Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 10 September 2020[1]

Case C-449/19

WEG Tevesstraße
v
Finanzamt Villingen-Schwenningen

(Request for a preliminary ruling from the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany))

(Reference for a preliminary ruling — Value Added Tax — Exemption for letting of immovable property — National provision exempting the supply of heat by an association of property owners to those owners)

I. Introduction

1. An association of property owners supplied heat to those property owners and claimed input value added tax ('VAT') on expenditure associated with that activity. The tax authority in charge rejected that claim. It held that, pursuant to German law, the supply of heat to property owners is exempt from VAT.

2. In this context, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany) seeks to ascertain whether Directive 2006/112/EC[2] ('the VAT Directive') precludes national legislation from exempting from VAT the supply of heat by associations of property owners to those owners. In answering that question, the Court will have the opportunity to provide guidance on when compensation in return for the supply of goods (such as heat) is deemed sufficiently commensurate to the 'benefit' derived from that transaction for it to have been rendered 'for consideration' within the meaning of Article 2(1) of the VAT Directive.

1 Original language: English.

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

II. Legal framework

A. EU law

3. Recital 4 of the VAT Directive states the following:

'The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.'

4. According to Article 2(1)(a) and (c) of the VAT Directive:

'1. The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such.'

5. Article 9(1) of the VAT Directive, which deals with 'taxable persons', reads as follows:

'1. "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

6. Article 14(1) of the VAT Directive defines the 'supply of goods' as meaning 'the transfer of the right to dispose of tangible property as owner', while, according to Article 15(1) of the VAT Directive, 'heat … shall be treated as tangible property'.

7. Article 135 of the VAT Directive, which falls under Chapter 3 ('Exemptions for other activities'), sets out a number of exemptions from VAT. It reads in relevant part:

'1. Member States shall exempt the following transactions:

…

(l) the leasing or letting of immovable property.'

B. German law

1. The German Law on Value Added Tax

8. Paragraphs 1 and 4 of the Umsatzsteuergesetz (the German Law on Value Added Tax) ('the UStG') lay down the general rules on the incurrence of VAT and its exemptions therefrom, which includes the exemption for the supply of heat by associations of property owners to those owners:

'Paragraph 1 Taxable transactions

(1) The following transactions shall be subject to turnover tax:

1. supplies of goods and services effected for consideration within the territory of the country by a trader in the course of business. Transactions are not excluded from taxation where they are carried out pursuant to statute or an order of an authority or are deemed to be carried out under a statutory provision;

…

Paragraph 4 Exemptions in respect of supplies of goods and services

The following transactions covered by Paragraph 1(1)(1) shall be exempt from tax:

…

13. services supplied by associations of property owners within the meaning of the Wohnungseigentumsgesetz (Act on the Ownership of Apartments and the Permanent Residential Right) … to property owners and co-owners, in so far as the services consist in the delivery of common property for use, maintenance, repair and other administrative purposes as well as the supply of heat and similar services.'

2. Act on the Ownership of Apartments and the Permanent Residential Right

9. The Wohnungseigentumsgesetz (Act on the Ownership of Apartments and the Permanent Residential Right) governs the principles underlying the formal division of property between property owners. In relevant part, it notes the following:

'Paragraph 10 General Principles

(1) Unless expressly provided otherwise, the apartment owners shall be the holders of the rights and obligations, including in particular in respect of the separately owned property and the jointly owned property, in accordance with the provisions of the present act.

…

Paragraph 16 Emoluments, Charges and Expenses

…

(2) Each apartment owner shall be under an obligation to the other apartment owners to bear the charges in respect of the jointly owned property as well as the expenses relating to the maintenance, repair and other administration, and to the common use of the jointly owned property proportionate to his share (subsection 1, second sentence).

(3) Notwithstanding subsection 2, the apartment owners may resolve by majority that the operating costs … for the jointly owned property or the separately owned property, which do not have to be settled directly with third parties, as well as the administrative expenses, be recorded by reference to usage or causation and that they be distributed by reference thereto or to some other standard, provided this is consistent with proper administration.'

