



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT

delivered on 10 November 2022¹

Case C-616/21

Dyrektor Krajowej Informacji Skarbowej

v

Gmina L.

(Request for a preliminary ruling
from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Request for a preliminary ruling – Tax legislation – Value added tax – Directive 2006/112/EC – Articles 2, 9 and 13 – Services for consideration – Meaning of ‘taxable person’ – Economic activity – Typological approach – A body governed by public law which arranges for asbestos removal in its territory at no cost to residents, which receives a subsidy from a fund for this purpose – No significant distortions of competition)

I. Introduction

1. The removal of dangerous contaminants such as products containing asbestos by a municipality not only serves to protect the health of residents, but also raises interesting questions in terms of value added tax (VAT). If the residents concerned had themselves commissioned a company to carry out the removal, the VAT assessment would be clear. The business provides them with an assessable and taxable service. The State receives the corresponding VAT. A State subsidy for 100% of the costs to the residents would have no relevance in terms of VAT law.

2. But what about when a municipality organises for this waste to be disposed of by a company it has commissioned, free of charge to the residents concerned, and it is then reimbursed, in whole or in part, by a third party (in this case, a State fund) for the costs it initially incurred? Here, too, the State receives its VAT at least once, specifically from the asbestos removal company. However, if the municipality receives a subsidy of between 40% and 100% from State resources, does this lead to further VAT being incurred because the municipality is providing a further assessable and taxable service to the residents?

3. The consequence of the resulting chain of supply (service provided by the asbestos removal company via the municipality to the resident) would be that the municipality would have to pay this VAT but could in principle claim an input tax deduction from the input supply. If the subsidy is as high as the input costs, this amounts to a ‘zero-sum game’ involving a great deal of

¹ Original language: German.

administrative effort. If the subsidy is lower (or not included within the taxable amount), an input tax surplus would remain, which would reduce the tax revenue. If the subsidy is higher, additional tax revenue would be generated via a State support programme. None of these options seem appropriate, especially when the municipality's objective (environmental protection, health protection, hazard prevention), which also benefits the general public and not just the residents, is also considered.

4. The VAT assessment of municipal asbestos removal subsidised by State funds raises some fundamental VAT questions which the Court must answer in this request for a preliminary ruling. Among other things, it must be clarified how the recipient and the provider of a service are to be identified. Equally fundamental is the question of whether a municipality – assuming it would be a provider of a service – is carrying out an economic activity in such a case.

II. Legal context

A. *European Union law*

5. Article 2(1)(c) of Directive 2006/112/EC on the common system of value added tax ('the VAT Directive')² provides:

'The following transactions shall be subject to VAT:

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

6. Article 9(1) of the VAT Directive provides:

"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.'

7. Article 13 of the VAT Directive, on the other hand, states:

'1. 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.

² Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1); most recently amended by Council Directive (EU) 2022/890 of 3 June 2022 (OJ 2022 L 155, p. 1).

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.

2. Member States may regard activities, exempt under Articles 132, 135, 136, 371, 374 to 377, and Article 378(2), Article 379(2), or Articles 380 to 390, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.'

8. Article 28 of the VAT Directive concerns the commissioning of services and reads:

'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.'

9. Article 73 of the VAT Directive governs the taxable amount:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

B. Polish law

10. The Republic of Poland adopted the VAT Directive through the Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on Tax on Goods and Services, Dz. U. of 2018, item 2174, as amended; 'the Law on VAT').

11. Article 29a(1) of the Law on VAT relates to the taxable amount and provides that:

'Subject to paragraphs 2, 3 and 5, Articles 30a to 30c, Article 32, Article 119 and Article 120(1), (4) and (5), the taxable amount shall be everything that constitutes consideration which the supplier of goods or services has received or is to receive on account of a sale from the purchaser, customer or a third party, including subsidies, subventions and other similar amounts received which have a direct effect on the price of the goods or services supplied by the taxable person.'

12. The Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (Law of 8 March 1990 on Municipal Local Government, Dz. U. of 2020, item 713, as amended; 'Law on Municipal Local Government') provides in Article 7(1) that:

'The municipality's own tasks shall include meeting the collective needs of the community. Own tasks shall, in particular, include matters relating to:

- 1) spatial planning, property management, environmental protection, nature conservation and water management; ...
- 5) healthcare; ...

13. The Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska (Environmental Protection Law of 27 April 2001, Dz. U. of 2020, item 1219, as amended; ‘Environmental Protection Law’) provides in Article 400(2) that:

‘Provincial funds for environmental protection and water management, hereinafter referred to as “provincial funds”, are local government legal persons within the meaning of Article 9(14) of the Law referred to in paragraph 1 (that is to say, the Ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych (the Law of 27 August 2009 on Public Finance, Dz. U. of 2019, item 869, as amended)).’

14. Article 400b(2) and (2a) of the Environmental Protection Law provides that:

‘(2) The purpose of provincial funds shall be to fund environmental protection and water management within the scope set forth in Article 400a(1)(2), (1)(2a), (1)(5) to (1)(9a), (1)(11) to (1)(22) and (1)(24) to (1)(42).

(2a) The purpose of the National Fund and of provincial funds shall also be to create conditions for the implementation of funding for environmental protection and water management, in particular by supporting and promoting activities aimed at such implementation as well as by cooperating with other entities, including local government units, entrepreneurs and entities established outside the Republic of Poland.’

15. The provisions on the removal of asbestos are set out in an act of parliament.³ A resolution of the Council of Ministers establishing a multiannual programme called the ‘National Programme for the Removal of Asbestos for 2009-2032’ was adopted on 14 July 2009.⁴ The resolution lists the tasks set by the European Union in a multiannual perspective, stipulating the objectives as well as the legislative, financial and organisational framework for the programme. It imposes an obligation on local government units to develop programmes for the removal of products containing asbestos.

