Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 10 November 2022 [1]

**Case C-612/21**

**Gmina O.**
**v**
**Dyrektor Krajowej Informacji Skarbowej**

(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 organises the installation of renewable energy sources in a municipality for the residents in return for a contribution from the latter of 25%, with 75% of the costs being reimbursed by a subsidy from a third party – Transactions performed in the exercise of public authority – No significant distortions of competition)

## I. Introduction

1. Support from local government units such as municipalities for renewable energy sources is not only welcome right now, but also raises interesting questions in terms of VAT. If a resident had himself or herself commissioned a company to install solar panels, for example, the VAT assessment would be clear. The business provides him or her with an assessable and taxable service (supply of goods or services). The State receives the corresponding VAT. A State subsidy for 75% of the costs to the resident would have no relevance in terms of VAT law.

2. But what about when a municipality organises and pays for the company to build this facility on land belonging to one of its residents? Here, too, the State receives its VAT at least once, specifically from the installation company. However, if the municipality receives a subsidy from State funds totalling 75% and the residents pay approximately 25% to the municipality as their contribution, 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 installation 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 and the resident contribution is as high as the input costs, this amounts to a 'zero-sum game' involving a

[1] Original language: German.

great deal of administrative effort. If the subsidy plus the resident contribution is lower (or the subsidy is not included within the taxable amount), an input tax surplus would remain, which would reduce the tax revenue. If the subsidy plus the resident contribution is higher, additional tax revenue would be generated via a state support programme. None of these options seem appropriate, especially when the municipality's general interest objectives of environmental protection and energy security are also considered.

4. The VAT assessment of the installation of renewable energy sources subsidised by State funds raises some fundamental questions which the Court of Justice [2] 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 were a provider of a service – is carrying out an economic activity in such a case. If so, it would have to be decided whether it is carrying out these transactions to support the installation of renewable energy sources in the exercise of public authority, and whether these lead to significant distortions of competition.

## II. Legal context

### *A. European Union law*

5. Article 2(1)(a) and (c) of Directive 2006/112/EC on the common system of value added tax ('the VAT Directive') [3] provides:

'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'.

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.'

[2] Similar questions arise in the parallel pending proceedings in Case C-616/21.

[3] 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).

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.

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 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*

9. 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’).

10. 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.’

11. 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 400a(1) that:

‘The financing of environmental protection and water management shall include: …

21) projects related to air protection;

22) supporting the use of local renewable energy sources and the introduction of more environmentally friendly energy carriers …’

12. Article 403(2) of the Environmental Protection Law states:

'The municipalities' own tasks shall include financing environmental protection within the scope set out in Article 400a(1) … (21-25) … in an amount not lower than the amount of revenue from the fees and penalties referred to in Article 402(4), (5) and (6) which constitutes municipal budget revenue, less the surplus of such revenue transferred to the provincial funds.'

## III. Facts and preliminary ruling procedure

13. Gmina O. (Municipality of O., Poland; 'the Municipality') is a local authority which is responsible for its own administration. It is also registered as a taxable person for VAT purposes.

14. Together with three other municipalities, the Municipality entered into a partnership agreement in order to implement a project consisting in the installation of renewable energy source systems ('RES') in those four municipalities ('the Project').

15. One of the municipalities, acting as Project leader, entered into a co-financing agreement with the provincial authority on behalf of all the partners. The resources themselves come from an EU fund. The co-financing received is transferred to the individual partners within the scope in which it is granted to them.

16. The co-financing is only intended to cover part of the eligible costs. The decision on how to fund the remaining costs of the Project is at the discretion of each municipality. The co-financing received by the Municipality covers the expenditure related to the Project and may only be used to fund the expenditure necessary for the implementation of the Project. The Municipality was granted co-financing that amounted to 75% of the total eligible costs of the Project.

17. The main objectives of the Project are to increase the share of RES in total energy production, reduce emissions of atmospheric pollutants, promote the use of solar energy and stimulate the use of RES among individual customers through the installation of environmentally friendly RES systems. Within the framework of the Project, the Municipality is implementing 'Poland's Energy Policy until 2030', adopted by the Council of Ministers on 10 November 2009, under which RES are to account for 20% of energy produced.

18. Under the Project, photovoltaic panels, air source heat pumps for domestic water heating and solar thermal collectors will be installed on properties belonging to both individuals and legal persons. The Municipality has entered into agreements with individuals (residents) as property owners who wish to benefit from the installation of renewable energy sources. The property owners are required to pay their contribution to the Municipality's bank account by the agreed date.

