Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 19 March 2019 [1]

Case C-71/18

Skatteministeriet
v
KPC Herning

(Request for a preliminary ruling from the Vestre Landsret (High Court of Western Denmark, Denmark))

(Value added tax (VAT) — Supply of land occupied by a building to be partly demolished in place of which a new building is to be constructed — Article 12 of Directive 2006/112/EC — Article 135(1)(j) and (k) of Directive 2006/112 — VAT exemption — Intention of the parties — Objective assessment — Concept of a 'building')

1. Does the transfer of land on which there is an existing building, where the parties clearly intend at the moment of transfer that the purchaser or a subsequent purchaser of the land will demolish that building in order to construct a new building, constitute a transaction which is exempt from value added tax (VAT), in conformity with Articles 12 and 135(1)(j) and (k) of the VAT Directive? [2]

2. That is, in a nutshell, the question referred to this Court by the Vestre Landsret (High Court of Western Denmark, Denmark). The broader issue of principle raised by this case is the role of parties' intent in classifying a transaction for the purposes of the VAT Directive.

I. Legal framework

A. EU law

3. Article 12 of the VAT Directive provides:

'1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

(a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands;

(b) the supply of building land.

1 Original language: English.

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

2. For the purposes of paragraph 1(a), "building" shall mean any structure fixed to or in the ground.

…

3. For the purposes of paragraph 1(b), "building land" shall mean any unimproved or improved land defined as such by the Member States.'

4. Article 135(1) of the VAT Directive states:

'Member States shall exempt the following transactions:

…

(j) the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1);

(k) the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1);

…'

B. National law

5. Paragraph 13(1)(9) and (3) of the Lovbekendtgørelse nr. 760 af 21 juni 2016 om merværdiafgift (Consolidated Law No 760 of 21 June 2016 on value added tax) ('the VAT Act') provides:

'1. The following goods and services are exempt from tax:

…

9) the supply of immovable property. However, the following are excluded from the exemption:

(a) the supply of a new building or of a new building and the land on which the building stands;

(b) the supply of building land, whether developed or not, and in particular the supply of built-on land.

…

3. The Minister for Taxation may establish detailed rules relating to the definition of immovable property within the meaning of paragraph 1, point 9.'

6. Paragraph 54(1) of the Bekendtgørelse nr. 808 af. 30 juni 2015 om merværdiafgift (Regulation No 808 of 30 June 2015 on value added tax) ('the VAT Regulation'), states:

'The term "building" referred to in Paragraph 13(1)(9)(a) of the VAT Act shall mean structures fixed to or in the ground which are completed for their intended use. The supply of parts of such a building is also deemed to be a supply of a building.'

7. Paragraph 56(1) of the VAT Regulation states:

'The term "building land" referred to in Paragraph 13(1)(9)(b) of the VAT Act shall mean undeveloped land which is designated, pursuant to the Planning Act or provisions adopted pursuant thereto, for purposes which enable the construction of buildings within the meaning of Paragraph 54 of this Regulation.'

8. Section 2.2 of the Skatteministeriets vejledning om moms på salg af nye bygninger og byggegrunde (Instruction of the Ministry of Taxation on VAT on the sale of new buildings and building land) reads as follows:

'The supply of buildings and the land on which the buildings stand is not subject to VAT where they are not new buildings.

If the supply is made for the purpose of the construction of a new building, however, the supply shall be considered to be a supply of building land.

...

If it is agreed that the building will be demolished by the seller or if it appears from the contract of sale that the buildings are acquired for demolition by the buyer, it is a sale of building land.

In other cases, the buyer's intention cannot be decisive in assessing whether there is a supply of building land.

The criteria that may be taken into account, on an individual or combined basis, to determine whether building land is being supplied may be, for example, the price fixed in the contract of sale in comparison with the normal value of similar goods, the nature of the construction ("shed"), a lack of connection to public/commercial services, the previous use of the property and the nature of the construction (e.g. a "barn" for storage which does not meet very basic conditions for future use).

