



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
SZPUNAR  
delivered on 8 September 2016<sup>1</sup>

**Case C-344/15**

**National Roads Authority**  
**v**  
**The Revenue Commissioners**

(Request for a preliminary ruling from the Appeal Commissioners, Ireland)

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 13(1) — Taxable persons — Activities or transactions engaged in by bodies governed by public law as public authorities — Construction and management of toll roads — Distortions of competition))

### Introduction

1. The levying of value added tax (VAT) on activities carried on by bodies governed by public law in their capacity as public authorities may appear to be pointless because it leads to significant administrative complications without any evident effect on public finances, apart from the movement of funds from one account to another. However, there are two major reasons for levying tax in this way where the activities carried on by the public bodies are similar in nature to ordinary economic activities.

2. First, the principle of the universality of VAT requires, wherever possible, that VAT must be levied on all economic activities. Secondly, if activities are carried on by public bodies on the same basis as they are or may be carried on by private bodies, but without tax being levied, this will lead to a different type of distortion of competition.<sup>2</sup>

3. It is for that reason that the EU legislature provided for the taxation of activities carried on by public bodies where the absence of such taxation would lead to distortions of competition. The Court has already addressed that principle in a series of judgments, but it still causes problems in practice. The present case provides an opportunity to clarify some of those doubts and to add to the existing case-law.

<sup>1</sup> — Original language: Polish.

<sup>2</sup> — See the Opinion of Advocate General Kokott in *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2015:855, points 22 to 27).

## Legal framework

### *EU law*

4. In accordance with Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax:<sup>3</sup>

‘States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.’

### *Irish law*

5. The provision of Irish law transposing Article 13(1) of Directive 2006/112 in force at the material time was section 8(2A) of the Value Added Tax Act, 1972.

6. The National Roads Authority, the appellant in the main proceedings (‘the NRA’), was established pursuant to the Roads Act, 1993 as an independent public authority with responsibility for the construction and management of national roads. According to section 17(1) of that Act, its duty is to secure the provision of a safe and efficient network of national roads.

7. In accordance with sections 56 and 57 of the Roads Act, 1993, as the ‘road authority’ for national roads, the NRA may make a toll scheme on selected national roads. Under section 61 of that Act, it is also authorised to make bye-laws relating to the toll scheme.

8. Under section 58 of the Roads Act, 1993, the NRA may collect tolls of such amounts as may be specified in bye-laws made by the NRA itself. However, under section 63 of that Act, the NRA may enter into an agreement whereby the collection of those tolls is entrusted to third parties. Apart from the right to collect tolls, such agreements also impose obligations on those third parties regarding the construction and maintenance or the funding of the construction and maintenance of the toll road in question and the management of that road during the term of the agreement.

## Facts, proceedings and questions referred for a preliminary ruling

9. The majority of national toll roads in Ireland are managed by private bodies on the basis of agreements concluded with the NRA. However, two of those roads, namely the Westlink Toll Road (part of the Dublin ring road) and the Dublin Tunnel (a tunnel linking Dublin with the port), are managed by the NRA and it is the NRA that collects the relevant tolls.<sup>4</sup> It is worth noting that until

3 — OJ 2006 L 347, p. 1.

4 — As may be seen from the order for reference, the NRA entrusts responsibility for the technical aspects of toll collection to third parties, but the rules governing those arrangements are different from those governing the management agreements concluded under section 63 of the Roads Act, 1993, so that revenues from the tolls accrue to the NRA’s account.

August 2008 the Westlink Toll Road was also managed by a private body under an agreement with the NRA. However, that body was unwilling to bear the cost of changing the toll collection system, as a result of which the NRA terminated the agreement with it and assumed direct management of the road.

10. The tolls collected from users on roads managed both by private bodies and by the NRA include VAT. However, the NRA applied to the Revenue Commissioners (the competent tax authority) for repayment of that tax for the July and August 2010 period in respect of tolls on the two national roads it manages directly, arguing that, pursuant to the provisions transposing Article 13(1) of Directive 2006/112, as a body governed by public law it is not a taxable person for VAT purposes. When the Revenue Commissioners refused to repay the tax, the NRA appealed against that decision to the referring tribunal.