III. Facts, national proceedings and the question referred

10. WEG Tevesstraße ('the applicant') is an association of property owners. Those property owners are three legal persons (a private company, a public authority and a municipality) ('the Owners'). It appears that the applicant has been tasked with managing a mixed-use property estate in Baden-Württemberg ('the Estate'). The Estate consists of 20 rental apartments, a department of the public authority, and an entity of the municipality.

11. In 2012, the applicant constructed a combined heat and power unit ('the CHPU') on the Estate. It started generating electricity from the CHPU. It then sold the electricity to a power company, and supplied the heat produced thereby to the Owners.

12. In the same year, the applicant filed its advance VAT return and claimed a total of EUR 19 765.17 in input VAT resulting from the acquisition and operating costs associated with the CHPU.

13. On 3 December 2014, after assessing that request, the Finance Authority Villingen-Schwenningen authorised only an amount corresponding to 28% of the VAT for input tax deduction. According to its calculation, that amount represented the share of the abovementioned costs attributable to the generation of electricity. As regards the 72% of the input tax deduction attributable to the generation of heat, the Finance Authority rejected the applicant's request on the basis that, pursuant to Paragraph 4.13 of the UStG, the supply of heat to property owners is exempt from VAT.

14. After unsuccessfully challenging that assessment before the Finance Authority, the applicant brought proceedings before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany). Among other things, the applicant considers Paragraph 4.13 of the UStG to be contrary to EU law in so far as the exemption contained therein does not derive from the VAT Directive. Given the primacy of EU law, the supply of heat to the Owners should be subject to VAT, so that the applicant is entitled also to the outstanding 72% of the VAT for input tax deduction.

15. Harbouring doubts as to whether the national legislation applicable is compatible with EU law, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany) decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) to be interpreted as precluding legislation of a Member State under which the supply of heat by associations of property owners to those owners is exempt from value added tax?'

16. Written observations have been submitted by the German Government and the European Commission. On 22 May 2020, they also replied to written questions put to the parties.

IV. Analysis

17. This Opinion is structured as follows: I shall start with preliminary remarks setting out a number of hypotheses regarding the facts of the case and the assumptions I make in order to provide the referring court with an answer (A). I shall then set out the legal test for determining whether there is a taxable transaction under the VAT Directive (B). Next, I shall consider arguments put forward by the German Government and the Commission, before applying the legal test to the hypothetical scenarios established (C).

A. Preliminary clarifications

18. The referring court asks essentially whether the provisions of the VAT Directive preclude Member State legislation from exempting from VAT the supply of heat by an association of property owners to those owners.

19. Given the need for a uniform basis of assessment of VAT,[3] absolving a transaction from VAT can arise in one of two situations: (i) where no taxable transaction is present in the first place; or (ii) where one of the limited exemptions listed in Title IX of the VAT Directive applies.

20. Both considerations require a detailed account of the factual circumstances underlying the transaction at issue. In the present case, the order for reference is rather scarce in detail, thus making it difficult to conclude on either situation without the knowledge of a number of factual variables. I consider it therefore necessary to set out my understanding of the facts, and the need for certain assumptions, which will inevitably frame the answer that I may give to the question raised by the referring court.

21. Two sets of variables will necessarily inform my opinion. Those are the following.

1. Who delivers what to whom and what is being heated?

22. The referring court indicates, both in the order for reference and in the question referred, that it is the applicant which supplies the heat arising from the production of electricity to '*die Wohnungseigentümer*' (the Owners). I stress that the heat is supplied to those legal persons to indicate that there is no evidence in the case file which would suggest that the heat is supplied to the residential tenants of the 20 rental apartments also forming part of the Estate (and the ownership of which is equally unclear). In fact, no tenants appear to be involved in this transaction.

23. That brings about a further complication: should the referring court's order be read literally? That query arises because the use of the definite article '*die*' before '*Wohnungseigentümer*' indicates the use of the plural, which may suggest that the Court would be requested to give an opinion on the supply of heat to the Owners *collectively*, presumably then for *collective* use in the common areas. Or am I to understand the referring court as meaning that the heat is supplied to '*die Wohnungseigentümer*' collectively but for *personal* use in the *individually owned* areas of the Estate?