If it is concluded that the supply was made for purpose of the construction of a new building, the supply shall be considered to be a supply of building land.

…'

II. Facts, procedure and the question referred

9. In April 2012, the Odense Municipal Council, Denmark adopted an urban plan for an area in the port which includes the property called Finlandkaj 12 ('the property at issue'). The urban plan stated inter alia that the warehouse located on the property at issue was, as far as possible, to be preserved.

10. KPC Herning A/S (a Danish project development and construction company) (KPC) and Boligforeningen Kristiansdal (Kristiansdal Housing Association, Denmark) worked together on a concept from May 2013 for the construction of youth housing in the Port of Odense. The project was developed in cooperation with the Municipality of Odense and the Port of Odense.

11. In July 2013, a proposal was drawn up for an amendment to the urban plan with a view to authorising the construction of housing within the parameters of the existing warehouse on the property at issue. According to that amendment, adopted by Odense Municipal Council on 4 December 2013, the middle part of the warehouse's eastern gable was to be preserved.

12. In November 2013 — after the proposal for an amendment to the urban plan had been sent out for consultation, but before its formal adoption — KPC made a conditional purchase of the property at issue from the Port of Odense ('the first sale of the property at issue'). It was understood by the parties that the transaction was VAT-exempt but, in the event that the transaction was subject to VAT, the agreement provided that any VAT due would be paid by KPC. The purchase agreement was conditional on, inter alia, KPC entering into an agreement with a general housing association for the execution of a project to construct a youth housing unit on the property, and the Municipality of Odense adopting a final urban plan authorising the project in question.

13. On 5 December 2013, KPC entered into three agreements with Boligforeningen Kristiansdal. They were: (i) a conditional framework agreement regarding the sale of the property with the existing warehouse ('the resale of the property at issue') and subsequent conversions thereof into youth housing units; (ii) a conditional purchase agreement regarding the sale of the property at issue; and (iii) a turnkey contract in connection with the conversion of the property at issue.

14. The conditional framework agreement states that, together with the two other agreements, it constitutes one overall contractual framework forming a contractual whole. The framework agreement states that Boligforeningen Kristiansdal was prepared to purchase the property in order then, as builder and operator, to convert it into housing units which it would subsequently rent out and manage, and that KPC, as a condition of the sale of the property, reserved the right to carry out the design and conversion of the property into housing units as contractor. The framework agreement was conditional on, inter alia, KPC ultimately purchasing the property from the Port of Odense.

15. Under the conditional purchase agreement, the purchase amount was considered VAT-exempt, as the transfer related to a property with an existing building. Under the agreement, KPC bore the risk if, contrary to the parties' expectations, the transaction turned out to be subject to VAT. The purchase agreement was subject to the same conditions as the framework agreement. The conditional turnkey contract stated that KPC was to carry out all work necessary to deliver the construction in a fully completed state, although Boligforeningen Kristiansdal itself was to take care of demolishing the warehouse remaining on the property. The associated expenses were estimated at 625 000 Danish kroner (DKK), inclusive of VAT.

16. On 7 March 2014, Boligforeningen Kristiansdal entered into an agreement with another company regarding the demolition of the warehouse (except for the middle part of the eastern gable that was to be preserved). KPC did not take part in the demolition of the warehouse, which was set in motion by Boligforeningen Kristiansdal at its own expense and risk.

17. On 15 August 2015, the housing units on the property were ready for occupation.

18. According to the referring court, the warehouse had been rented out by the Port of Odense until it was sold to KPC and was valued, for tax purposes, at DKK 814 000. At the time of both its sale and its subsequent resale, the warehouse was fully functional and could have been used, for example, for cultural and sporting events. However, the warehouse was not suitable for residential units. It is undisputed that, at the time of the transactions at issue, the Port of Odense, KPC and Boligforeningen Kristiansdal had a common understanding that the warehouse, save for part of the eastern gable, was to be demolished in order for the housing unit project to be carried through to completion.