11. Having doubts as to the correct interpretation of the provisions of Directive 2006/112, that tribunal decided to stay the proceedings and to request a preliminary ruling from the Court on the following questions:

- ‘(1) If a body governed by public law carries on an activity such as providing access to a road on payment of a toll and if in the Member State there are private bodies who collect tolls on different toll roads pursuant to an agreement with the public body concerned under national statutory provisions, is the second indent of Article 13[1] of Council Directive 2006/112/EC to be interpreted as meaning that the public body concerned must be deemed to be in competition with the private operators concerned such that to treat the public body as a non-taxable person is deemed to lead to a significant distortion of competition notwithstanding the facts that (a) there is not and cannot be any actual competition between the public body and the private operators concerned and (b) there is no evidence that there is any realistic possibility that any private operator could enter the market to build and operate a toll road which would compete with the toll road operated by the public body?
- (2) If there is no presumption, what exercise should be conducted to determine whether there is significant distortion of competition within the meaning of the second indent of Article 13[1] of Council Directive 2006/112/EC?’

12. The order for reference was received by the Court on 6 July 2015. Written observations were submitted by the parties to the main proceedings and the European Commission. They and also the German and Polish Governments were represented at the hearing on 25 May 2016.

## Analysis

13. The questions referred for a preliminary ruling in this case, which should be considered together, are based on the premise, expressed directly by the referring court in its order for reference, that when it collects tolls the NRA is acting as a body governed by public law within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112. In connection with the foregoing, the referring court takes the view that the NRA could potentially be regarded as a taxable person solely on the ground that not levying tax on its activities would lead to significant distortions of competition. For that reason, the referring court has asked the Court for an interpretation of the second subparagraph of Article 13(1) of Directive 2006/112, taking it as read that the first subparagraph of Article 13(1) of that directive is applicable. However, I am not entirely convinced that the referring court’s premise is correct. For that reason, I would first of all like to devote some

attention to that issue.<sup>5</sup>

*The collection of road tolls as an activity performed by a public authority*

14. According to the first subparagraph of Article 13(1) of Directive 2006/112, bodies governed by public law are not to be regarded as taxable persons in respect only of the activities in which they engage ‘as public authorities’. The question then arises as to whether, when they collect tolls for the use of public roads, bodies such as the NRA are acting as public authorities.

15. It would seem obvious that securing the provision and operation of appropriate public infrastructure such as roads is the task of a public authority, so that bodies responsible for performing that task are indeed acting as public authorities. At the same time, however, the Court has held in a series of judgments that providing access to roads on payment of a toll constitutes a supply of services for consideration within the meaning of the provisions of EU law concerning VAT.<sup>6</sup> This can be explained in particular by the fact that, where such tolls are collected for driving on specific sections of roads, rather than in general for using the entire national road network or for using all roads in a particular category, the roads in question are of a higher standard (for example, motorways) or are non-standard stretches of road (for example, tunnels or longer bridges). As a rule, in such cases there is also an alternative in the form of toll-free roads leading to the same places. The provision of access to such roads falls outside the remit of a public authority regarding the provision of a road network and is akin to services of a commercial nature.<sup>7</sup>

16. On the other hand, in those same judgments the Court rejected the Commission’s argument to the effect that the concept of a public authority within the meaning of the current first subparagraph of Article 13(1) of Directive 2006/112<sup>8</sup> should be interpreted strictly, that is to say as referring only to the exercise of public authority, which would exclude the activity of providing access to roads on payment of a toll.<sup>9</sup> The Court’s position in that regard seems understandable given that, according to the provisions of EU law relating to VAT, persons carrying out an economic activity are taxable persons.<sup>10</sup> Article 13 of Directive 2006/112 therefore excludes activities of an economic nature from tax, because excluding activities of a non-economic nature would not make sense.<sup>11</sup>

17. The Court pointed out that, according to its case-law, activities pursued as public authorities are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private operators.<sup>12</sup>

5 — In addition, for the sake of good order, it should also be noted that the application of the third subparagraph of Article 13(1) of Directive 2006/112 in the main proceedings is precluded, since the collection of road tolls is not one of the activities listed in Annex I to that directive. In particular, it does not fall within the scope of activities concerned with the transport of goods and passenger transport (Annex I, points 3 and 5): see judgment of 12 September 2000, *Commission v Ireland* (C-358/97, EU:C:2000:425, paragraph 4).