16. On 26 April 2019, the City Council of L., acting pursuant to the Environmental Protection Law, adopted by way of Resolution 227/VI/2019 the ‘Update of the Programme for the Removal of Asbestos in the City of L. for 2018-2032’. Its implementation was entrusted to the Mayor of the City of L. Ordinance 62/9/2019 of the Mayor of the City of L. of 23 September 2019 laid down the implementation rules. Pursuant to the annex to the resolution of the City Council of L., the activities related to asbestos removal include the removal of products and disposal of waste containing asbestos from the area of L.

III. Facts and preliminary ruling procedure

17. Gmina L. (Municipality of L., Poland; ‘the Municipality’) is a local government unit that performs its own tasks listed in Article 7 of the Law on Municipal Local Government as well as multiple tasks delegated in the area of public administration. It is registered as a taxable person for the purposes of VAT.

³ Ustawa z 19 czerwca 1997 r. o zakazie stosowania wyrobów zawierających azbest (Law of 19 June 1997 on prohibition of the use of products containing asbestos, Dz. U. (Journal of Laws) of 2020, item 1680).

⁴ Uchwała Rady Ministrów z 14 lipca 2009 r. w sprawie ustanowienia programu wieloletniego pod nazwą ‘Program Oczyszczania Kraju z Azbestu na lata 2009-2032’, adopted pursuant to the Ustawa z dnia 6 grudnia 2006 r. o zasadach prowadzenia polityki rozwoju (Law of 6 December 2006 on the Principles of Development Policy, Dz. U. of 2009, No 84, item 712).

18. The implementation of the programme for the removal of asbestos-containing products is a statutory task of the Municipality as well as being part of the government's 'National Programme for the Removal of Asbestos for 2009-2032' and is carried out under the Ordinance of the Mayor of the City of L. of 23 September 2019.

19. Pursuant to that ordinance, the Municipality removes (collects) asbestos-containing products from residential and farm buildings as well as asbestos-containing waste within the area of the Municipality. Properties where economic activity is conducted are not eligible for the programme. The Municipality intends to finance the entire cost of asbestos removal from the buildings eligible for the programme.

20. The implementation of the programme within the Municipality will be based on applications from residents who are interested in removing asbestos from their properties. Subsequently, in accordance with the Law on Public Procurement, the Municipality will select a contractor to remove the asbestos. Thereafter, the Municipality will enter into a contract with the selected contractor for the provision of services at the properties of those residents who have earlier submitted the relevant applications to the Municipal Office.

21. After performing the services, the contractor selected in this manner will issue an invoice to the Municipality with VAT charged on the agreed remuneration. The entire remuneration, including VAT, will be paid by the Municipality from its own funds. Then the Municipality will apply for the reimbursement of all or part of the expenses incurred for that purpose in the form of a subsidy from the Fund for Environmental Protection and Water Management in L. The subsidy may range from 40% to 100% of the expenses incurred depending on whether the requirements set by the fund are met. The residents will not bear any costs on this account, nor will the Municipality enter into any contracts with them for the provision of services for the removal of asbestos from their properties.

22. On 7 January 2020, the Municipality applied to the tax authorities for an advance tax ruling concerning the following issues:

- When implementing the programme, will the Municipality be acting as the authority referred to in Article 15(6) of the Law on VAT?
- Will the receipt of a subsidy from the Fund for Environmental Protection and Water Management in L. result in a tax liability on the part of the Municipality under Article 19a(5)(2) of the Law on VAT, read in conjunction with Article 6 thereof?
- Does the Municipality have the right to deduct input VAT on the basis of the invoices issued by the contractor selected under public procurement law and documenting the removal of asbestos-containing products from the buildings owned by natural persons and residents' associations eligible for the programme for the removal of asbestos in L.?

23. In this context, the Municipality considered that it was acting as a body governed by public law. As a local government unit, it performs its own tasks arising from Article 7(1)(1) of the Law on Municipal Local Government and the aforementioned government programmes. It finances the removal of asbestos for the benefit of residents – members of the local community, for whom this service is free of charge with no fees, contributions or payments being collected on that account. The Municipality also pointed out that, in the presented situation, there is no danger of distortion of competition as referred to in Article 13 of the VAT Directive, since the Municipality

does not implement the programme using its own resources and staff. Instead, it must select a contractor pursuant to the provisions of public procurement law, which in fact strengthens competition.

24. In the advance tax ruling dated 13 March 2020, the tax authorities stated that the programme described by the Municipality should be classified as an activity subject to VAT, since it consists in the resale of asbestos removal services purchased from the selected contractor to the residents of the Municipality. According to the authorities, the Municipality will purchase those services from the contractor selected under public procurement law in its own name, but for the benefit of third parties. Thus, pursuant to Article 8(2a) of the Law on VAT, it will become a supplier of services even if it does not enter into contracts with residents. The recipients of those services will not include all the residents of the Municipality, but only those who submit the relevant applications for the removal of asbestos from their properties. In the view of the authorities that issued the advance tax ruling, it is irrelevant that all residents will indirectly benefit from the effects of the programme.

25. The tax authorities stressed that the contractor will be selected by the Municipality (not by the residents), and the Municipality will enter into a contract with the contractor, will receive invoices and will pay the contractor's remuneration from its own funds. The Municipality will therefore actively participate in the provision of services. There will be specific services provided by the Municipality to individual property owners who have submitted an application, and a subsidy from the Fund for Environmental Protection and Water Management in L. will be used to cover the costs of those specific services.

26. In the light of the aforementioned statements, the tax authorities determined that the Municipality has the status of a taxable person for VAT purposes who engages in the performance of activities subject to VAT. The tax authorities considered that a tax liability emerges in that regard, which also includes the subsidy granted by the Fund for Environmental Protection and Water Management in L., and involves the right to deduct input VAT from the invoices issued by the contractor.

27. By its judgment of 21 July 2020, the Wojewódzki Sąd Administracyjny w Lublinie (Provincial Administrative Court in Lublin, Poland) set aside the advance tax ruling of 13 March 2020, holding that a municipality which receives a subsidy for the removal of asbestos from the properties of individual residents and does not receive any remuneration for that service from the residents does not act as a taxable person for VAT purposes when carrying out that project. In removing asbestos from its territory, including from residents' properties, the Municipality does not carry out an economic project that could be considered a private-law transaction. The Municipality does not approach an unspecified group of prospective customers with an offer to provide services consisting in the removal of asbestos (asbestos-containing products and waste) as an entrepreneur operating under free market conditions.