19. On 10 December 2013, KPC requested a binding answer from the Skatterådet (National Tax Board, Denmark) as to whether the first sale of the property at issue by the Port of Odense and the resale of the property at issue to Boligforeningen Kristiansdal were VAT-exempt. By letter of 24 June 2014 the Skatterådet delivered a binding answer in which both questions were answered in the negative.

20. KPC appealed against the Skatterådet's decision before the Landsskatteretten (National Tax Tribunal, Denmark) which, by decision of 9 December 2015, held that there was no basis for categorising the property as building land, since there was a building on the property at the time of both sales, and the subsequent demolition work would not involve KPC, but rather the housing association which was to carry out the demolition at its own expense and risk.

21. By application of 9 March 2016, the Skatteministeriet (Danish Ministry of Taxation) brought an action against the Landsskatteretten's decision before the Retten i Herning (Herning Court, Denmark), which referred the case to the Vestre Landsret (High Court of Western Denmark, Denmark). However, harbouring doubts as to the correct interpretation of certain provisions of the VAT Directive, that court decided, by order of 15 May 2017, to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with Article 135(1)(j), and Article 12(1)(a) and (2), on the one hand, and with Article 135(1)(k), and Article 12(1)(b) and (3), on the other hand, of the VAT Directive for a Member State, in circumstances such as those in the main proceedings, to consider a supply of land on which at the time of supply there is a building as a sale of building land subject to [VAT], when it is the parties' intention that the building is to be demolished completely or partially in order to make room for a new building?'

22. Written observations have been submitted by KPC, the Danish Government and the European Commission. Those parties also presented oral argument at the hearing on 30 January 2019.

III. Analysis

23. By its question, the referring court essentially asks whether a national rule, according to which a supply of land on which there is a building constitutes a sale of building land subject to VAT if the parties' intention is that the building be demolished to allow for the construction of a new building, is compatible with Article 12 and Article 135(1)(j) and (k) of the VAT Directive.

24. The parties who submitted observations in the present proceedings hold different views in that regard.

25. KPC proposes to answer the question in the negative. In particular, it argues that both transactions at issue in the main proceedings (the first sale and the resale of the property at issue) are exempt from VAT in so far as they are '[supplies] of a building or parts thereof, and of the land on which it stands' for the purposes of Article 135(1)(j) of the VAT Directive. The Commission, for its part, agrees with KPC with regard to the first transaction, but considers the subsequent set of transactions between KPC and Boligforeningen Kristiansdal (which, in its view, have to be assessed together) to constitute a supply, 'before first occupation, of a building or parts of a building and of the land on which the building stands'. Accordingly, the latter would be subject to VAT under Article 12(1)(a) of the VAT Directive. The Danish Government, however, proposes a positive answer to the question referred. In its view, by virtue of Article 12(3) of the VAT Directive, Member States are entitled to consider a plot of land such as that in question to be 'building land'. The sale of such a plot of land would, as a consequence, be subject to VAT in accordance with Article 12(1)(b) of the VAT Directive.

26. I take the view that the question referred should, in principle, receive a negative answer. The evaluation of a potential supply of building land under the VAT Directive must follow the same logic as the assessment of any other transaction under the directive: the *objective character* of the transaction *at the moment of the supply* shall be assessed. Within such a framework, the *subjective* intent of the parties relating to the future use of the property is certainly of relevance. But, in and of itself, it can hardly be conclusive as to override any, or rather all, other objective factors relating to a supply.

27. In what follows, I shall focus primarily on the national rules and their operation in classifying certain transactions. The solution of the individual case remains the responsibility of the national court. However, a preliminary clarification is called for at the outset: what are, in fact, the transactions that are to be assessed?

A. Which transaction(s)?

28. In the order for reference, as well as in some of the parties' submissions, the two transactions consisting, respectively, of the first sale of the property at issue (from the Port of Odense to KPC) and of the resale of the property at issue (from KPC to Boligforeningen Kristiansdal) are examined together, without drawing any distinction between them. With these two sale transactions comes the network of further agreements between KPC and Boligforeningen Kristiansdal, outlined above in point 13 of this Opinion. The presumption appears to be that those transactions, in particular the two sale transactions, must, if they are not assessed jointly, at least share the same fate with regard to their treatment under the VAT rules.