6 — See judgments of 12 September 2000, *Commission v France* (C-276/97, EU:C:2000:424, paragraph 36); *Commission v Ireland* (C-358/97, EU:C:2000:425, paragraph 34); *Commission v United Kingdom* (C-359/97, EU:C:2000:426, paragraph 46) and *Commission v Netherlands* (C-408/97, EU:C:2000:427, paragraph 30).

7 — See also the Opinion of Advocate General Alber in *Commission v Netherlands* (C-408/97, EU:C:2000:43, point 52).

8 — The judgments in question were delivered on the basis of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1). Article 4(5) of the Sixth Directive was equivalent to Article 13(1) of Directive 2006/112.

9 — See judgments of 12 September 2000, *Commission v France* (C-276/97, EU:C:2000:424, paragraph 41); *Commission v Ireland* (C-358/97, EU:C:2000:425, paragraph 39); *Commission v United Kingdom* (C-359/97, EU:C:2000:426, paragraph 51) and *Commission v Netherlands* (C-408/97, EU:C:2000:427, paragraph 36).

10 — See Article 9(1) of Directive 2006/112.

11 — See judgment of 16 July 2009, *Commission v Ireland* (C-554/07, EU:C:2009:464, paragraph 40 and the case-law cited).

12 — See judgments of 12 September 2000, *Commission v France* (C-276/97, EU:C:2000:424, paragraph 40); *Commission v Ireland* (C-358/97, EU:C:2000:425, paragraph 38); *Commission v United Kingdom* (C-359/97, EU:C:2000:426, paragraph 50) and *Commission v Netherlands* (C-408/97, EU:C:2000:427, paragraph 35).

18. By rejecting the Commission's arguments, the Court implicitly acknowledged that the collection of road tolls may be treated both as the activity of a public authority and as an economic activity performed by private operators, even in States where those two systems of collection coexist.<sup>13</sup> However, I do not consider that it should be concluded from those judgments that a public body collecting road tolls always acts as a public authority within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112.

19. The aforementioned judgments were delivered in proceedings for a Member State's failure to fulfil obligations. As the Court pointed out, in those proceedings the Commission had not established or had not even sought to establish that the public bodies in the individual defendant Member States were collecting road tolls under the same conditions as private operators.<sup>14</sup> In that situation, in view of the adversarial nature of proceedings for failure to fulfil obligations, the Court had no option other than to find that the defendant Member States had not failed to fulfil their obligations under the Treaty by not levying VAT on road tolls collected by public bodies.

20. However, in my opinion, that does not mean that the current first subparagraph of Article 13(1) of Directive 2006/112 is to be interpreted as meaning that public bodies which collect road tolls always act as public authorities. That question must be analysed separately in relation to each individual case, in accordance with the criterion which I referred to in point 17 above. I would recall that, according to that criterion, it is necessary to establish whether a public body is acting under the special legal regime applicable to it or under general legal conditions which also apply or may apply to private operators.

21. Returning to the case at issue, it is for the national courts to determine whether a public body which collects road tolls is acting under provisions applicable solely to that body or under general legal conditions. However, I would like to draw attention to the following points.

22. As may be seen from the information given in the order for reference, the NRA was established pursuant to the Roads Act, 1993, which also lays down the rules governing its operation. According to the provisions of that Act, the NRA may make toll schemes on the national roads it manages. It is also authorised to make bye-laws governing the operation of such a toll scheme. It may also collect those tolls itself or entrust their collection to a private body.<sup>15</sup>

23. It may therefore seem obvious that when collecting road tolls the NRA is acting under the special legal regime applicable to it, which is undoubtedly that contained in the Roads Act, 1993. However, it should be remembered that private bodies managing toll roads under agreements with the NRA operate on the basis of that same act and the bye-laws made by the NRA. Likewise, the NRA itself, when collecting those road tolls, is bound by its own bye-laws applicable to a specific toll scheme (that is to say, to the toll scheme operating on a specific section of a national road) in the same way as the private bodies.