19. According to the agreement concluded with the property owners, all RES systems will be owned by the Municipality for the duration of the Project, that is to say, for five years from the date of receipt by the Municipality of the last payment under the co-financing agreement and the partnership agreement. After that period, the ownership of the RES systems will be transferred to the property owners. For the duration of the Project, property owners will not be able to dispose of the RES systems. Also, the Municipality may not dispose of, or dismantle, the installations during that period, as this could entail having to return the co-financing received. The property owners will be able to use the RES systems at no additional charge as per the terms and conditions of the

agreement entered into. The Municipality has been authorised by each property owner to act on the property owner's behalf before the competent administrative authorities when applying for any permits required by law in order to construct the installation on the owner's property.

20. The Municipality has undertaken to select the contractor, set the work schedule, exercise ongoing site supervision, conduct final acceptance inspections and perform the financial settlement of the Project.

21. The contribution paid by the property owners will be their only payment to the Municipality in connection with the implementation of the Project. That contribution represents part of the eligible costs of the specific RES system, that is to say, the consideration due to the contractor for that specific system. This part is 25% of the eligible costs, and the agreement with the property owner also lays down the maximum amount of the property owner's contribution. This means that their actual contribution may also be lower than 25% of the eligible costs.

22. Property owner contributions do not go towards supervision and promotional costs – those eligible costs are covered by the Municipality from its own resources and from the co-financing received. The RES systems will be installed by a contractor which will be selected by way of an open tender procedure held under public procurement regulations.

23. The contract will be concluded between five parties: the contractor and the four contracting municipalities. The contract will indicate the scope and type of RES systems to be installed for each individual municipality. Each municipality will settle accounts with the contractor separately, with the contractor invoicing each municipality in accordance with the scope of work it has contracted.

24. It will not be possible to obtain additional co-financing if the contractor's bid is higher than anticipated. However, the amount of co-financing will be lower if the price due to the contractor is lower than that assumed in the application for co-financing. The Project co-financing agreement with the provincial authority does not impose any obligation on the Municipality to obtain contributions from the property owners and does not refer to the amount of their payments.

25. The co-financing is granted to cover part of the eligible costs (including promotion and supervision costs) incurred by the Municipality in connection with the Project and the Municipality will settle those costs with the institution providing the co-financing. The amount of co-financing is determined by the amount of eligible costs incurred by the Municipality for purchases related to the Project.

26. The Municipality requested an advance tax ruling as regards its recognition as a taxable person for VAT purposes with respect to services consisting in the installation of RES systems. In its view, the services provided are not subject to VAT because they are performed under provisions of public law and not as part of economic activity. Consequently, the property owners' contribution and the co-financing obtained do not constitute consideration for the taxable services rendered.

27. In the advance tax ruling of 7 August 2019, the Polish tax authorities found that the Municipality's position was incorrect. It indicated that the Municipality would be acting as a taxable person for VAT purposes with respect to the activities in question. Neither the fact that

the Municipality is performing its own tasks nor the purpose of the Project could result in the absence of taxation for VAT purposes, since the performance of the activities in question must also be subject to specific public-law regulations which pertain to the exercise of public authority.

28. The Municipality appealed against this advance tax ruling. The court of first instance dismissed the Municipality's action. In the court's view, the non-equivalence of contributions is essentially a feature of all civil-law relationships in which the price of goods or services is 'subsidised'. The court likewise did not share the Municipality's view according to which the purpose of the activities undertaken is not to achieve profit, but rather to increase the share of RES in total energy production. In the court's view, the achievement of the second objective does not preclude the achievement of the first. The Municipality is reimbursed by the property owners for 25% of the eligible costs incurred, and thus the installation involves the financial participation of the property owners. The fact that the Municipality does not make a profit likewise does not affect the assessment of whether those activities fall within the scope of economic activity.

29. The Municipality brought an appeal before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland). That court stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'(1) Must the provisions of [the VAT Directive], in particular Articles 2(1), 9(1) and 13(1) thereof, be interpreted as meaning that a municipality (a public authority) acts as a taxable person for VAT purposes in carrying out a project whose objective is to increase the proportion of renewable energy sources by means of entering into a civil-law contract with property owners, under which the municipality undertakes to install renewable energy source systems on their property and – after a certain period of time has elapsed – to transfer the ownership of those systems to the property owners?

(2) If the answer to the first question is in the affirmative, must European co-financing received by a municipality (a public authority) for the implementation of projects involving renewable energy sources be included in the taxable amount within the meaning of Article 73 of that directive?'