28. Under the circumstances in question, the Municipality fulfils its public-law obligation to remove asbestos from its area, since it is a substance dangerous to human life and health as well as to the natural environment. All the Municipality's activities are associated exclusively with the public authority's performance of its public tasks under Article 7(1)(1) and (1)(5) of the Law on Municipal Local Government, which are directly aimed at protecting the health and lives of its residents as well as the natural environment in the area administered by the Municipality.

29. An appeal was brought against the above judgment before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland). That court stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling under Article 267 TFEU:

‘Must the provisions of [the VAT Directive], in particular Articles 2(1), 9(1) and 13(1) of that directive, be interpreted as meaning that a municipality (a public authority) is to be regarded as a taxable person for VAT purposes in respect of the implementation of a programme for the removal of asbestos from properties located within that municipality which are owned by residents who do not incur any expense in that regard? Or is the implementation of such a programme included in the activities of the municipality as a public authority which are undertaken in order to fulfil its tasks of protecting the health and life of its residents and protecting the environment, in which connection the municipality is not regarded as a taxable person for VAT purposes?’

30. In the procedure before the Court, the Municipality, the Republic of Poland, the Polish tax authorities and the European Commission submitted written observations. In accordance with Article 76(2) of the Rules of Procedure, the Court did not consider it necessary to hold a hearing.

IV. Legal assessment

A. *The question referred for a preliminary ruling*

31. Taking the question referred literally, at first glance the referring court appears to be concerned with classifying a specific case within the scope of the VAT Directive. However, the referring court alone has jurisdiction to assess the facts.⁵ In essence, however, the court is asking how Articles 2, 9 and 13 of that directive are to be interpreted in order to then be able to decide whether the Municipality here – as the tax authorities believe – is actually providing an assessable and taxable supply of services to the residents.

32. In order to be covered by the VAT Directive, the Municipality’s asbestos-removal activities must comprise a supply of services provided to its residents *for consideration* (Article 2(1)(c) of the VAT Directive, see B.). This supply of services must be carried out as part of an *economic activity* (Article 9(1) of the VAT Directive, see C.) in order for the Municipality to have acted as a taxable person. However, under certain circumstances, municipalities are not considered taxable persons if they have engaged in an economic activity *as public authorities* (Article 13 of the VAT Directive). Therefore, this exception must then be examined (see D.).

⁵ See, for example, judgments of 13 January 2022, *Termas Sulfurosas de Alcafache* (C-513/20, EU:C:2022:18, paragraph 36); of 8 October 2020, *Universitatea „Lucian Blaga” Sibiu and Others* (C-644/19, EU:C:2020:810, paragraph 47); and of 25 July 2018, *Vernaza Ayovi* (C-96/17, EU:C:2018:603, paragraph 35).

B. Identifying the supplier and the recipient of a supply of services

33. The aim of VAT as a general tax on consumption is to impose a tax on consumer capacity, which is demonstrated by consumers' expenditure of assets to procure a consumable benefit.⁶ Therefore, the recipient must have received a consumable benefit. This applies both to a supply of goods and to a supply of services within the meaning of Article 2(1)(a) and (c) of the VAT Directive. The consumable benefit under consideration in the present case is asbestos removal. The removal of asbestos does not constitute a supply of goods within the meaning of Article 14 of the VAT Directive and is thus a supply of services within the meaning of Article 24(1) thereof.

34. What needs to be clarified, however, is who provided this service and to whom. A service provided by the asbestos removal company to the Municipality (because it placed and paid for the order) or to the resident (because asbestos was removed from his or her property) are possible options. However, it is also possible that the Municipality provided a service to the resident, since the resident submitted a corresponding application to the Municipality and the latter (by means of an appointed subcontractor) removed the asbestos from his or her property (see point 2.). In addition, the Polish tax authorities apparently assume that a transaction for commission within the meaning of Article 28 of the VAT Directive (see point 1.) was involved, in which the Municipality acted as commission agent for the resident.

1. The existence of a transaction for commission

35. Article 28 of the VAT Directive clarifies that 'where a taxable person acting in his own name but on behalf of another person takes part in a supply of services' he will be 'deemed to have received and supplied those services himself'. Therefore, if the Municipality, as commission agent, engaged the company for asbestos removal in its own name but on behalf of residents, it will be treated as if it had removed the asbestos from the residents' properties itself.

36. These VAT obligations relating to transactions for commission are a legal fiction, as the Court of Justice has emphasised in settled case-law.⁷ Actually, the commission agent's activity is a mere business supply service, for which it receives a commission premium. However, this business supply service is reclassified for VAT purposes so that it is treated as the principal service. This is particularly crucial with regard to tax exemptions;⁸ these are thereby extended to cover the commission agent's business supply service. This means that direct transactions and transactions for commission are treated in the same way.

⁶ See, for example, judgments of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraph 23); of 11 October 2007, *KÖGÁZ and Others* (C-283/06 and C-312/06, EU:C:2007:598, paragraph 37 – 'it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied'); and of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraphs 20 and 23 – 'only the nature of the undertaking given is to be taken into consideration: for such an undertaking to be covered by the common system of VAT it must imply consumption').

⁷ Judgments of 21 January 2021, *UCMR – ADA* (C-501/19, EU:C:2021:50, paragraph 43); of 12 November 2020, *ITH Comercial Timișoara* (C-734/19, EU:C:2020:919, paragraphs 49 and 50); of 19 December 2019, *Amărăști Land Investment* (C-707/18, EU:C:2019:1136, paragraphs 37 and 38); of 16 September 2020, *Valstybinė mokesčių inspekcija (Joint activity agreement)* (C-312/19, EU:C:2020:711, paragraph 49); of 4 May 2017, *Commission v Luxembourg* (C-274/15, EU:C:2017:333, paragraphs 85, 86 and 88); and of 14 July 2011, *Henfling and Others* (C-464/10, EU:C:2011:489, paragraph 35).