24. It is not therefore inconceivable that the NRA is acting as a public authority only when it decides to make a toll scheme on a specific section of road and makes bye-laws relating to that scheme, whereas when it collects those tolls, it is acting under the same legal conditions as a private body. In such a situation, the exclusion contained in the first subparagraph of Article 13(1) of Directive 2006/112 would not be applicable. I consider that, in the light of the above considerations, the referring court ought to reconsider its assumption that, when it is collecting road tolls, the NRA is

13 — See, in particular, judgment of 12 September 2000, *Commission v United Kingdom* (C-359/97, EU:C:2000:426, paragraphs 56 and 57).

14 — See the judgments in *Commission v France* (C-276/97, EU:C:2000:424, paragraph 42); *Commission v Ireland* (C-358/97, EU:C:2000:425, paragraph 40); *Commission v United Kingdom* (C-359/97, EU:C:2000:426, paragraph 52) and *Commission v Netherlands* (C-408/97, EU:C:2000:427, paragraph 37).

15 — See points 6 to 8 of this Opinion.



acting as a public authority and, as such, qualifies for the exclusion described above. If, as a result of that further analysis, the referring court were to conclude that the NRA is not acting as a public authority when it collects road tolls, the questions referred for a preliminary ruling in this case would then be nugatory.

*The questions referred for a preliminary ruling*

25. By submitting the questions for a preliminary ruling in this case, which should be considered together, the referring court is essentially asking the Court whether the second subparagraph of Article 13(1) of Directive 2006/112 is to be interpreted as meaning that where, under the national law of a Member State, road tolls may be and actually are collected both by bodies governed by public law and by private bodies, the bodies governed by public law must be treated as taxable persons for VAT purposes, on account of significant distortions of competition, even if there is no real possibility of direct competition between roads on which tolls are collected by a body governed by public law and those on which they are collected by a private body.

26. If the second subparagraph of Article 13(1) of Directive 2006/112 is to be interpreted correctly, that provision must be placed within the context of the common system of VAT. According to the first subparagraph of Article 9(1) of that directive, a taxable person is any person who, independently, carries out any economic activity. Moreover, I would recall that, according to the case-law of the Court,<sup>16</sup> providing access to roads on payment of a toll is such an activity. The body carrying out that activity is therefore in principle a taxable person. However, the first subparagraph of Article 13(1) of Directive 2006/112 requires that bodies governed by public law are not to be regarded as taxable persons when they are engaging in activities as public authorities. According to the case-law of the Court cited above,<sup>17</sup> an activity engaged in under the special legal regime applicable to a body governed by public law is an activity pursued by that body as a public authority. That exception is based on the premise that the activity of the body governed by public law is carried on by way of a sort of monopoly: as that activity is subject to the legal regime specific to that body, it cannot in principle be engaged in by other bodies, in particular private bodies. In those circumstances, there is also no threat of distortion of competition, since competition is, on principle, excluded.

27. However, the second subparagraph of Article 13(1) of Directive 2006/112 introduces a restriction to the rule contained in the first subparagraph of that paragraph and requires the re-application of the general principle that an economic activity is subject to tax where failure to tax an activity engaged in by a body governed by public law would lead to significant distortions of competition. Logically, the second subparagraph should be applied to situations where the activity of the body governed by public law, despite the fact that it is carried on under the specific legal regime applicable to it, is not a monopoly, that is to say that it may also be carried on by other bodies, in particular private ones. In such cases the presumption that competition will not be distorted cannot be applied.

28. According to that logic, the Court, sitting as a Grand Chamber, when examining an activity involving the provision by a body governed by public law of parking facilities for which a charge is made, held that distortions of competition resulting from failure to tax activities carried on by public bodies must be evaluated by reference to the type of activity involved, rather than by reference to a specific market or the probability that competition will actually be distorted on that particular market.<sup>18</sup>

<sup>16</sup> — See point 15 of this Opinion.

<sup>17</sup> — See point 17 of this Opinion.

<sup>18</sup> — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 31 to 40 and point 1 of the operative part).