24. The order for reference gives no clear guidance in either direction. Paragraph 4.13 of the UStG is equally unclear. In relevant part, it merely provides, without further qualification, that the supply of heat by an association of property owners to '*die Wohnungseigentümer*' is exempt from VAT.

3 Recital 7 of the VAT Directive speaks of the need for the common system of VAT to 'result in neutrality in competition'. See also judgment of 3 May 2001, *Commission* v *France* (C-481/98, EU:C:2001:237, paragraph 22).

25. That lack of detail consequently gives rise to the existence of two possible scenarios. First, there is the heating of the *common areas*. Under this scenario, the applicant supplies heat to the Owners *collectively*, in the sense that either the Owners or the applicant (or perhaps even directly the applicant on the Owners' behalf) heat the communal areas of the Estate for collective consumption and enjoyment. Second, there is the heating of the *individual areas*. In such a scenario, the applicant would also supply heat to the Owners, but in a rather different manner. In that case, the Owners receive heat for their designated parts of the Estate directly and consume it *individually*.

2. What compensation (if any) is provided and how is it calculated?

26. As the German Government and Commission correctly point out, the referring court's order is equally silent on the question of compensation. In fact, there is no indication that *any* compensation is provided. Nor is there detail as to how compensation, if any, would be calculated.

27. Indeed, without compensation, there is no taxable transaction. [4]

28. For the purposes of my assessment, I shall nonetheless assume that the Owners provide some compensation to the applicant for the supply of heat, since it is unlikely that the referring court would even pose such a question if there was no compensation whatsoever.

29. Moreover, the manner in which the system of compensation is designed and calculated equally matters. On the one hand, there may be a specific invoice for a specific expense. In other words, any payment for the supply of heat is earmarked and thus provided *directly* to cover that specific expense. On the other hand, the supply of heat could be part of a larger array of activities provided by the applicant. The Owners would then, presumably, pay a regular lump sum to cover various running costs, including the supply of heat. Here, the mode of invoicing would be for all (or some) of those running activities, potentially with a breakdown of costs. Compensation would be provided *indirectly* to cover 'general' expenses.

30. In sum, the two variables unknown to me, but in my view important for the eventual assessment of the case, are not only whether the *common areas* or the *individual areas* of the Estate are to receive the heat, but also whether compensation in return for that supply is provided to cover a specific expense ('*directly*') or a general expense ('*indirectly*').

B. Legal test

31. For a transaction to be taxable within the meaning of the VAT Directive, there must be a transaction carried out for consideration (falling within Article 2 of the VAT Directive) on the territory of a Member State (as required by Article 5 thereof) by a taxable person acting in that capacity (within the meaning of Article 9 of the same directive). That is, unless one of the exemptions contained in Title IX of the VAT Directive applies.

32. In the present case, satisfaction of the territorial scope criterion is undisputed. I shall therefore have no further regard to it and focus my analysis on the remaining factors.

4 Judgments of 5 February 1981, *Coöperatieve Aardappelenbewaarplaats* (154/80, EU:C:1981:38, paragraph 14), and of 1 April 1982, *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121, paragraph 10). As I have suggested elsewhere, without knowledge of the element of compensation, one cannot presume any element of consideration for a 'supply of goods' to be present. See my Opinion in *Gmina Wrocław* (C-665/16, EU:C:2018:112, point 57).

1. Supply of goods for consideration?

33. Article 2 of the VAT Directive lays down those transactions which are liable to VAT. Among others, it clarifies that the 'supply of goods for consideration' is a transaction subject to VAT. That has been interpreted to mean that the EU legislature sought to tax only consumption 'for consideration', that is to say that there was compensation provided reciprocally in return for the supply of goods.[5] Such 'consideration' is deemed to be the (at least some, at times even subjective) value of the good in question, and not a value estimated according to objective criteria.[6]

34. The 'consideration' must also be 'directly and immediately linked' to the taxed activity at issue.[7] I read the case-law as prescribing two cumulative conditions in this regard. First, that there exists some sort of 'causality' in payment. In other words, that a person can be seen to be paying for a particular good or service.[8] Second, that the payment rendered is pursuant to a 'legal relationship' between the two parties to the transaction.[9]

35. I should note at this point that I find the use of the expression 'legal relationship' in the case-law somewhat unfortunate. There may be transactions subject to a 'legal relationship' that do not fall within the scope of Article 2 of the VAT Directive. Thus, *Apple and Pear Development Council* undoubtedly concerned a 'legal relationship' between commercial growers of apples and pears in England and Wales and the body tasked by law to promote their interests (with membership mandatory), even though the Court held that the annual charge paid by each apple and pear grower was insufficiently commensurate to the individual 'benefit' derived from the body's activities.[10] That implies that there is more to the concept of 'legal relationship' than first meets the eye.