29. It is indisputable that the two sale transactions are linked. The first sale of the property at issue was conditional on KPC entering into an agreement with a general housing association for the execution of a youth housing unit construction project on the property. In turn, the resale of the property at issue was conditional on KPC purchasing that property from the Port of Odense.

30. The Court has already held that, in certain circumstances, several formally distinct transactions, which could be supplied separately, must be considered to be a single transaction when they are not independent. This is particularly true where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. That is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied.[3]

31. However, I have difficulty seeing how that reasoning, normally applicable to a bundle or network of agreements between the same parties, could be applicable to the transactions in question. First, those transactions were concluded at different times by different parties (the Port of Odense and KPC on the one hand, and KPC and Boligforeningen Kristiansdal on the other).[4] Second, those transactions, in particular the two successive sale transactions, cannot be deemed to be ancillary to one another. In the light of its commercial purpose and economic rationale, the first sale of the property at issue is, in and of itself, a 'principal' transaction; and the same holds true with regard to the resale of that property. Although related, those two transactions cannot really be said to form part of a single package.

32. Accordingly, each of those sale transactions must, in conformity with Article 1(2) of the VAT Directive, be regarded as distinct and independent.[5] Each must thus be assessed, for the purposes of the VAT rules, on its own terms and in the light of its specific characteristics.

3 See, amongst others, judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraphs 32 to 34 and the case-law cited).

4 On the importance of the latter element, see for example judgments of 8 July 1986, *Kerrutt* (73/85, EU:C:1986:295, paragraph 15), and of 29 March 2007, *Aktiebolaget NN* (C-111/05, EU:C:2007:195, paragraph 25).

5 See, to that effect, judgment of 18 October 2018, *Volkswagen Financial Services (UK)* (C-153/17, EU:C:2018:845, paragraph 30 and the case-law cited).

33. Nevertheless, the fact that the two sale transactions cannot be deemed as one does not preclude their treatment under the VAT rules, on the successive application of the same criteria, being the same in the end. After all, the content of the two transactions and the circumstances in which those transactions were entered into are broadly similar. However, whether or not this is the case, and in particular whether the three transactions entered into between KPC and Boligforeningen Kristiansdal on 5 December 2013 [6] should be considered a single transaction for VAT purposes, will be for the referring court to determine. [7]

B. The national rule at issue in the main proceedings

34. At the outset, I wish to underline two key elements for assessing transactions under the VAT Directive: the time with regard to which that assessment is to be carried out and the nature of that assessment.

35. First, pursuant to Article 63 of the VAT Directive, the chargeable event occurs and VAT becomes chargeable as a rule 'when the goods or the services are supplied'. In order to determine whether a transaction gives rise to VAT, the *point in time* at which a transaction is to be assessed is, in principle, when the good or service in question *is supplied*. It must be noted in this regard that, in accordance with Article 14(1) of the VAT Directive, '"supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

36. Second, with regard to the manner in which that assessment must be carried out, its *objective* character should be stressed. The aim of that exercise is to ascertain the *economic and commercial reality* of the transaction in question [8] by looking at all relevant factors. [9] The perspective to be adopted is that of an independent observer seeking to identify the true nature and purpose of a transaction by considering all objective circumstances. [10]

37. Those circumstances include, in particular, the specific characteristics of the product or service supplied, the manner in which the supply takes place and, more generally, the circumstances surrounding the transaction. In that context, the intention of the parties may also be a relevant element. The Court has consistently held that 'the declared intention of the parties concerning the VAT liability of a transaction must be taken into consideration, in the course of an overall assessment of the circumstances of a transaction, provided that it is supported by objective evidence'. [11]

38. Thus, the default rule to be applied in assessing a transaction is the evaluation of *all objective elements at the moment of the supply*.

39. Against this background, the compatibility of a national rule such as (part of) Section 2.2 of the Instruction of the Ministry of Taxation on VAT on the sale of new buildings and building land ('Section 2.2') appears problematic.