29. The Court so held for two reasons. First, in its opinion, what is now the second subparagraph of Article 13(1) of Directive 2006/112 is to be interpreted in the light of the third subparagraph of that paragraph. That provision requires that bodies governed by public law are in any event to be regarded as taxable persons in so far as they engage in one of the types of activity now listed in Annex I to the directive, irrespective of whether or not, in practice, competition may be distorted on the specific market. Likewise, the present second subparagraph of Article 13(1) of Directive 2006/112 is therefore to be interpreted as referring to types of activities as such and not to the situation on particular markets.<sup>19</sup>

30. Secondly, in the Court's opinion, the principles of fiscal neutrality and legal certainty also preclude an interpretation of the current second subparagraph of Article 13(1) of Directive 2006/112 to the effect that the possibility of distortions of competition is to be examined in relation to the situation on a particular market. That would lead not only to the different treatment of public and private bodies, but even to the different treatment of particular public bodies, some of which, in connection with the same type of activity, might be regarded as taxable persons, while others not. That would infringe the principle of the neutrality of VAT.<sup>20</sup> Furthermore, such an interpretation would demand complex economic analyses of particular markets, the results of which, moreover, might change over time, which would be contrary to the principle of legal certainty.<sup>21</sup>

31. Contrary to the NRA's submissions in its observations in the present case, I consider that that finding by the Court should be interpreted as establishing a presumption that distortion of competition will occur. The Court expressly held that what is now the third subparagraph of Article 13(1) of Directive 2006/112 is based on the presumption that distortions of competition will occur where bodies governed by public law carry on one of the categories of activities listed in the present Annex I to the directive.<sup>22</sup> Next, the Court observed that, in some Member States, there may exist other categories of activities, not listed in the annex to the directive, which are also carried on in parallel both by public bodies and by private bodies. The present second subparagraph of Article 13(1) of Directive 2006/112 applies to them.<sup>23</sup> Lastly, the Court held that both those provisions (that is to say, the present second and third subparagraphs of Article 13(1)) are based on the same logic.<sup>24</sup>

32. In my opinion, the Court's reasoning in that case cannot be interpreted otherwise than as meaning that where, under the national law of a Member State, an activity of a particular type is carried on by a body governed by public law under the special legal regime applicable to that body, while at the same time that activity is or may be carried on also by private bodies under general legal conditions, it must be presumed that there will be distortions of competition, irrespective of the actual situation on the particular market. This requires bodies governed by public law to be regarded as taxable persons in respect of that type of activity pursuant to the second subparagraph of Article 13(1) of Directive 2006/112.

33. The Court's decision in the judgment cited above was based on an analysis of the provisions of EU law concerning the taxation of an activity carried on by bodies governed by public law and not on the specific nature of the actual activity with which that case was concerned, namely the provision of parking facilities in return for payment. Consequently, I do not see any reason why that case-law should not also be applied to other types of activity, such as the provision of access to roads in return for payment. If such an activity is carried on exclusively by a body or bodies governed by public law under the special legal regime applicable to them, that is to say as a monopoly, then there is no

19 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 38 to 40).

20 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 42 to 45).

21 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 47 to 51).

22 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 35).

23 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 36 and 37).

24 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 38). See also the Opinion of Advocate General Poiares Maduro in *Isle of Wight Council and Others* (C-288/07, EU:C:2008:345, points 18 and 19).

danger of any distortions of competition. Bodies governed by public law which engage in those activities must therefore not be regarded as taxable persons. On the other hand, if, as is the case in Ireland, road tolls may also be collected by private bodies, that activity is not a monopoly of a body governed by public law, with the result that it should be presumed that there will be distortions of competition, and, consequently, tax must also be levied on the transactions carried out by those bodies governed by public law. In such a case, it makes no difference that the roads on which the tolls are collected by public bodies are not in competition with roads on which the tolls are collected by private bodies. What matters here is the identical nature of the activity carried on, rather than the situation on the particular market, on a particular section of a road or on roads linking specific places.

34. Some of the reasons put forward by the Court in the judgment cited above, which was delivered in a case concerned with services involving the provision of parking facilities for which a charge is made in several local authorities in the United Kingdom, may clearly be less relevant to the present case, which is concerned with the provision of access to roads on payment of a toll by a body with country-wide powers. First, there is no issue here of different public bodies being treated differently, since the body in question, as a central body, is by definition unique. Secondly, it seems that the analysis of whether or not there are distortions of competition is less complex in the case of sections of road than in the case of parking facilities. Moreover, roads are usually less subject to change over time than the number and location of parking facilities. The decision as to whether or not VAT is to be levied on an activity involving the provision of access to roads may therefore give rise to fewer doubts from the point of view of legal certainty.