36. To me, the 'legal relationship' in such type of situations rather aims at the 'commensurability of benefit' linked to the payment rendered. That is to say that the requisite 'legal relationship' is only present where the party providing the compensation also receives a certain 'benefit' commensurate to that compensation. In *Apple and Pear Development Council*, that 'commensurability of benefit' was inexistent as the body's functions related to the common interests of the growers collectively, so that any benefit derived from those functions by the individual grower was derived '*indirectly from those accruing generally to the industry as a whole*'.[11]

37. The same logic is also apparent in *Commission* v *Finland*, where the Court held that legal aid services in return for a modest fee, which was calculated on the basis of the legal aid recipient's income, did not have a commensurate link to the services received, even though a legal relationship was present.[12] Similarly, in *Tolsma*, admittedly a case without a 'legal relationship', the Court held that there was also no commensurability between donations given by passers-by to a street busker and the benefit received from him playing music on a public street.[13]

5 See the case-law quoted above in footnote 4.

6 See judgment of 13 June 2018, *Gmina Wrocław* (C-665/16, EU:C:2018:431, paragraph 43).

7 See, for instance, judgment of 3 July 2019, *The Chancellor, Masters and Scholars of the University of Cambridge* (C-316/18, EU:C:2019:559, paragraph 21 and the case-law cited).

8 See judgment of 5 February 1981, *Coöperatieve Aardappelenbewaarplaats* (154/80, EU:C:1981:38, paragraph 12).

9 See judgments of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 17), and of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855, paragraph 28 and the case-law cited).

10 Judgment of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120, paragraph 14).

11 Ibid, paragraph 14.

12 Judgment of 29 October 2009, *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraphs 50 to 51).

13 Judgment of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 17).

38. Conversely, a 'commensurability of benefit' was found to be present in both *Kennemer Golf* and *Le Rayon D'Or*, where the payment of a flat-rate charge in return for the 'standby' availability of a service (the possibility to use the golf course or to receive care on demand) was deemed to be 'for consideration', even though no use of those services was actually made.[14]

39. In sum, the 'legal relationship' criterion thus appears to have both formal and substantive facets. Beyond (or within) the formal condition of there being some sort of structured legal relationship between the parties to a transaction, the notion of a legal relationship links back to the idea of consideration. It aims at capturing any exchange of mutual benefit of at least some economic value, within which there is a traceable causality between the supplies carried out by either party.

2. An economic activity?

40. Article 9 of the VAT Directive concerns itself with 'taxable persons'. Pursuant to the first subparagraph of Article 9(1), a taxable person is 'any person', who, independently, carries out in 'any place' 'any economic activity', whatever the purpose or results of that activity. The second subparagraph of that provision then specifies what an 'economic activity' is.

41. Given the wide wording of that provision, any person in any place engaging in any economic activity is a 'taxable person'.[15] Similarly, the term 'economic activity' has been interpreted broadly and is objective in character, in the sense that the activity is considered per se and without regard to its purpose and results.[16]

42. Having clarified the legal test resulting from Articles 2 and 9 of the VAT Directive, I shall now turn to the present case.

C. The present case

43. Pursuant to Article 15 of the VAT Directive, 'heat' is deemed tangible property.

44. The present case could essentially concern two different scenarios: one where the heat is supplied for the *common areas* of the Estate and one where it is supplied for the *individual areas* of the Estate. In both cases, I assume that the Owners compensate the applicant for the supply of the good (heat) in some way, be that *directly* or *indirectly*.[17]

45. Before I proceed to assessing those scenarios individually, I should comment on two transversal lines of argument made in the present case which apply irrespective of the scenario considered.