40. In general, the rule provided for in Section 2.2 appears to reflect the approach outlined above: by default, 'the supply of buildings and the land on which the buildings stand is not subject to VAT where they are not new buildings'. Furthermore, the rest of the rule provides that in (other) general cases, 'the buyer's intention cannot be decisive in assessing whether there is a supply of building land', with a number of (objective) criteria to be taken into account for that assessment.

6 See *supra*, points 13 to 15 of this Opinion.

7 I shall address that issue *infra*, in points 66 to 73 of this Opinion.

8 See, to that effect, judgment of 22 February 2018, *T-2* (C-396/16, EU:C:2018:109, paragraph 43 and the case-law cited).

9 See, further, my Opinion in *E LATS* (C-154/17, EU:C:2018:226, point 82).

10 Ibid., point 77.

11 See judgment of 12 July 2012, *J.J. Komen en Zonen Beheer Heerhugowaard* (C-326/11, EU:C:2012:461, paragraph 33 and the case-law cited).

41. However, there is also the special category inserted into the Section 2.2, where it is specified that 'if it is agreed that the building will be demolished by the seller or if it appears from the contract of sale that the buildings are acquired for demolition by the buyer, it is a sale of building land'.

42. That specific national rule (or rather that specific exception to the general national rule) seems to deviate from the principles of VAT law illustrated above in two important regards. First, whether a transaction is subject to VAT is, according to Section 2.2, not determined on the basis of the state of affairs when the supply takes place, but on the basis of events which are supposed to take place in the future (*the temporal element*). Second, the parties' intention as stated in the contract becomes the conclusive element in the assessment, whilst all objective characteristics of the transaction at issue will be disregarded (*the nature of the assessment*).

43. To my mind, the application of a national rule such as that part of Section 2.2 is likely to produce erroneous assessments with regard to transactions such as those at issue in the main proceedings. A closer analysis of the transactions at issue in the main proceedings may illustrate more clearly why the question referred should, in my view, receive a negative answer.

C. The first sale of the property at issue

44. By the first transaction, KPC purchased the property at issue from the Port of Odense, consisting in a plot of land which was almost entirely occupied by a warehouse. At the time of sale, that warehouse was intact, fully functional and, according to the Danish tax administration, valued at DKK 814 000.

45. Therefore, when examined on the basis of its objective characteristics, that transaction seems to fall squarely in the category referred to in Article 135(1)(j) of the VAT Directive: 'the supply of a building or parts thereof, and of the land on which it stands'.

46. However, the Danish Government argues that such a conclusion would erroneously overlook the true purpose of the transaction. The intention of the parties — as reflected in the agreement — was unquestionably that of transferring ownership of a plot of land on which a new building would be constructed at a later date. It was common ground between the parties that no construction could take place without the prior demolition of the warehouse. According to the plans approved by the Municipality of Odense, only a very limited portion of that building (part of the eastern gable) was to be incorporated into the new building.

47. In support of its argument, the Danish Government refers to the judgment in *Don Bosco*, in which the Court found that the exemption from VAT provided for the supply of land which has not been built on other than building land 'does not cover the supply of land still occupied by a dilapidated building that is to be demolished and replaced by a new building and whose demolition, paid for by the vendor, had already begun before the actual supply took place'. [12]

48. I find the argument put forward by the Danish Government unconvincing. That argument is based on an inflation of the weight that the parties' intention may have in identifying, for the purposes of VAT rules, the true nature and aim of a given transaction. Moreover, it also pushes the statements made by this Court in *Don Bosco* beyond the scope and the logical limits of that case.

49. As outlined in points 36 to 38 above, an economic transaction must first and foremost be analysed in the light of its objective characteristics. The intention of the parties with regard to the product being supplied may also be a relevant element in that context, since it may shed further light on the underlying rationale of the transaction.