35. However, on the other hand, the interpretation of provisions of EU law should not depend on the structure of public authorities in the individual Member States, but should be universal and capable of being applied throughout the European Union. Nevertheless, it is not inconceivable that the same problems to which the Court drew attention in connection with the activity consisting in the provision of parking facilities could in some Member States also arise in connection with the provision of access to roads. Moreover, the debate in the present case regarding whether and to what extent the toll section of the Westlink Toll Road, which is a part of the Dublin western ring road, is in competition with the Dublin eastern ring road itself shows that, in the case of roads too, the analysis of potential distortions of competition is not always simple and obvious.

36. There is, however, also a further argument which, in my view, supports an interpretation of the second subparagraph of Article 13(1) of Directive 2006/112 to the effect that the existence of distortions of competition must be examined by reference to the type of activity involved, rather than by reference to the situation on the specific market.

37. In its order for reference, the referring court acknowledged that it had been established that, in practice, no competition could occur between the sections of the roads on which the NRA collects tolls and other existing or future sections of road on which tolls might potentially be collected by private bodies. However, in arriving at that view, the referring court took into account only competition in which roads can be compared from the point of view of road users, and concluded that that type of competition could not occur. To that extent, that conclusion is obviously correct: a driver wishing to travel from point A to point B would not travel to point C instead simply because he would then pay a lower toll.

38. However, private bodies providing access to roads on payment of a toll are service providers not only in relation to the users of those roads, but also in relation to the public authorities, such as the NRA in Ireland, which entrust that task to them. Roads are public infrastructure the construction and maintenance of which are the responsibility of the public authorities. Those authorities may entrust the performance of those tasks to private bodies in return for the right to collect tolls from road users. In those circumstances, private bodies act as service providers to the public authorities. The fact that the consideration for that service is not in the nature of a price established in advance, but takes the form of the right to collect tolls, is irrelevant.



39. The decision to entrust the management of a section of toll road to a private body depends on a series of different factors. One of these is undoubtedly the amount of the toll that the private body will collect. On the other hand, from the point of view of that private body, the amount of the tolls that it will be able to collect is also one of the main factors in its decision to engage in that activity, because it determines its profitability.

40. If, at the same time, the public authorities have a choice between entrusting the management of a road and the collection of tolls to a private body and carrying out that activity themselves, they are automatically in competition with private bodies which could perform that activity. In those circumstances, failure to levy tax on the activity carried on by the public body while at the same time levying tax on that same activity if it were carried on by a private body would inevitably lead to distortions of competition. If the amount of the toll charged to users were the same, the activity would be more profitable if it were carried on by the public body than if this were done by a private body, which would have to deduct the VAT due to the Treasury from the tolls collected from users. Such a difference in profitability cannot fail to influence the public authorities' decision whether or not to entrust the management of the road to a private body, and that influence will itself be sufficient to demonstrate distortion of competition.

41. That conclusion is even more correct where the public authorities — which have discretion to decide whether to entrust the management of a road and the collection of tolls to a private body — are permitted, as in the case of the NRA, to determine the maximum tolls charged to users. In those circumstances, private bodies are clearly in a less favourable situation since, from the tolls for which an upper limit has been set in advance, they must cover not only their costs and an appropriate profit, but also VAT.

42. This corresponds to the argument put forward by the Polish Government at the hearing to the effect that the possibility of a private body entering a market such as the market for services providing access to roads on payment of a toll is purely hypothetical, since it depends on a decision by the public authorities. Furthermore, precisely the situation in which the public authorities decide to allow private bodies to enter the market, while at the same time engaging in activities on that market themselves, but under different conditions because of not being liable to tax, establishes a distortion of competition justifying the application of the second subparagraph of Article 13(1) of Directive 2006/112.

43. Nor can that finding be called into question by the argument put forward by the NRA at the hearing, and supported by the German Government, that the collection of tolls by a body governed by public law in its capacity as a public authority has a purpose other than simply to raise revenue, that is to say, for example, to restrict traffic on a specific section of road or to direct it towards another route. What is more, that same argument contradicts the assertion that there is no competition whatsoever between different sections of roads.