⁸ See expressly judgment of 14 July 2011, *Henfling and Others* (C-464/10, EU:C:2011:489, paragraph 36).

37. It follows, however, according to the Court,⁹ that two conditions must be satisfied in order for those provisions to be applicable. First, there must be an agency in performance of which the commission agent acts, on behalf of the principal, in the supply of services. Second, the supplies of services acquired by the commission agent and the supplies of services sold or transferred to the principal must be identical.

38. As regards the first of those conditions, the Court¹⁰ points out that Article 14(2)(c) of the VAT Directive expressly uses the term ‘contract’ and Article 28 of that directive states that the taxable person must act ‘on behalf of another person’. It follows that there must be an agreement between the commission agent and the principal for the purpose of granting the agency concerned. This is why the term ‘principal’ is also used to define the commissioning party in some legal systems.

39. However, if this agency and the principal’s right to issue instructions to the commission agent resulting therefrom is an essential feature of transactions for commission, then – as the Commission rightly points out – there is no such agency here. The resident concerned does not commission the Municipality to remove the asbestos at his or her own expense, but applies to be included in the State-funded removal programme. Whether or not he or she is successful in his or her application is up to the Municipality to decide. Other than the application, the resident does not appear to have any influence on the performance of the service. Consequently, the assumption of a transaction for commission can be ruled out.

2. Supplier and recipient of the ‘asbestos removal’ service

40. This raises the fundamental question of who provided the asbestos-removal service to whom here. We must ask, therefore, how the supplier and the recipient of the service are to be identified when several persons are involved in the provision of a ‘service for consideration’ within the meaning of Article 2(1)(c) of the VAT Directive.

(a) Ways to identify the supplier and the recipient of the service

41. Since the purpose of VAT is to tax the recipient’s expenditure on consumer goods, *identifying the recipient of the service* can, in principle, be based on the person who paid for the service, as he or she has borne the corresponding expense. However, this is only an indication. This is because for a supply of services to be deemed to be ‘for consideration’, within the meaning of the VAT Directive, as is also apparent from Article 73 thereof, it is not a requirement that the consideration be obtained directly from the recipient of that supply, since it may be obtained from a third party.¹¹ The fact that it is not the resident but a fund or the Municipality that has provided consideration therefore does not rule out a service being provided to the resident.

⁹ Judgment of 12 November 2020, *ITH Comercial Timișoara* (C-734/19, EU:C:2020:919, paragraph 51).

¹⁰ Judgment of 12 November 2020, *ITH Comercial Timișoara* (C-734/19, EU:C:2020:919, paragraph 52).

¹¹ Judgments of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 40); of 27 March 2014, *Le Rayon d’Or* (C-151/13, EU:C:2014:185, paragraph 34); and of 7 October 2010, *Loyalty Management UK* (C-53/09 and C-55/09, EU:C:2010:590, paragraph 56).

42. Since the trader acts as tax collector on behalf of the State under VAT law,¹² the person who received the consideration is generally used to *identify the supplier*. This is because only this person can pay the VAT included in the consideration to the State. In this respect, the Municipality qualifies as a supplier, because it receives reimbursement from a fund for a certain amount used to pay to remove asbestos from the resident's property. The fact that the Municipality did not arrange for its own staff to remove the asbestos, but commissioned a private company to do so, is irrelevant. Employing a subcontractor is entirely normal in the business world and involves the subcontractor providing a service to a client, which then provides said service to its customers as its own service. This has already been clarified by the Court of Justice.¹³

43. The fact that the Municipality is performing a public service (healthcare, hazard prevention) by removing the asbestos does not mean that the Municipality is not providing a possible service to the residents. This is because, according to the case-law, a supply of services effected for consideration may also consist in the performance of duties conferred and regulated by law in the public interest.¹⁴

(b) Legal relationship between the service provider and the service recipient

44. On the contrary, the Court explicitly stated that in order to identify the recipient of the taxable supply, it is necessary to determine who was linked by a legal relationship in the course of which there is reciprocal performance.¹⁵ However, such a legal relationship is assumed by the Court if there is a sufficiently direct link between the service supplied and the consideration received.¹⁶ In this regard, in so far as the contractual position normally reflects the economic and commercial reality of the transactions, the relevant contractual terms constitute a factor to be taken into consideration.¹⁷ Ultimately, it is for the referring court to assess these legal relationships and contractual terms.

45. If the Municipality had, at the request of the resident, merely brokered an agreement between the latter and the asbestos removal company, only paying the consideration as a 'third party' within the meaning of Article 73 of the VAT Directive and having some of the cost reimbursed by the fund, then there would be a direct supply link between the company and the resident. An indication of this would be who would be liable to the resident in the event of any damage incurred during performance of the service.

¹² According to settled case-law of the Court of Justice, judgments of 11 November 2021, *ELVOSPOL* (C-398/20, EU:C:2021:911, paragraph 31); of 15 October 2020, *E. (VAT – Reduction of the taxable amount)* (C-335/19, EU:C:2020:829, paragraph 31); of 8 May 2019, *A-PACK CZ* (C-127/18, EU:C:2019:377, paragraph 22); of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 23); of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25); and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

¹³ Judgment of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraph 34 et seq.): A distributor of telephone cards provides a telecommunications service that has previously been procured for it by a telephone company (as a subcontractor).

¹⁴ Judgments of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 39); and of 2 June 2016, *Lajvér* (C-263/15, EU:C:2016:392, paragraph 42).

¹⁵ Judgment of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraph 33); along similar lines, see also judgment of 16 September 2020, *Valstybinė mokesčių inspekcija (Joint activity agreement)* (C-312/19, EU:C:2020:711, paragraph 40 et seq.).

¹⁶ Judgments of 20 January 2022, *Apcoa Parking Danmark* (C-90/20, EU:C:2022:37, paragraph 27); of 16 September 2021, *Balgarska nacionalna televizija* (C-21/20, EU:C:2021:743, paragraph 31); of 20 January 2021, *Finanzamt Saarbrücken* (C-288/19, EU:C:2021:32, paragraph 29); and of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia* (C-295/17, EU:C:2018:942, paragraph 39).