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 questions referred*

31. Taking the two questions 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.[4] In essence, however, the court is asking

[4] 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).

how Articles 2, 9, 13 and 73 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 goods or services and what the taxable amount is.

32. In order to be covered by the VAT Directive, the Municipality's activities relating to renewable energy support must comprise a supply of goods or services provided to its residents *for consideration* (Article 2(1)(a) and (c) of the VAT Directive, see B.). This supply of goods or 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.).

## *B. Identifying the supplier and the recipient of a supply of goods and 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.[5] 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.

34. The consumable benefit under consideration in the present case is the installation of a renewable energy system. The transfer of ownership of this system represents a supply of goods (Article 14 of the VAT Directive) and the transfer of use a supply of services (Article 24(1) of the VAT Directive).

35. What needs to be clarified, however, is who provided this benefit (goods and/or services) and to whom. A service provided by the installation company to the Municipality is a possible option, as the Municipality placed the order, paid the contractor and received the installation. However, it is also possible that the company provided a service to the resident, on whose land the system is installed and who can use it for the next five years and will subsequently become the owner of this system, and who therefore bears 25% of the cost. In the latter case, the Municipality would not have performed an assessable and taxable transaction. In the former case, a further provision of services from the Municipality to the resident can be considered, since an agreement was concluded with the latter regarding the construction, use and later transfer of ownership of the system. On the basis of this contract, the Municipality (through an appointed subcontractor) constructed the facility on the resident's land, with the resident (25%) and the provincial authority (75%) paying for it.

### *1. Ways to identify the supplier and the recipient of the service*

36. 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

[5] 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').

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.[6] The fact that the resident did not pay for the system alone, with the provincial authority and the Municipality also contributing, thus does not exclude the assumption that a service was provided to the resident.

37. Since the trader acts as tax collector on behalf of the State under VAT law,[7] 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 must be considered as a supplier, because it receives a certain amount for installing the system both from the resident and from the provincial authority. The fact that the Municipality did not install the system itself, but commissioned a private contractor to do so, is irrelevant in this context. 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.[8]

38. The fact that the Municipality is performing a public service (environmental protection, energy security) in supporting the development of renewable energy sources also does not mean that the Municipality is not providing a service to the resident. This is because, according to the case-law, a supply of goods or services effected for consideration may also consist in the performance of duties conferred and regulated by law in the public interest.[9]

### *2. Legal relationship between the service provider and the service recipient*

39. 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.[10] 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.[11] 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.[12] Ultimately, it is for the referring court to assess these legal relationships and contractual terms.

6 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).

7 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).

8 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).

9 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).

10 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.).

11 Judgments of 20 January 2022, *Apcoa Parking Danmark* (C-90/20, EU:C:2022:37, paragraph 27); of 16 September 2021, *Balgarska natsionalna televizia* (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).

12 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).

40. In this case, there is a contract between the Municipality and the installation company for the installation and transfer of ownership of the system to the Municipality. There can therefore be no doubt that the installation company provides a service to the Municipality. The property owner, on the other hand, does not appear to have any contractual relationship with the installation company. However, there is a contract between the Municipality and the respective resident for the use of the system on the latter's land and the subsequent transfer of ownership to him or her. This shows that the construction and provision of the system by the Municipality is significant to the owner and thus represents a consumable benefit for him or her. This is substantiated by the fact that he or she pays the Municipality a contribution of 25% of the cost of the system. Regarding the question of consideration, even the fact that a third party covered 75% of the cost of the system can be disregarded.

41. This is because the Court of Justice has already 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.[13] In this respect – as Poland stresses – the resident's contribution of 25% is sufficient to assume a supply of goods or services for consideration by the Municipality to the resident.

*3. Interim conclusion*

42. Article 2(1)(a) and (c) of the VAT Directive are to be interpreted as meaning that the classification of the parties between whom a supply of goods or 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, by the resident) and the supply of goods or services (here, the construction, transfer of use and subsequent transfer of ownership of the system to a resident by the Municipality), then there is also performance (supply of goods or services) by the Municipality 'for consideration'.

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

43. 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 in constructing, transferring the use of and later transferring the ownership of the system. 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.

44. 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.[14]

[13] 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).

[14] 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).

45. 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 therefrom 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 be relevant for VAT purposes. However, the question which arises in the present case is whether the provision of the systems for five years with subsequent transfer of ownership can be regarded as 'the exploitation of … property' [15] at all. Rather, it seems to me that it is ultimately a transfer of goods. Moreover, the planned installation of renewable energy systems over a certain period of time on the properties of a large number of people throughout the Municipality's territory is likely to be sufficiently continuous. After all, the Municipality's programme to support the development of renewable energy sources was incorporated into 'Poland's Energy Policy until 2030'.