12 Judgment of 19 November 2009, *Don Bosco Onroerend Goed* (C-461/08, EU:C:2009:722) ('*Don Bosco*').

50. That is true, however, only in so far as the parties' intention is reflected in and/or underlined by the characteristics of the transaction itself. Mere statements of the parties, unsupported by any concrete evidence, can play no role. More importantly, the intention of the parties is pertinent only when it concerns the aim pursued by them *through* the transaction in question. The intention of the parties is, conversely, of little or no relevance when — like in the present case — it concerns what is supposed to happen to the product after being supplied, through the intervention of third parties, at some point in the future.

51. Put differently, the intention and plans of the parties can colour or confirm a certain reading of the reality. However, unless tax law assessment is to become an instance of metaphysical voluntarism, in which, to paraphrase Schopenhauer, the transaction is just will and representation,[13] the intention of the parties can hardly override the reality.

52. Furthermore, the position defended by the Danish Government finds no support in the case-law. For instance, in *Teleos*, the Court pointed out that, contrary to the parties' argument that the supplier's and purchaser's intention to effect a given transaction is sufficient for its classification as such, 'it is clear from the Court's case-law that requiring the tax authorities to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating the measures necessary for the application of VAT by having regard, *save in exceptional cases, to the objective character of the transaction concerned*'. The Court went on to stress that the classification of a transaction must necessarily be made 'on the basis of objective matters'.[14]

53. Against this background, it becomes clear why the case at hand is different from *Don Bosco*. In *Don Bosco*, the Court focused on the reality of the economic transaction in question. The buyer intended to build something new on the plot of land being purchased, in replacement of what was in the process of being demolished by the vendor himself at the very time the transaction was entered into. In practice, the buyer was acquiring a plot of land that was virtually ready for a new construction. It was thus of little significance that that situation would only materialise somewhat later than the date on which the ownership of the property was transferred.

54. Paragraph 39 of *Don Bosco* is revealing in that respect. As the Court noted, the economic purpose of the actions undertaken by the vendor (supply of land and completion of the demolition works) was 'to supply land *ready* for construction'.[15] The Court further pointed out that the old building was of no economic use to the buyer, and the plot of land would become economically useful for him only upon completion of the demolition works,[16] which had been organised and paid for by the vendor.[17]

55. All this stands in contrast to the present case, in which, at the time of the first sale of the property at issue, the warehouse was still intact and no demolition works had been started. The date of demolition was not even foreseen with certainty and the process was to be set in motion by a subsequent buyer of the land, not KPC.

56. This reading of *Don Bosco* is further confirmed by the judgments of the Court in which the supply of immovable property comprising land and an old building being transformed into a new building was found to be exempt from VAT in so far as 'at the time of that supply, the old building *had only undergone partial demolition work* and was, at least in part, still used as such'.[18]

13 Schopenhauer, A., *Die Welt als Wille und Vorstellung* (first edition in F.A. Brockhaus, Leipzig, 1819).

14 Judgment of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraphs 39 and 40). Emphasis added.

15 *Don Bosco* (paragraph 39). Emphasis added.

16 Ibid.

17 *Don Bosco*, paragraph 32.

18 See judgment of 16 November 2017, *Kozuba Premium Selection* (C-308/16, EU:C:2017:869, paragraph 53 and the case-law cited). Emphasis added.

57. In the present case, the objective situation at the time of the transaction was that a change of plan with regard to the fate of the warehouse — as unlikely as that might have been in the parties' view — could not be ruled out completely. In principle, some delay in the works, or litigation with regard to the demolition of the old building or the construction of the new building, or mere amendments to the urban plan (for example, prompted by issues emerging at the stage of demolition of the warehouse) could have had an impact on the use of the existing warehouse.