¹⁷ Judgment of 18 June 2020, *KrakVet Marek Batko* (C-276/18, EU:C:2020:485, paragraph 66); similar to judgment of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraph 43).

46. However, should the Municipality have entered into the agreement with the asbestos removal company in its own name and on its own account and also have acted vis-à-vis the respective resident (applicant) in its own name and on its own account – possibly on the basis of public law – then the fund may also have provided consideration as a ‘third party’ for a service rendered by the Municipality to the resident.

47. If I understand the referring court correctly, the asbestos removal company undertook, in respect of the Municipality, to remove asbestos from the properties indicated by the Municipality, which undertook to pay for it. This constitutes a service provided by the company to the Municipality in return for payment.

48. The property owner, on the other hand, does not appear to have any contractual relations with the company. Rather, he or she merely applied to the Municipality to have the asbestos removed from his or her property. This shows that the removal of the asbestos by the Municipality is significant to the owner and thus represents a consumable benefit for him or her. The Municipality subsequently receives reimbursement from a fund of all or a proportion of the costs for removing the asbestos from the resident’s property. In that respect, I assume that there is a direct connection between the removal of asbestos for the benefit of an individual resident (on his or her application to the Municipality) and the – at least pro rata – ‘payment’ for that service of the Municipality by a third party (the fund).

49. However, it would also be conceivable for the fund to reimburse the costs irrespective of whether asbestos was removed from the resident’s property or from a property belonging to the Municipality itself. Then the payment from the fund (a third party within the meaning of Article 73 of the VAT Directive) would relate to the service rendered by the asbestos removal company to the Municipality and would merely constitute refinancing of the Municipality from public funds. However, this does not follow from the request for a preliminary ruling.

50. Given that some submissions emphasise the lack of a contract between the Municipality and the resident, this is not an appropriate solution. There is certainly no traditional civil-law contract involved. However, as already mentioned (point 44), it is sufficient for there to be a direct link between the service rendered and the consideration received.¹⁸

51. There is a direct link of this kind where two services are mutually dependent on each other, that is to say, that one is made only on condition that the other is also made, and vice versa.¹⁹ That is the case here if there is a connection of this kind between the refinancing of the Municipality from the fund and the removal of the asbestos from the property of a particular resident who had previously applied for this service,²⁰ which it is for the referring court to determine.

52. Consequently, there are two services in the present case. The company provides a service (asbestos removal) to the Municipality, which indisputably also provides consideration. For its part, the Municipality provides a service (asbestos removal) to the respective resident which the latter has requested from it and which is probably also provided in return for consideration from a third party (payment from the fund).

¹⁸ See the references in footnotes 15 and 16 above.

¹⁹ Judgment of 11 March 2020, *San Domenico Vetraria* (C-94/19, EU:C:2020:193, paragraph 26); see, to that effect, judgment of 2 June 1994, *Empire Stores* (C-33/93, EU:C:1994:225, paragraph 16); and of 23 November 1988, *Naturally Yours Cosmetics* (230/87, EU:C:1988:508, paragraph 14).

²⁰ In this broad sense, see also judgment of 20 January 2022, *Apcoa Parking Danmark* (C-90/20, EU:C:2022:37, paragraph 27 et seq.).

(c) *Amount of the consideration*

53. The only question that remains is whether the consideration received by the Municipality is *actually equivalent* to the service provided to the resident. This seems doubtful because the consideration paid by a third party (here, the fund) may only cover part of the costs. It is apparent from the request for a preliminary ruling that the fund covered, depending on the circumstances, between 40% and 100% of the costs incurred.

54. However, the VAT Directive does not require adequate remuneration. This is demonstrated by Article 26(1)(b) of the VAT Directive, which presumes a supply of services for consideration even where services are provided free of charge. A service for a small fee must a fortiori be capable of constituting a service for consideration. The same follows from Article 80 of the VAT Directive. According to the latter, Member States may provide for, in the case of services between parties with close ties, an excessively low consideration to be increased to the open market value. In all other cases, consideration agreed below the open market value is sufficient and decisive.

55. For this reason, the Court of Justice has ruled on several occasions that the fact that the price paid for an economic transaction is higher or lower than the cost price, and, therefore, higher or lower than the open market value, is irrelevant for the purpose of establishing whether it was a transaction effected for consideration, since that circumstance is not such as to affect the direct link between the services supplied or to be supplied and the consideration received or to be received, the amount of which is determined in advance and according to well-established criteria.²¹

56. Consequently, the amount of the remuneration is not decisive when determining whether a transaction qualifies as a service for consideration within the meaning of Article 2(1)(c) of the VAT Directive. The decisive factor is rather whether the payment (here, from the fund) relates to a specific service (here, the removal of asbestos) performed by the recipient of the payment (here, the Municipality). If this is confirmed, which it is to be verified by the referring court, then there is also a service provided by the Municipality ‘for consideration’.

3. *Interim conclusion*

57. Article 2(1)(c) of the VAT Directive is to be interpreted as meaning that the classification of the parties between whom a supply of services has been provided in exchange for consideration must be based on an overall assessment of the existing legal relationships. If this overall assessment shows a direct connection between the payment (here, from the fund) and the service (here, the removal of asbestos from a resident’s property by the Municipality), there is a service ‘for consideration’.

²¹ Judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 43); see, in that sense, judgment of 2 June 2016, *Lajvér* (C-263/15, EU:C:2016:392, paragraphs 45 and 46 and the case-law cited).

C. Concept of economic activity within the meaning of Article 9 of the VAT Directive

58. In order for the Municipality to have acted as a taxable person in this respect, it must have carried out an economic activity, in this specific case by removing the asbestos. The concept of ‘economic activity’ is defined in the second subparagraph of Article 9(1) of the VAT Directive as covering any activity of producers, traders and persons supplying services, including mining and agricultural activities and activities of the professions.