14 Judgments of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraphs 40 to 42), and of 27 March 2014, *Le Rayon d'Or* (C-151/13, EU:C:2014:185, paragraph 37).

15 As Terra and Kajus observe, for the purposes of the VAT Directive, that means that the 'satay-peddler in Djarkarta' is considered a taxable person in the same sense as a 'department store in Amsterdam'. See Terra, B.J.M., and Kajus, J., *Introduction to European VAT*, IBFD Publications 2018, p. 371.

16 Cf, inter alia, judgments of 5 July 2018, *Marle Participations* (C-320/17, EU:C:2018:537, paragraph 22), and of 10 April 2019, *PSM 'K'* (C-214/18, EU:C:2019:301, paragraphs 41 to 42).

17 Set out in detail above, points 22 to 30 of this Opinion.

46. The first line of argument concerns the nature of an 'economic activity'. The German Government and the Commission consider that, given the *identity of persons* between the parties making up the association of property owners (the applicant, which is in effect the Owners) and the parties receiving the heat (again, the Owners), that transaction could not be deemed an 'economic activity'. According to the Commission, that would also extend to general maintenance, repair, and other services which the applicant would provide to the Owners. All of the above would fall outside the scope of application of the VAT Directive.

47. I cannot agree with that line of reasoning.

48. First, as far as the nature of supply is concerned, the first sentence of Article 9(1) of the VAT Directive uses the rather clear qualifier 'any' to indicate that 'any activity of producers, traders or persons supplying services is to be regarded as an "economic activity"'. Furthermore, the interplay between abstract and typological definitions in the first and second subparagraphs of that provision implies, to me, that the EU legislature intended the concept of 'economic activity' to include as broad a range of activities as possible.[18]

49. Second, and to my mind rather crucially, as the referring court notes, under German law, the applicant is a separate legal person. Consequently, the heat is supplied by one legal entity to three other legal entities. I certainly do understand that, in economic terms, the applicant is made up of some of the same persons benefiting from its activities. However, the overlap in economic interests is hardly an argument for completely disregarding a clear legal differentiation present under national law. There is thus no identity of persons and no self-supply arises.

50. I therefore do not see how the supply of heat performed by a legal person distinct from the recipient of the goods would not amount to an 'economic activity' within the meaning of Article 9(1) of the VAT Directive. Even if one were to change the activity at issue, that conclusion would not be affected: if the applicant received compensation for, say, the cleaning of the common areas, the maintenance of the building's façade, or even the repair of the front gate interphones, it would be performing individual 'economic activities' in the same way as it does, in the present case, with the supply of heat. None of those activities escape the scope of Article 9(1) of the VAT Directive.[19]

51. The second line of argument concerns the nature of Paragraph 4.13 of the UStG. The German Government puts forward two observations in this regard. First, Paragraph 4.13 of the UStG would be an implementation into national law of the exemption found in Article 135(1)(l) of the VAT Directive relating to the 'leasing or letting of immovable property'. Second, the German Government argues that the exemption contained in Paragraph 4.13 of the UStG would find support in a statement by the Commission and the Council. That statement, contained in the Council minutes relating to the adoption of the Sixth Council Directive 77/388/EEC[20] ('Sixth Directive'), notes that Member States may exempt from VAT, among other things, the supply of heat.

52. I cannot subscribe to either of those arguments.

18 See, to that effect, Opinion of Advocate General Kokott in *Posnania Investment* (C-36/16, EU:C:2017:134, point 25).

19 The *economic* nature of such activities may be further stressed by a mind experiment: would and could such activities be provided by a different (externally hired) entity (not the applicant) on a normal paid basis? The answer to that question is bound to be positive: of course heat can (and often is) supplied by an external company on a paid basis, similarly to hiring a company to fix a broken lift in the house.

20 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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).

53. Article 135(1)(l) of the VAT Directive sets out one of the activities that Member States may exempt from VAT. It may not define what constitutes 'leasing or letting', nor does it make a reference to national law for that purpose.[21] However, that provision is an exemption from the ordinary requirement to pay VAT and so must be interpreted strictly.[22]

54. First, looking at the face of the text, I see no argument to support the German Government's position that the supply of heat, or, in fact, the supply of any items not constituting immovable property, by an association of property owners to those owners, should fall within that exemption. It escapes me how the 'supply of heat for consumption at the property' could ever be, by any reasonable construction (and certainly not a narrow one), subsumed under 'the leasing and letting of immovable property'. The former is simply a completely different activity, which indeed has something to do with 'property', but that is just about it.

