C-531/17, *Vetsch*, EU:C:2019:114, paras. 44-45.

152 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 para. 52.

transaction in the supply chain had already been completed at the time the taxable person in question realized its own supply.[153]

Hence, there are strong indications that the latest relevant point in time to know is the time of the taxable person's own supply. A later gain of knowledge and a later need to know are harmless.

3.5. Prohibition of overcompensation requires subordination of liability

The risk of a loss of tax revenue or a tax advantage gained by a taxable person are not conditions for denying an input VAT deduction. Hence, also in cases when a reverse charge applies and, thus, effectively, no tax is lost in a transaction as the VAT to be paid and the input VAT to be deducted are equal, an input VAT deduction can be denied.[154] VAT due under the reverse charge mechanism, however, would still have to be paid. Regarding fictitious supplies, in *EN.SA.,* the Court also held that an input VAT deduction may be denied as a transaction that did not take place cannot give rise to the right to deduction while, simultaneously, the VAT on the same transaction shown on the invoice was due.[155] Member States, however, must provide for the possibility to recover the VAT if the risk of any loss of VAT revenue is eliminated.[156] Otherwise, "an excessive adverse effect on the principle of VAT neutrality" could arise which would be contrary to the principle of proportionality.[157] This option would also have been open to Ferimet as providing the name of the actual supplier would have allowed for an assessment of his taxable status.

Moreover, it is currently unclear how overcompensation of the tax authorities from the prohibition of abuse can be prevented. This already applies to the possible accumulation of input VAT refusals for taxable persons in the chain of supply, the denial of input VAT deduction under the reverse charge mechanism, and even in the case of cumulative tax collection from the fraudster and input tax refusal from the party acting in bad faith.[158] The latter was the case in *Finanzamt M* where the referring German court even specifically asked whether the denial of an input VAT deduction is limited to the amount of VAT lost due to the fraud.[159] The Court explicitly stated that the deduction must be denied in its entirety as,

153 CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266, para. 32.
154 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 56-57.
155 CJEU, 8 May 2019, C-712/17, *EN.SA.*, EU:C:2019:374, paras. 25-26.
156 CJEU, 8 May 2019, C-712/17, *EN.SA.*, EU:C:2019:374, para. 36.
157 CJEU, 8 May 2019, C-712/17, *EN.SA.*, EU:C:2019:374, para. 33. In detail on the case, see M. Greggi, *Neutrality and Proportionality in VAT: Making Sense of an (Apparent) Conflict*, Intertax 2020, p. 122.
158 This is also pointed out by M. Kemper, *Der "Missbrauch" und die Steuerhinterziehung bei der Umsatzsteuer*, UR 2017, p. 455. Doubting also Heuermann, *Durchsetzung des Unionsrechts im MwSt-Recht: Euro Tyre, Italmoda, Barlis 06 und die Folgen*, DB 2017, p. 993.
159 CJEU, 24 November 2022, C-596/21 *Finanzamt M*, EU:C:2022:921, paras. 16-19. Such an approach was advocated for by J. Kokott, in: J. Kokott, *Das Steuerrecht der Europäischen Union*, 1st Edition Munich: C.H.Beck, 2018) § 8, para. 410.

otherwise, taxable persons would not be encouraged to avoid fraudulent transactions but solely to limit the consequences.[160] If the tax can actually be levied in the cases mentioned previously, this obviously leads to economic double taxation.[161] This has not been addressed by the Court, however, and thus neither have been concerns regarding the principle of neutrality and the principle of proportionality although it would be suggestive that such double taxation is likely not to be compatible with EU law.

The collision becomes even more of a concern when liability standards on the one hand and the denial of input tax deduction on the other meet. Overcompensation in the applicability of a domestic liability according to the *Italmoda* judgements and the denial of input tax deduction according to Art. 168 of the VAT Directive in accordance with the requirements of the CJEU are disproportionate and should therefore be avoided in any case.[162] Sometimes, it is argued that the refusal of the input tax deduction should be subordinate as this is an unwritten legal rule.[163] However, as the new case law has concluded, the denial of rights and benefits in the event of abuse is a general legal principle of Union law. This must take precedence over national measures so that liability is only subsidiary.[164]

4. Summary

Although a bit wobbly when it comes to defining the exact relationship between the case law and the prohibition of abuse, the Court of Justice has used the plethora of cases in the area of VAT fraud to build a largely consistent corpus of case law. Given the sheer number of cases, this is impressive. The case law can best be understood through a combination of three components, namely, (i) the prohibition of abuse of law in its concretization for VAT purposes, (ii) the formal and substantive requirements under the VAT Directive and domestic law as well as (iii) the proportionality principle as a powerful limiting factor. Thus, the Court generally

160 CJEU, 24 November 2022, C-596/21 *Finanzamt M*, EU:C:2022:921, paras. 39-40.

161 On the concept of economic double taxation in VAT law, see R. Ismer & K. Artinger, *International Double Taxation Under VAT: Causes and Possible Solutions*, Intertax 2017, pp. 593 et seq.

162 Rightly so regarding the previous provision, for example, F. Schuska, *Die gesamtschuldnerische Haftung nach § 25d UStG*, MwStR 2015, p. 328; as well as previously F. Grube, *Darstellung und Analyse der neueren Rechtsprechung zum innergemeinschaftlichen Umsatzsteuerkarussell*, MwStR 2013, p. 13.

163 D. Hummel, *Umgang mit "betrugsbehafteten Umsätzen" im Umsatzsteuerrecht*, UR 2014, pp. 262 et seq.; W. Reiß, *Steuerstrafrechtliche und (umsatz-)steuerrechtliche Aspekte bei grenzüberschreitenden Warenlieferungen in der Union*, in: M. Fischer (ed.), *Festgabe für Heinrich List zum 100. Geburtstag am 15. März 2015* (Stuttgart, Munich: Boorberg, 2014) p. 176. For the precedence of § 25d UStG also C. Wäger, *Der Kampf gegen die Steuerhinterziehung*, UR 2015, p. 98 with the assessment that liability leads to more appropriate results.

164 In the same sense, A. Treiber, *Die Bekämpfung von Steuerhinterziehungen als Rechtfertigungsgrund für die Einschränkung nationaler umsatzsteuerrechtlicher Vorschriften*, MwStR 2015, p. 632; K. Drüen, *Haftungsausschluss nach § 25d UStG nach Versagung des Vorsteuerabzuges bei betrugsbehafteten Umsätzen*, UR 2016, p. 777; F. Grube, *Darstellung und Analyse der neueren Rechtsprechung zum innergemeinschaftlichen Umsatzsteuerkarussell*, MwStR 2013, p. 13; B. Heuermann, *Mit Italmoda auf den Schultern von Larenz*, DStR 2015, p. 1416.