59. It is apparent from the Court’s case-law that that definition shows that the scope of the concept of ‘economic activity’ is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results.²²

60. Provided that ‘the exploitation of ... property’ is involved, the second sentence of the second subparagraph of Article 9(1) of the VAT Directive makes it clear that obtaining income on a continuing basis *shall be regarded* as an economic activity. Consequently, even mere asset management – if it is performed on a continuous basis – can also be relevant for VAT purposes. The present case, however, does not involve the ‘exploitation of ... property’,²³ so the issue of continuity is not relevant here. Moreover, the planned removal of asbestos from a large number of properties over a certain period of time should easily meet this criterion. The programme for the removal of asbestos in L. covered a period from 2018 to 2032.

61. Furthermore, it follows from the Court’s case-law that, in order to determine whether a service is supplied in return for remuneration, such that the activity in question is to be classified as an economic activity, *all the circumstances* in which it is supplied have to be examined.²⁴

62. This is confirmed by the wording of Article 9(1) of the VAT Directive. It delineates the economic activity that leads to a person being considered as a taxable person, listing various specific jobs and ‘the professions’ whose activities are regarded as an economic activity.

63. Given the difficulty of precisely defining ‘economic activity’, the description of the necessary economic activity with typical occupational images (‘producers, traders or persons supplying services’ or ‘mining and agricultural activities and activities of the professions’) outlines the concept of a taxable person and the economic activity necessary to qualify as such.

64. In contrast to an abstract definition, a typological description is more open.²⁵ Whether a particular thing belongs to the type does not have to be determined by logical/abstract subsumption, but can be determined according to the degree of similarity to the prototype (pattern). That assignment demands a view of the overall picture in each individual case, taking into account the generally accepted standards.

²² Judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 47); similarly, judgment of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)* (C-604/19, EU:C:2021:132, paragraph 69); along similar lines, see also judgment of 16 September 2020, *Valstybinė mokesčių inspekcija (Joint activity agreement)* (C-312/19, EU:C:2020:711, paragraph 39).

²³ There is a lack of content and thus a lack of comparability for decisions in which the Court of Justice has had to distinguish between occasional asset management and economic activity – see, for example, judgment of 20 January 2021, *AJFP Sibiu and DGRFP Braşov* (C-655/19, EU:C:2021:40, paragraph 24 et seq.).

²⁴ Judgments of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 48), and of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 29); see, in that sense, judgments of 19 July 2012, *Rēdlihs* (C-263/11, EU:C:2012:497, paragraph 34), and of 26 September 1996, *Enkler* (C-230/94, EU:C:1996:352, paragraph 27).

²⁵ For greater detail, see my Opinion in *Posnania Investment* (C-36/16, EU:C:2017:134, point 25).

65. In that regard, according to the case-law of the Court, the question of whether the amount of compensation was determined on the basis of criteria which ensured that it was sufficient to cover the operating costs of the provider of the service may be a relevant factor.²⁶ This also applies to the amount of earnings and other factors, such as the number of customers.²⁷ The mere circumstance that each supply of services, considered individually, is not remunerated at a level corresponding to the costs incurred is not sufficient to show that the activity as a whole is not remunerated on the basis of criteria ensuring that the operating costs of the provider of the service are covered.²⁸ However, the Court has denied economic activity specifically on the grounds that the contributions paid by the recipients of the service concerned covered only a small part of the total operating costs incurred by the provider.²⁹

66. Such a typological approach underlies, for example, the Court’s decision regarding the economic activity of a supervisory board member who received remuneration for his work on the supervisory board of an incorporated company. In conclusion, the Court compared this activity with that of a typical taxpayer and, due to the particular features of the case (remuneration which was not dependent on participation in meetings or workload, no economic risk, small and fixed lump sum), declared that this could not be considered an economic activity.³⁰ It had already applied this typological approach in its judgment in *Gemeente Borsele*³¹ and, to a certain extent, in the judgment in *Enkler* prior to that.³²

67. Considering the activity of the Municipality in the present case, there are some noticeable differences from the activity of a typical taxpayer with a comparable job (here, ‘profession of asbestos remover’). First, the Municipality does not engage in any activity of its own to provide these services. It neither provides its own staff nor actively seeks customers. Rather, only its residents may apply to be accepted onto an asbestos removal programme set up under public law. Only then does the Municipality arrange for a company to carry out the asbestos removal on its behalf. This company is selected as part of a public and open tendering procedure. This does not reflect the typical selection of a subcontractor by an asbestos removal company.

68. The Municipality’s activities are limited to arranging for the successful removal of the asbestos by a private party. No remuneration is provided specifically for these organisational services; the fund covers, at most, the costs of the appointed ‘subcontractor’. By contrast, a typical trader would just add these organisational costs plus a profit margin to the price of his or her service. In any case, the Municipality is not in competition with other private service providers through its provision of intermediary organisational services.

²⁶ Judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 49); see, in that sense, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.* (C-182/17, EU:C:2018:91, paragraph 38 and the case-law cited).

²⁷ Judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 49); see, in that sense, judgments of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 31); of 19 July 2012, *Rédlihs* (C-263/11, EU:C:2012:497, paragraph 38); and of 26 September 1996, *Enkler* (C-230/94, EU:C:1996:352, paragraph 29).

²⁸ Judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 51).

²⁹ Judgments of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 33), and of 29 October 2009, *Commission v Finland* (C-246/08, EU:C:2009:671, paragraph 50). This is also emphasised in the judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 52).

³⁰ Judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)* (C-420/18, EU:C:2019:490, paragraph 44).

³¹ Judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 29 et seq.). The background to this was the lack of typical market participation by the municipality – see my Opinion in that case (C-520/14, EU:C:2015:855, point 62 et seq.).

³² Judgment of 26 September 1996, *Enkler* (C-230/94, EU:C:1996:352, paragraph 28 – ‘comparing the circumstances’); and, building on that, judgment of 19 July 2012, *Rédlihs* (C-263/11, EU:C:2012:497, paragraphs 35 and 36).