58. The latter is by no means a merely hypothetical scenario. In fact, the original urban plan for the area adopted by the Odense Municipal Council stated that the warehouse in question was to be preserved 'as far as possible'. Only subsequently was the urban plan changed to the effect that the middle part of the eastern gable of the warehouse was the sole architectural element of the old building that had to be preserved. Although envisaged prior to the signature of the purchase agreement, that amendment was effectively adopted afterwards. [19]

59. I also find unconvincing a second argument put forward by the Danish Government, according to which it was entitled to classify the plot of land in question as 'building land' given that the definition of that concept has, under Article 12(3) of the VAT Directive, been left to the Member States. [20] As the Commission rightly pointed out, Member States' leeway in defining what constitutes 'building land' cannot go as far as encroaching on the concept of a 'building' which is, conversely, a Community concept. [21] That concept is, furthermore, defined quite broadly in Article 12(2), first subparagraph, of the VAT Directive: '*any* structure fixed to or in the ground'. [22]

60. In that connection, I would only add that, in the framework of the present analysis, the fact that part of a gable of the old building was kept in the new building is immaterial. As far as I understand, that part of the building was first removed in order to be subsequently integrated into the new building. To my mind, under no reasonable interpretation of the concept of a 'building' within the meaning of Article 12(2), first subparagraph, of the VAT Directive, could that concept be stretched so far as to include an element of the old building that was simply later integrated into or used for the new one, without ever even having been fixed to the ground. Therefore, despite the fact that the contours of that concept were the object of some discussion between the parties, I see no purpose in dwelling on that issue in any detail, since it is of little relevance for the present case.

61. Finally, the outcome whereby the first sale of the property at issue could hardly be regarded as a sale of building land for the purposes of the VAT rules finds support in two additional considerations.

62. First, the Court has already held that the *ratio legis* of Article 12(1)(a) and Article 135(1)(j) of the VAT Directive is the relative lack of added value generated by the sale of an old building. The Court has observed that 'the sale of a building following its first supply to a final consumer, which marks the end of the production process, does not generate any significant added value and must therefore, as a rule, be exempt'. [23]

63. Seen from that perspective, the transaction at issue can hardly justify the imposition of VAT: no activity had been carried out on the property that could enhance its economic value for KPC. In fact, before that property could once again become part of a value-adding production chain the warehouse had to be demolished. [24]

19 See *supra*, points 11 and 12 of this Opinion.

20 See also judgment of 28 March 1996, *Gemeente Emmen* (C-468/93, EU:C:1996:139, paragraphs 25 and 26).

21 See ibid., paragraph 25 and the case-law cited. Similarly, the Court also held that the concept of 'supply of buildings or parts of buildings and the land on which they stand' cannot be determined by reference to national law but must be interpreted uniformly: see, inter alia, judgment of 11 June 2009, *RLRE Tellmer Property* (C-572/07, EU:C:2009:365, paragraph 15).

22 Emphasis added.

23 See judgment of 16 November 2017, *Kozuba Premium Selection* (C-308/16, EU:C:2017:869, paragraph 31 and the case-law cited).

24 On this issue, more generally, see the Opinion of Advocate General Jacobs in *Blasi* (C-346/95, EU:C:1997:432, point 15).

64. Second, the Court has recently stated that Article 12(1)(a) and Article 135(1)(j) of the VAT Directive 'read together, make a distinction between old and new buildings, the sale of an old building *not being, as a rule, subject to VAT*'.[25] In that regard, I wonder whether, were the sale of a plot of land, with an old building that could be immediately economically exploited, to be classified as a sale of building land, that would not raise issues under the principle of fiscal neutrality. Indeed, analogous transactions would end up being subject to or exempted from VAT only on the basis of the parties' declared intention with regard to the future destiny of the building, regardless of the physical appearance thereof.

65. By dissociating the application of the rules from the objective reality, that approach could also make it relatively simple to circumvent them. Indeed, it would be all too easy for the parties to include some declaration in the contract with regard to the future of a building in order to obtain the desired result in terms of VAT treatment. I do not find it acceptable that the tax authorities would then bear the burden of checking, at a later stage, whether and to what extent the stated intention of the parties has effectively materialised.

D. The resale of the property at issue

66. It seems to me that the considerations developed above with respect to the sale of the property at issue could be equally valid with regard to the subsequent resale of that property.