55. Second, presumably, if the Owners leased or let immovable property from the applicant (*quod non* on the facts of the case) and the applicant stated that consumption of heat was part of the compulsory 'rental package', the argument could be had that the supply of heat is part of the letting transaction. However, the case-law exempts an 'ancillary' supply from VAT only to the extent that it shares the tax treatment of the 'principal' supply and where it does not constitute an object for customers or a service sought of its own sake, but a means of better enjoying the principal service.[23] That requires an assessment of the essential features of the transaction.[24]

56. While that determination would then be for the national court to make, I note that there is no indication in the present case that the 'ancillary' activity for the supply of heat is part of the 'leasing or letting' transaction, if any, which, after all, constitutes the 'principal' activity for the purposes of the exemption under Article 135(1)(l) of the VAT Directive.[25] Even if it were, I would have serious doubts that, in general, such a bundling of activities would be possible under the VAT Directive. The supply of heat would therefore have some difficulty in coming under the notion of a specific aspect of that exempted 'principal' activity.[26]

57. Third, and without prejudice to whether the supply of heat could, in certain circumstances, be considered ancillary, it is, in any event, an 'active' transaction. As the Court has held, Article 135(1)(l) of the VAT Directive merely intended to exempt the 'passive' transaction of 'leasing or letting of immovable property' from VAT.[27] As the Commission correctly observes, the judgment in *Wojskowa Agencja Mieszkaniowa w Warszawie* clearly finds that 'active' transactions, such as 'the provision of water, electricity and heating as well as refuse collection accompanying that letting must, in principle, be regarded as constituting several distinct and independent supplies which need to be assessed separately for VAT purposes'.[28]

21 It is settled case-law that the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation, which must take into account the context of that provision and the purpose of the legislation in question (see, for instance, judgment of 16 November 2017, *Kozuba Premium Selection* (C-308/16, EU:C:2017:869, paragraph 38 and the case-law cited)).

22 See, most recently, judgment of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 22).

23 See judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 34 and the case-law cited).

24 See judgment of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 30 and the case-law cited).

25 See, to that effect, judgments of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraphs 7 to 10 and 31); of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 23); of 27 June 2013, *RR Donnelley Global Turnkey Solutions Poland* (C-155/12, EU:C:2013:434, paragraph 24); and of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 40).

26 See, in like measure, judgment of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253, paragraph 34).

27 Judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506, paragraph 52), and of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 19). See also the Opinion of Advocate General Trstenjak in *RLRE Tellmer Property* (C-572/07, EU:C:2008:697, point 32).

28 Judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 47).

58. As regards the statement of the Commission and the Council in relation to the Sixth Directive, the reply is even simpler. The case-law is clear that such instruments have no legal value and may be used only where the content thereof is referred to in the wording of the provision in question.[29] That is because those addressed by the legislation at issue must be able to rely on what it contains.[30]

59. Article 135(1)(l) of the VAT Directive makes no reference to the supply of heat. Nor does its predecessor in the Sixth Directive, namely Article 13(B)(b) thereof, to which the statement relates. It thus cannot be relied on in this case.

60. Having dealt with the general, transversal arguments, I shall now turn to the two scenarios which may arise in the present case.

1. Scenario 1: heating of the common areas

61. To recall, the first scenario presupposes that the applicant supplies the heat to the Owners *collectively*. The heat is thus supplied for the communal interest of the Owners and is consumed in like measure. The Owners pay the applicant either *directly* or *indirectly* for the supply of the heat.

62. Having suggested that the supply of heat is likely to constitute an economic activity, the next issue would be whether or not it is being provided for consideration in the sense of Article 2 of the VAT Directive. With no knowledge about the payment or invoicing arrangements between the applicant and the Owners, I cannot but offer some, indeed rather vague, guidance on the criteria that are likely to be of relevance for the national court.