69. It is also the Municipality which chooses to whom the relevant service is provided under that programme. Therefore, there is no traditional order from the resident. Typically, asbestos removal measures are not free of charge for the recipient (here, the respective resident), especially not if these services have previously been purchased exclusively from a third party. Even taking into account the payments from the fund, which cover between 40% and 100% of the costs, there remains uncertainty, atypical for a ‘normal’ taxable person, over a fee that at most covers the costs.

70. The question of whether and to what extent the third party reimburses the cost of the services remains open until said third party (here, the fund) makes a subsequent decision. In this respect, the Municipality is not developing an entrepreneurial initiative, nor does it have any chance to make a profit.³³ As a result, it only bears the risk of loss, depending on the reimbursement arrangements with the third party. No typical taxable person would run his or her business in such a way that he or she organises something for a customer, but only bears the risk of loss and does not have any chance of making a profit, even in the very long term.

71. In addition, the reason behind the Municipality’s actions does not relate to economics. It is not about generating further revenue or maximising existing profits or about achieving surpluses of any kind. Rather, reasons of general public interest (environmental protection, hazard protection, health protection and so forth) for the benefit of all or individuals are the primary concern. The typical taxable person acts differently.

72. The conditions under which the service at issue in the main proceedings is provided are therefore different from those under which asbestos removal services are usually carried out. The Municipality also does not offer asbestos removal services on the general market, but rather itself appears to be a final consumer of these removal services. It purchases them from asbestos removal companies with which it has contractual relationships and makes them available to the inhabitants of its territory as part of a healthcare and hazard prevention (or public services and environmental protection) programme.³⁴

73. The second subparagraph of Article 9(1) of the VAT Directive must therefore be interpreted as requiring, in the context of an overall assessment, a comparison of the specific activity with that of a taxable person typical of the professional category in question. The circumstances described above give rise to doubts about the Municipality performing an economic activity. However, it is for the referring court to make the final decision.

D. In the alternative: transactions which are the responsibility of a body governed by public law ‘in which those bodies engage as public authorities’

74. If an economic activity within the meaning of Article 9(1) of the VAT Directive were to be assumed, it would have to be clarified whether Article 13 thereof applies. This suggests that, under certain circumstances, bodies governed by public law are not to be regarded as taxable persons, even if they carry out economic activities within the meaning of Article 9 of the VAT Directive.

³³ On bearing the economic risk, see also judgment of 16 September 2020, *Valstybinė mokesčių inspekcija (Joint activity agreement)* (C-312/19, EU:C:2020:711, paragraph 41).

³⁴ See the almost identical wording in the judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 35).

1. Character and purpose of Article 13 of the VAT Directive

75. Article 13 of the VAT Directive is not a tax exemption,³⁵ because both tax liability and tax exemption presuppose an economic activity carried out by a *taxable person* (see only the regulation of tax exemptions in Article 131 et seq. of that directive). The transactions covered by Article 13 of the VAT Directive are not carried out by taxable persons and are therefore inherently not taxable. They are outside the scope of the VAT Directive.

76. The prerequisite for this is that a body governed by public law (here, the Municipality) ‘engages in] transactions’ as a public authority (paragraph 1), unless their treatment as a non-taxable person would lead to significant distortions of competition (subparagraph 2).

77. This exemption for bodies governed by public law is, in my view, based on the premiss that activities in which the State engages as a public authority in the role of tax creditor do not need to be taxed again in order to maintain competitive neutrality.³⁶ As a rule, such ‘official activities’ are not economic activities within the meaning of Article 9 of the VAT Directive according to the required type analysis. If they are, then Article 13 of that directive, as a *simplification rule*, prevents tax obligations (recording, declaration and payment obligations) from arising for the State in this regard. However, this is difficult to reconcile with the VAT Directive’s concept of a general tax on consumption, as outlined above (point 33),³⁷ because correct taxation of a final consumer cannot depend on whether or not the body is providing a service to the consumer ‘as a public authority’.

78. Nevertheless, the VAT Directive provides for special treatment for bodies governed by public law in respect of transactions in which they engage as public authorities. This may be based on the idea that there is usually no competition requiring protection where public authority is exercised in return for a charge (for example, the issuing of a passport for a fee – assuming that this would be an economic activity within the meaning of Article 9 of the VAT Directive) and a self-taxation by the State then makes little sense. Should major distortions of competition nevertheless occur because private parties could provide the same service, the exception to the exclusion in the second subparagraph prevents any distortion of competitive neutrality between providers of comparable services.

2. Transactions performed in the exercise of public authority

79. According to the case-law of the Court of Justice, activities pursued as public authorities within the meaning of that provision 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 economic operators.³⁸ Consequently, the only criterion making it possible to distinguish with certainty between those

³⁵ Contrary to what is implied in some decisions of the Court – for example, judgments of 10 April 2019, *PSM ‘K’* (C-214/18, EU:C:2019:301, paragraph 38); of 29 October 2015, *Saudaçor* (C-174/14, EU:C:2015:733, paragraphs 71 and 75); and of 13 December 2007, *Götz* (C-408/06, EU:C:2007:789, paragraph 41); or in some Opinions, for example, Opinion of Advocate General Poiares Maduro in *Isle of Wight Council and Others* (C-288/07, EU:C:2008:345, points 10, 12, 16, 18 and 30).

³⁶ See, on the problem of ‘self-taxation’ by the State, my Opinion in *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2015:855, point 23 et seq.).

³⁷ See also my Opinion in *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2015:855, point 24 et seq.) for the classification of Article 13 of the VAT Directive.

³⁸ Judgments of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 21), and of 14 December 2000, *Fazenda Pública* (C-446/98, EU:C:2000:691, paragraph 17 and the case-law cited).

two categories of activity is the legal regime applicable under national law.³⁹ In view of the nature of the analysis to be carried out, it is for the national court to classify the activity at issue in the main proceedings in the light of the criterion adopted above.⁴⁰

80. In that regard, the case-law of the Court of Justice seems to focus primarily on whether the legal basis for the activity in question is public law or private law. However, a merely superficial reference to the legal basis is always problematic if the law of the Member State allows bodies governed by public law to enter into contractual relations under public law as well. The scope of the VAT Directive should not depend on the nature of the dealings in question (public-law or civil-law contract), but on substantive criteria. However, in so far as the economic activity of a body governed by public law is assessed by means of a type comparison (see C. above), most of the problems should be solved within the framework of Article 9 of the VAT Directive.