67. The latter transaction — entered into by KPC and Boligforeningen Kristiansdal — concerned, as far as I understand, the very same property which was the object of the first sale. The subsequent transaction too, therefore, concerned the sale of a plot of land on which there was a warehouse that was intact, fully functional and had a certain (non-negligible) value. Similarly to what I observed with regard to the first transaction, no demolition works had started at the time when the vendor seems to have transferred the ownership of the property to the purchaser.

68. At the hearing, however, the Commission suggested that the resale of the property at issue should not be regarded in isolation, but should be considered to be part of a set of transactions that, by the very terms of the agreements in question, is to be assessed as a whole. In the Commission's view, such an approach implies that, taken together, the transactions between KPC and Boligforeningen Kristiansdal should be considered to give rise to a 'supply, before first occupation, of a building or parts of a building and of the land on which the building stands' within the meaning of Article 12(1)(a) of the VAT Directive.

69. In my view, there are not enough elements in the file that would permit the Court to take a definitive position on that issue. Furthermore, it is generally a matter for the national court to determine, in the light of the principles developed by the Court,[26] whether formally distinct transactions are so closely linked that they form, objectively, a single and indivisible economic supply, which it would be artificial to split.[27]

70. I would also add, in this context, that the question referred by the national court has been formulated in abstract terms and is focused on the significance of the parties' intention in the assessment, for VAT purposes, of a transfer of land with an existing building. The referring court has not sought guidance from the Court on the specific point raised by the Commission. There are thus just a few concluding remarks that may be offered as assistance to the national court, should it require any.

25 Judgment of 16 November 2017, *Kozuba Premium Selection* (C-308/16, EU:C:2017:869, paragraphs 29 and 30). Emphasis added.

26 See *supra*, point 33 of this Opinion.

27 See, to that effect, judgments of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraphs 51 to 54), and of 18 October 2018, *Volkswagen Financial Services (UK)* (C-153/17, EU:C:2018:845, paragraphs 32 and 33).

71. The framework agreement seems clear that it was Boligforeningen Kristiansdal that purchased the property in order to then act as builder and operator. KPC, for its part, was merely identified as contractor for the carrying out of the design and conversion of the property into housing units. In addition, before KPC could begin any construction work, Boligforeningen Kristiansdal had to organise and pay for the demolition of the existing warehouse. It was also Boligforeningen Kristiansdal that had to bear any possible liability deriving from the demolition works.

72. Against that backdrop, it would seem that, before the housing units were built, Boligforeningen Kristiansdal acted as owner of the property at issue which, under Articles 14 and 63 of the VAT Directive,[28] constitutes a chargeable event. In that regard, the Court has made clear that the term 'supply of goods' must be interpreted as meaning 'the transfer of the right to dispose of tangible property as owner, even if there is no transfer of legal ownership of the property'.[29]

73. Furthermore, as in the case of the first transaction, it does not seem that, before the resale took place, the property underwent any works which increased its value, thereby warranting the levying of VAT.

74. It is, however, for the referring court to ascertain whether these elements, when assessed together with all other relevant factors, may or may not indicate that, for the application of the VAT rules, the resale of the property at issue is 'a supply of a building or parts thereof, and of the land on which it stands' within the meaning of Article 135(1)(j) of the VAT Directive.

75. In any event, regardless of how the second transaction is ultimately classified, it follows from the above considerations that a national rule, such as a part of Section 2.2, according to which a supply of land on which there is a building automatically constitutes a sale of building land subject to VAT if the parties' intention is that the building be demolished so that a new building may be constructed, is not compatible with the provisions of the VAT Directive.

IV. Conclusion

76. In conclusion, I propose that the Court answer the question referred for a preliminary ruling by the Vestre Landsret (High Court of Western Denmark, Denmark) as follows:

– A national rule, such as that at issue in the main proceedings, according to which a supply of land on which there is a building constitutes a sale of building land subject to value added tax if the parties' intention is that the building be demolished to permit construction of a new building, is not compatible with Article 12 and Article 135(1)(j) and (k) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

28 See *supra*, point 35 of this Opinion.

29 See, for instance, judgment of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraph 9).