46. 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. [16]

47. 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.

48. 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.

49. In contrast to an abstract definition, a typological description is more open. [17] 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.

50. 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. [18] This also applies to the amount of earnings and other factors, such as the number of customers. [19] 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

[15] 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.).

[16] 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).

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

[18] 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 this regard, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.* (C-182/17, EU:C:2018:91, paragraph 38 and the case-law cited).

[19] 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 this regard, judgments of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 31); of 19 July 2012, *Rēdlihs* (C-263/11, EU:C:2012:497, paragraph 38); and of 26 September 1996, *Enkler* (C-230/94, EU:C:1996:352, paragraph 29).

basis of criteria ensuring that the operating costs of the provider of the service are covered.[20] 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.[21]

51. 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.[22] It had already applied this typological approach in the judgment in *Gemeente Borsele*[23] and, to a certain extent, in the judgment in *Enkler* prior to that.[24]

52. Considering the activity of the Municipality in the present case, there are, contrary to the view of the Polish tax authorities, some noticeable differences from the activity of a typical taxpayer with a comparable job (here, 'profession of solar energy system installer'). First, the Municipality does not engage in any activity of its own to provide these services. Neither does it provide its own installation staff nor its own comparable distribution structure. Rather, the contracts are only entered into with its residents who wish to benefit from the development of renewable energy sources and have applied to the Municipality in this regard. In return for a relatively low contribution to the cost, the residents can initially make use of the system and, after five years, they will be granted ownership thereof. As a result, the Municipality arranges the remaining funding through a State body, which bears the majority of the cost. It also arranges for a private company to install the system. The latter is selected as part of a public and open tendering procedure. This does not reflect the typical selection of a subcontractor by a solar energy system installer.

53. The Municipality's activities are therefore limited to arranging the successful financing and construction of new renewable energy systems in its territory by a private party. This includes, in particular, ongoing construction management and financial management. These organisational services are compensated on a pro rata basis at most; the provincial authority reimburses a maximum of 75% of the eligible costs. The resident contributes a maximum of 25% of the costs of the 'subcontractor' hired. 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.

54. Such systems are also not typically supplied by an economic actor at such a low price (maximum 25%), especially not if the preliminary service (installation of the system) was previously purchased exclusively from a third party at the market price.

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

[21] 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).

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

[23] Judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiënz* (C-520/14, EU:C:2016:334, paragraph 29 et seq.). The background was a 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.).

[24] 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, *Rēdlihs* (C-263/11, EU:C:2012:497, paragraphs 35 and 36).

55. Moreover, even taking into account the payments by the provincial authority, which cover 75% of the eligible costs, there remains uncertainty, atypical for a 'normal' taxable person, over a fee that at most covers the costs. The question of whether and to what extent the third party reimburses the costs incurred remains open until said third party (here, the provincial authority) 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,[25] as the Commission also rightly points out. As a result, it only bears the risk of loss. No typical taxable person would run his or her business in such a way that he 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.

56. 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. Instead, reasons based on general interest (environmental protection and energy security), which benefit everyone or individuals, are the primary considerations. The typical taxable person acts differently.

57. The conditions under which the services at issue in the main proceedings are supplied are different from those under which installation of renewable energy systems is usually provided. The Municipality does not offer services on the general market for installations of this kind, but rather itself appears to be a final consumer of these services. It purchases them from the installation company with which it has a contractual relationship (together with the other participating municipalities) and makes them available to the residents in its territory in order to achieve and/or promote environmental objectives and also energy security.[26]

58. 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'*

59. 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.

[25] 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).

[26] 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*

60. Article 13 of the VAT Directive is not a tax exemption,[27] 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 economic activities carried out by taxable persons and are therefore inherently not taxable. They are outside the scope of the VAT Directive.

61. 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).

62. 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.[28] 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 of consumption, as outlined above (point 33),[29] 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'.

63. 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*

64. 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.[30] Consequently, the only criterion making it possible to distinguish with certainty between those

[27] 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, the 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).

[28] 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.).

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

[30] 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.[31] 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.[32] 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.

65. In the present case, the Municipality arguably acted under civil law. The contract between the Municipality and the resident appears to be a 'normal' civil-law contract, governing the retention of title by the Municipality for the next five years, the right of use by the resident during that period and the transfer of ownership of the system at the end of that period. Therefore, the Municipality would not have carried out its activity under the special legal regime applicable to public law bodies. Accordingly, the scope of application of Article 13 of the VAT Directive would not be relevant – unlike in the case of a municipal asbestos removal programme as in the Gmina L.[33] case.