63. First, depending on the type of compensation and invoicing, it is likely that some causality in the consideration provided is present,[31] unless of course the applicant finds itself in the rather unlikely scenario where the Owners would pay absolutely nothing for the heat supplied to them.

64. Second, is there a 'legal relationship' under which there is a structured exchange of consideration? Such 'legal relationship' presupposes not only a 'meeting of the minds' but also commensurate 'benefit' to the payer.[32] What that means for the present case is the following.

65. By its very nature, the applicant does not act in the interest of or at the direction of one individual owner. Where it supplies heat with a view to heating the common areas of the Estate, the applicant is likely to carry out its functions *for the benefit of and in the common interest of the Estate as a whole*. The consideration received for carrying out its activities (such as the supply of heat) lacks any real correlation to the 'benefit' commensurate to *the individual share* that the owner holds in the overall 'consideration' provided for that transaction.[33] Any 'benefit' received by the individual owner would be derived indirectly from the benefit to the Owners collectively, even if it cannot be ruled out that some of the Owners, in certain circumstances, might benefit more greatly from the supply of heat than others.[34]

29 See, inter alia, judgment of 14 March 2013, *Agrargenossenschaft Neuzelle* (C-545/11, EU:C:2013:169, paragraph 52).

30 See judgment of 17 October 1996, *Denkavit and Others* (C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 29).

31 As set out above, points 26 to 30 of this Opinion.

32 As set out above, points 34 to 39 of this Opinion.

33 See also judgment of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 14), which called this the lack of a '*reciprocal performance*'.

34 The prime scenario here would be that of a well-maintained communal garden on the ground floor, which would indirectly benefit the owner of a ground floor apartment to a greater extent than the owner of a top floor apartment. Cf, to that effect, judgment of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120, paragraph 14).

66. Put differently, the individual 'benefit' is thus insufficiently commensurate to the payment rendered. That makes the link between the consideration provided and the transaction received insufficiently direct for it to fall within the scope of Article 2(1) of the VAT Directive. [35]

67. It is true that, at least under German law, and subject to verification by the referring court, the Owners are legally obliged to cover their share of the overall charges and expenses incurred by the applicant. [36] However, I do not deem the existence of a legal obligation to become part of a separate entity (like in *Apple and Pear Development Council*), or, in fact, the obligation to pay one's proportionate share of the overall expenses of that body (as would be required in the present case under the applicable German law), as determinative of whether 'commensurability of benefit' exists. Certainly, for all effects and purposes, the lack of control and absence of any consensual element may be considered a 'pointer' for the transaction not to be '*in any real sense a payment for a particular activity*', [37] but it does not characterise the relationship between the activity concerned and the payment rendered.

68. That is why, to me, the supply of heat under the first scenario, if destined for the common areas of the Estate, may equally lack the 'commensurability of benefit' if the Owners were not legally obliged to cover the charges and expenses incurred by the applicant. In those circumstances, the supply of heat is for the common interest of the Owners, and thus not made 'for consideration' within the scope of Article 2(1) of the VAT Directive.

69. Accordingly, were those the factual circumstances of the case, I would be of the view that the VAT Directive does not preclude Paragraph 4.13 of the UStG. Indeed, in such a case, and to such an extent, Paragraph 4.13 of the UStG could be seen as a mere clarification in national law of an activity in any event not subject to VAT.

2. Scenario 2: heating of the individual areas

70. In the second scenario, the applicant supplies heat to the Owners *individually*, for their personal use within their parts of the Estate. Such a supply is then provided in the individual interest of the Owner. The heat is not consumed in the common areas of the Estate. The Owners pay the applicant *directly* or *indirectly*.

71. In this scenario, the 'causality' criterion for there to be consideration is, a fortiori to the first scenario, likely to be established. Indeed, whereas one may conceive a number of various types of flat rate, lump sum, or other types of hybrid payments possible when each owner is to come up regularly with their share for the heating of the communal areas, it is rather difficult to imagine that the same type of arrangement would also be applicable to what is essentially private consumption.