44. First, determining whether or not tax is to be levied on an activity engaged in by a body governed by public law by reference to the purpose of that activity would be entirely contrary to the principle of legal certainty. Road tolls may in fact be introduced for various purposes. Sometimes the aim is to restrict traffic; sometimes to transfer the cost of building the road to a private body in return for the right subsequently to collect tolls on that road; and sometimes to obtain resources for the construction and maintenance of other public roads. Those aims may exist in isolation or as a combination, and may also change over time, for example if the expenditure on building the road is recovered, but the tolls continue to be charged. This therefore is not a criterion for determining a priori and with certainty whether tax should be levied on the activity.

45. Secondly, the pursuit of aims other than simply to raise revenue does not mean that the collection of tolls cannot be entrusted to a private body. Ultimately, it is a matter of indifference to the road user who is actually collecting the toll. It is therefore possible to achieve the desired behaviour on the part of road users, irrespective of which body is collecting the tolls.

46. Thirdly and finally, under the first subparagraph of Article 9(1) of Directive 2006/112, a taxable person means any person who carries out any economic activity, ‘whatever the purpose or results of that activity’. Therefore, since, as we know,<sup>25</sup> providing access to roads on payment of a toll is an economic activity within the meaning of that provision, the purpose and results of that activity are not an appropriate criterion for determining whether the body carrying on that activity should be regarded as a taxable person.

47. I therefore consider that, whenever national law permits a body governed by public law to entrust the performance of a specific activity to private bodies, but also to perform that activity itself, it must be presumed that there will be a distortion of competition if tax is not levied on that activity where it is carried on by the public body, but tax is levied on it where it is carried on by a private body.

48. That does not mean, as the German Government suggested at the hearing, that, in those circumstances, any activity carried on by the public authorities in return for payment must be subject to tax, because it could hypothetically be entrusted to private bodies. Admittedly, the Court has held that, when assessing the possibility of distortions of competition, account should be taken not only of actual competition, but also potential competition.<sup>26</sup> At the same time, however, the Court has pointed out that the purely hypothetical possibility of private bodies engaging in a specific activity cannot be assimilated to the existence of potential competition, since that possibility must be real and not purely hypothetical.<sup>27</sup>

49. That principle should be interpreted in conjunction with the principle that the existence of distortions of competition must be analysed by reference to the type of activity involved, rather than by reference to the situation on the specific market. If, therefore, as is the case in Germany for example, road tolls are collected exclusively by the public authorities (or on their behalf and for their account), there is no real possibility that that activity could be engaged in by private bodies, there is therefore not even any potential competition, and there is no possibility of competition being distorted. On the other hand, in a situation such as that in Ireland, where the possibility of entrusting the collection of tolls to private bodies is not only provided for by law, but is also a very common practice, since the NRA collects tolls only exceptionally, on two sections of road, it is obvious, in my view, that the possibility of private operators engaging in that activity cannot be considered as purely hypothetical.

50. Lastly, the second subparagraph of Article 13(1) of Directive 2006/112 requires distortions of competition resulting from failure to tax the activities of a public body to be significant. According to the case-law of the Court, that term is to be interpreted in the same way as the third subparagraph of Article 13(1) of Directive 2006/112 as meaning that the treatment of public bodies as non-taxable persons can be permitted only in cases where it would lead only to negligible distortions of competition.<sup>28</sup>

25 — See point 15 of this Opinion and the case-law cited there.

26 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 60 to 63).

27 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 64).

28 — Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 76 and point 3 of the operative part).

51. The determination of whether the distortions of competition in a specific case are more than negligible is a finding of fact which obviously falls to the national authorities and national courts. I would simply point out that a finding that distortions of competition are negligible does not call into question the presumption that such distortions exist, but simply allows tax not to be levied on the activities of a public body *despite* those distortions.

## **Conclusion**

52. In view of all of the foregoing considerations, I propose that the Court reply as follows to the questions referred by the Appeal Commissioners:

The second subparagraph of Article 13(1) of Council Directive 2006/112/EEC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that where, under the national law of a Member State, road tolls may be and actually are collected both by bodies governed by public law and by private bodies, the bodies governed by public law must be treated as taxable persons for VAT purposes, on account of significant distortions of competition, even if there is no real possibility of direct competition between roads on which tolls are collected by a body governed by public law and those on which they are collected by a private body.