66. I doubt, however, that the Court really intends to make the scope of Article 13 of the VAT Directive solely dependent on the nature of the legal basis. While it has allowed that the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law,[34] it also emphasises that the transactions in which a body governed by public law engages as a public authority do not include activities engaged in by them as private economic operators.[35]

67. However, as stated in the assessment of economic activity, the activity of the Municipality in this case has some particular features that the activity of a private economic operator would not have. In my view, this prevents the activity in the present case from qualifying as an economic activity (see point 43 et seq. above), meaning that the question regarding Article 13 of the VAT Directive no longer applies. But if the concept of economic activity were to be interpreted more broadly and confirmed to be present here, then it should be possible to take the aforementioned special features into account, at least within the framework of Article 13 of the VAT Directive. However, this is only possible if it is irrelevant on which legal basis the Municipality has acted in its dealings with the resident.

68. In addition, a merely superficial reference to the legal basis is problematic because in some Member States, bodies governed by public law can enter into contractual relations under public law rather than on a civil-law basis. In any case, 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. Therefore, it is the subject matter and context of a legal relationship, and not its classification as public law or private law in the respective Member State, that should be decisive.

[31] 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).

[32] 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).

[33] This case is pending under C-616/21. See my Opinion delivered today.

[34] 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).

[35] Judgments of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 21); of 14 December 2000, *Fazenda Pública* (C-446/98, EU:C:2000:691, paragraph 17); and of 12 September 2000, *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraph 50).

69. In the present case, it can be noted that, from a substantive point of view, the Municipality is not acting under the same legal conditions as other private economic operators, even if it has ultimately – as far as can be seen – entered into a private-law contract with the resident. First of all, the Project is supported by a group of municipalities that have entered into a corresponding co-financing agreement with a provincial authority that has received European funds in order to be able to finance the Project. In this case, the Municipality's activity solely involves organising the promotion of renewable energy expansion, which is free of charge to the consumer (resident). Said expansion is then implemented by a private party, albeit with the latter being selected in accordance with public law (under public procurement law). As a substantive overall assessment, it can therefore be said that the Municipality did not carry out its activities under the same legal conditions as other private economic operators, even if the contract with the resident appears to have been a private-law contract.

70. Therefore, under this substantive overall assessment, this case in principle falls within the scope of Article 13(1) of the VAT Directive, and the Municipality would not be considered a taxable person.

*3. No significant distortions of competition*

71. 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 the construction of renewable energy systems.

72. 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.[36] 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.

73. 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.[37] 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.

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

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

74. 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.[38] Therefore, the second and third subparagraphs of Article 13(1) of the VAT Directive are to be interpreted as a whole.[39] 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.[40]

75. 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 renewable energy support scheme, it seems to me that significant distortions of competition can be ruled out.

76. 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 acts only 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 from the market for the installation of renewable energy systems, but – for public-law reasons of general interest (environmental protection, energy security) – is merely acting as an intermediary between the installation company and the final consumer (in this case, the resident) and refinances itself partly using State funds from another body governed by public law.

77. 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 used the installation 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 support scheme.

### *4. Interim conclusion*

78. The second subparagraph of Article 13(1) of the VAT Directive must be interpreted as meaning, first, that a substantive assessment must be carried out to determine whether transactions have been carried out in the exercise of public authority. Therefore, it may be irrelevant that the contract with the resident is of a civil nature, because all other parts of the activity relating to the support scheme were not carried out under the same legal conditions as those applicable to other private economic operators.

79. Secondly, 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.

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

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

[40] 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).

### *E. Subsidy as part of the taxable amount*

80. Since, in my view, there is no economic activity of the Municipality here and, even if an economic activity is assumed, Article 13 of the VAT Directive means that the Municipality is not deemed to be a taxable person, it is no longer necessary to answer the second question referred for a preliminary ruling as to the inclusion of the subsidy in the taxable amount.

## V. Conclusion

81. 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)(a) and (c) of the VAT Directive must be interpreted as meaning that, in order to determine between whom there is a supply of goods or 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 goods or 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, first, that a substantive assessment must be carried out to determine whether transactions have been carried out in the exercise of public authority. Therefore, it may be irrelevant that one of the contracts was concluded under civil law, because all other parts of the activity were not carried out under the same legal conditions as those applicable to other private economic operators. Secondly, significant distortions of competition are to 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.