72. That being said, to me, the distinguishing factor of Scenario 2 is the existence of a commensurate 'benefit' to the individual owner. Indeed, if the Owners receive, and compensate the applicant for the supply of heat for their *individual use*, then the compensation provided is earmarked for an activity that is of sufficiently direct and commensurate benefit to the owner. I am certainly not implying that a benefit need be commensurate to the *monetary* value of the payment provided. The VAT Directive does not police bad economic decision-making. The point is rather one of whether the benefit received is sufficiently direct to be made 'for consideration' within the meaning of Article 2(1) of the VAT Directive. If yes, it will be provided 'for consideration' within the meaning of Article 2(1) of the VAT Directive.

35 In this sense indeed concurring with the decision of the Conseil d'Etat of 7 December 2001 in Case No. 212273, ECLI:FR:CEORD:2001:212273.20011207, cited by the referring court.

36 I derive that understanding from Paragraph 16.2 of the *Wohnungseigentumsgesetz* (Act on the Ownership of Apartments and the Permanent Residential Right).

37 Opinion of Advocate General Slynn in *Apple and Pear Development Council* (102/86, not published, EU:C:1987:466, p. 1461).

73. Those conclusions remain irrespective of the mode of payment. Clearly, where the supply of heat is reciprocated by means of a *direct* payment to cover a specific invoice, there is no doubt that it will be commensurate to the benefit received from that heat. One may change the way that compensation is rendered, but that conclusion is still likely to remain the same. A transaction for the supply of heat which is reciprocated *indirectly* by the owner, say, by means of a regular flat rate payment, is still commensurate to the benefit received, and thus 'for consideration', since it covers, at least in part, an activity granted for the *individual benefit* of the owner.

74. As the judgments in *Kennemer Golf* and *Le Rayon d'Or* evidence, that holds true even if it is not possible to relate the sum to each personal use of the heat.[38] The 'commensurability of benefit' element is thus also present in a transaction incurring 'mixed expenses'. That is to say in a situation where the applicant carries out an array of activities for the Owners *collectively*, and, in addition, supplies the heat to the Owners *individually*. Here, at least part of the compensation provided is earmarked to cover an *individual* expenditure. The transaction thus becomes commensurate in part and, to that extent, 'for consideration' within the meaning of Article 2(1) of the VAT Directive and subject to VAT.

75. In those circumstances, Paragraph 4.13 of the UStG would exempt a transaction from the ordinary requirement to pay VAT in Germany, whereas the same transaction would be liable to VAT in other Member States, or perhaps even in Germany itself,[39] in violation of the principle of fiscal neutrality.[40] The VAT Directive would then preclude Paragraph 4.13 of the UStG for exempting the supply of heat from VAT.

76. In the light of the above, it falls to the national court to assess the details of the arrangement between the applicant and the Owners, taking due account of the above considerations on the 'commensurability of benefit' of the payments rendered, if any, for the supply of heat. Should there be an element of commensurability present in the transaction before the national court, the 'for consideration' element of Article 2(1) of the VAT Directive is likely to become satisfied and the transaction, to that extent, becomes liable to VAT.

V. Conclusion

77. I propose to the Court that it answers the question referred by the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany) as follows:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national provisions which exempt from value added tax the supply of heat by an association of property owners to those owners, in so far as the compensation received by the association in return for the supply of heat takes account only of charges and expenses incurred for the supply of heat to the common areas of the property.

38 See, in particular, judgments of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 40), and of 27 March 2014, *Le Rayon d'Or* (C-151/13, EU:C:2014:185, paragraph 37).

39 Again, the individual consumption of heat (or electricity or water, for that matter) in the individual owner's or rental flat units will normally be provided by a third party and will be subject to VAT. It is indeed only in the rather singular factual constellation of the present case that an association of owners apparently starts, beyond its normal (communal) functions, delivering also other, indeed (individualized), commercial supplies, thus effectively creating a dissonance between its generally stated legal nature, on the one hand, and the specific, effectively economic, activity, on the other hand.

40 See, for instance, judgment of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraph 36 and the case-law cited).

Conversely, Directive 2006/112/EC must be interpreted as precluding the same provisions of national law, to the extent that the compensation received by the association in return for the supply of heat takes account, in whole or in part, of the supply of heat to the individually owned parts of the property.

It falls to the national court to verify under what circumstances compensation is provided for the supply of heat in the main proceedings.