81. In the present case, subject to an assessment by the referring court, the Municipality appears to have acted within the framework of the special legal regime as set out in the case-law. The resident's (recipient's) application is made as part of a public-law programme for the removal of asbestos-containing products launched by the City Council of L. On the basis of a (public-law) ordinance from the Mayor, the Municipality collects the products containing asbestos. The application for inclusion in the removal programme and the granting of this application consequently seem to be actions carried out on the basis of public law. Even the refinancing by the Fund for Environmental Protection and Water Management seems to be based on public law. This case therefore involves an activity performed in the exercise of public authority within the meaning of the case-law. As a consequence, the Municipality is not considered a taxable person under Article 13(1) of the VAT Directive.

3. *No significant distortions of competition*

82. According to the second subparagraph of Article 13(1) of the VAT Directive, when bodies governed by public law engage in activities or transactions as public authorities, they are nevertheless to be regarded as taxable persons where their treatment as non-taxable persons would lead to significant distortions of competition. According to the third subparagraph of that article, they are to be regarded as taxable persons in respect of the activities listed in Annex I to that directive, provided that those activities are not carried out on such a small scale as to be negligible. Annex I lists typical services supplied to the residents of a Member State, including the supply of water, gas and so forth, but not waste disposal.

83. The background to this exemption to the exclusion is that a body governed by public law may be responsible, under national law, for carrying on certain activities of an essentially economic nature under the special legal regime applicable to it, where those same activities can also be carried on in parallel by private operators, with the result that the treatment of that body as a non-taxable person may give rise to certain distortions of competition.⁴¹ Moreover, some consumers would be charged VAT and some would not, even though they were all receiving the same service (and the same consumable benefit). The legal form of the service provider (a private-law or public-law institution) cannot justify this difference in VAT charges to service recipients.

³⁹ Judgments of 15 May 1990, *Comune di Carpaneto Piacentino and Others* (C-4/89, EU:C:1990:204, paragraph 10), and of 17 October 1989, *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraph 15).

⁴⁰ Settled case-law of the Court – see judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 22 with further references).

⁴¹ Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 33).

84. It is that undesirable result that the legislature sought to avoid by providing, in the third subparagraph of Article 13(1) of the VAT Directive, that the activities listed in Annex I to that directive – unless they are negligible – are, ‘in any event’, to be subject to VAT, even when they are carried on by bodies governed by public law acting as public authorities.⁴² The second and third subparagraphs of Article 13(1) of the VAT Directive are, consequently, closely linked since they pursue the same objective, namely charging the consumer with VAT, even when the supplier is acting as a public authority.

85. Those subparagraphs are thus subject to the same logic, under which any activity of an economic nature, from which a consumer receives a consumable benefit, is, in principle, to be subject to VAT.⁴³ Therefore, the second and third subparagraphs of Article 13(1) of the VAT Directive are to be interpreted as a whole.⁴⁴ From that overall perspective, the significant distortions of competition to which the treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead, must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular.⁴⁵

86. Despite this clarification by the Court, this indeterminate criterion (no significant distortions of competition) continues to pose problems in practice. I understand the Court to mean that it is ultimately necessary to examine whether and to what extent private economic operators are excluded from consumer supply by the activities of the body governed by public law, even if that body acts only under the special legal regime applicable to it. However, in the present case, given the particular circumstances of this asbestos removal programme, it seems to me that significant distortions of competition can be ruled out.

87. An essential aspect here is the fact that – as explained above under C. – the Municipality does not offer services on the market like a typical company, but rather only acts as a recipient of services itself. This argument is supported by the fact that a private party is selected and commissioned to provide the services under public procurement law. Thus, in the present case, the Municipality is not forcing a private competitor out of the asbestos removal market, but – for public-law reasons of general interest (environmental protection, hazard prevention, health protection and services in the public interest) – is merely acting as an intermediary between the asbestos removal company and the final consumer (in this case, the resident) and refinances itself partly using State funds from another body governed by public law.

88. In such a situation, I believe that distortions of competition, at least of a significant nature, can be ruled out. The fact that the same VAT revenue accrues as if the owner had engaged the asbestos removal company at his or her own expense (instead of the Municipality) also supports the application of Article 13 of the VAT Directive to the Municipality’s activities in relation to this specific asbestos removal programme.

⁴² Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 34); see also, in that sense, judgment of 19 January 2017, *Revenue Commissioners* (C-344/15, EU:C:2017:28, paragraph 39).

⁴³ Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 38).

⁴⁴ Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 39).

⁴⁵ Judgments of 19 January 2017, *Revenue Commissioners* (C-344/15, EU:C:2017:28, paragraph 41), and of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 53).

4. Interim conclusion

89. The second subparagraph of Article 13(1) of the VAT Directive must be interpreted as meaning that significant distortions of competition can be ruled out if the public service activities are of such a nature as to ensure that private economic operators are not prevented from supplying consumers, but – as here – are involved in it.

V. Conclusion

90. I therefore propose that the Court reply to the questions referred for a preliminary ruling by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) as follows:

- (1) Article 2(1)(c) of the VAT Directive must be interpreted as meaning that, in order to determine between whom there is a supply of services in return for consideration, an overall assessment of the existing legal relationships must be carried out first and foremost. If this reveals a direct link between the payment by a third party and the supply of services, there is a supply ‘for consideration’.
- (2) The second subparagraph of Article 9(1) of the VAT Directive must be interpreted as requiring that these specific activities be compared with those of a taxable person typical of the professional category in question.
- (3) The second subparagraph of Article 13(1) of the VAT Directive must be interpreted as meaning that significant distortions of competition can be ruled out if the public service activities are of such a nature as to ensure that private economic operators are not prevented from supplying consumers, but are involved in it.