OPINION OF ADVOCATE GENERAL CHRISTINE STIX-HACKL

delivered on 5 February 2002 [1]

I — Introduction

1. In this case, the VAT and Duties Tribunal, Manchester, is asking the Court of Justice to consider how the words 'subsidies directly linked to the price' within the meaning of Article 11A(1)(a) of Sixth Council Directive of 17 May on the harmonisation of the laws of the Member States relating turnover taxes — Common system of value added tax: uniform basis of assessment (hereinafter 'the Sixth Directive') [2] are to be interpreted. In particular, it concerns the question whether a payment by a national agency to an undertaking in connection with energy advice which the undertaking provides to householders is liable to VAT.

1 — Original language: German.
2 — OJ 1977 L145, p.1

II — Legal framework

A — *Community law*

2. Article 11A(1) of the Sixth Directive provides as follows:

'The taxable amount shall be:

(a) in respect of supplies of goods and services ..., everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies.'

B — *National law*

3. The Energy Action Grants Agency (hereinafter 'the EAGA') is the body responsible for implementing the Home Energy Efficiency Scheme (hereinafter 'the HEES'). The HEES is subject to the Home Energy Efficiency Grants Regulations 1992 (hereinafter 'the Regulations'). These replaced the original 1990 regulations and were amended by the Home Energy Efficiency Grants Regulations of 1993, 1994, 1995 and 1996. However the parties to the national proceedings requested that the appeal be decided on the footing of the Regulations, since the amendments did not appear to be material to the points in issue here.

4. Section 2(1) of the Regulations defines the term 'energy advice' as '[a]dvice relating to thermal insulation or to the economic and efficient use of domestic appliances or of facilities for lighting, or for space or water heating in certain dwellings'.

5. Regulation 4 governs applications for grants. Regulation 4(2) provides:

'An application shall be in writing, signed either by the applicant or by a person specified or of a description specified by the administering agency for the area and shall be in such form ... as is laid down by that administering agency.'

6. Regulation 5 sets out the work that may be subsidised. It includes 'energy advice'.

7. If an application has been made to the network installer for the locality, Regulation 7(1) requires the installer to consider whether the applicant is eligible for a grant. Regulation 7(3) provides:

'If the network installer is satisfied that there is eligibility for grant, he shall

(a) send the application to the administering agency for the area for determination, and at the same time certify to the administering agency in writing that he has carried out such verification as to the eligibility of a grant as may be laid down from time to time by that administering agency; and

(b) decide whether, pending determination of the application by that administering agency, he is prepared to carry out the work on the basis that, subject to the liability of the applicant as described in (i) below, he will, in the event that the administering agent should not approve the grant, bear the cost of the work; and

(i) if he is so prepared, notify the applicant in writing that he is prepared to carry out the work on the basis that, unless the application for grant is not approved or the claim not paid by the administering agency for the area on grounds of material misrepresentation, the applicant shall be liable to pay in respect of the work only such amount as has been agreed in writing between the applicant and the network installer before the making of the application as representing the amount by which the full costs of the work exceeds the sum of the grant ...'

8. Regulation 7(4) provides that a 'material misrepresentation' for the purposes of the regulation is any representation by or on behalf of the applicant in respect of any of the matters relating to eligibility for a grant which is false.

9. Regulation 9 specifies maximum grants, which amount to GBP 10 in the case of energy advice.

10. Regulation 10(2) provides that where the conditions for payment of a grant are satisfied, the administering agency for the area is to pay the grant, at such time as it may determine. If the work was carried out by a network installer, the grant is payable to the network installer.

11. The form prescribed by the EAGA under Regulation 4 is headed 'Application and Claim Form for a grant under the Home Energy Efficiency Scheme' and comes with 'Guidance Notes' and an 'Agreement'.

The agreement provides as follows:

'In this agreement "you" means the person applying for the grant and "the contractor" means the network installer. You and the contractor agree the following.

1. The contractor will carry out the works for the price described in section 3 on the front page.

2. (a) The contractor is entitled to the following:

— The payment, if any, due from you in section 3 on the front page. However you should only pay this when the work has been completed to your reasonable satisfaction.

— The grant payable under the Home Energy Efficiency Grants Regulations when EAGA Ltd pays the grant to the contractor.

(b) If the contractor carries out the work and EAGA Ltd. do not approve the grant application or they do not pay the grant on the grounds of material misrepresentation, then you will have to pay your contractor the full price of the work (when the work has been completed to your reasonable satisfaction).

3. The contractor must complete the work and carry out all acts relating to it according to the Regulations.'

III — Facts and Procedure

12. Keeping Newcastle Warm (hereinafter 'KNW') is registered for VAT in the United Kingdom as a limited company. Its principal object is to promote the efficient use of energy in general, and in particular among persons who are necessitous, and to undertake the works necessary therefor such as promotion, advice and education related to energy efficiency. KNW affirms that it is a non-profit organisation.

13. KNW was appointed as a network installer and the file shows that it was responsible for an area encompassing Tyne and Wear, Northumberland, Cumbria and parts of the Scottish border region. It entered into agreements for energy advice with householders in that area. It received the corresponding grant of GBP 10 from the EAGA for that advice.

14. The main proceedings go back to a dispute between KNW and the Commissioner of Customs and Excise before the VAT and Duties Tribunal, Manchester Tribunal Centre, concerning a claim by KNW for a refund of VAT which it allegedly overpaid between 1 April 1991

and 31 August 1996; the claim was for a total of GBP 939 492.01.

15. KNW appealed against the decision of the VAT and Duties Tribunal to the High Court of Justice. KNW argued that it is common ground that the GBP 10 received by it from the EAGA for advice it provided constituted part of the consideration within the meaning of the jurisprudence in *Tolsma* [3].

16. KNW relied on Article 11A(1)(a) of the Sixth VAT Directive which contains the words 'including subsidies directly linked to the price of such supplies'. It claimed that that additional wording could only have force if all other subsidies are excluded from the basis of assessment. Its purpose is to extend the scope of Article 11A(1) of the Sixth Directive; subsidies outside its frame of reference are excluded from the basis of assessment, since all subsidies directly linked to the price of supplies are payments made in return for those supplies and so normally form part of the consideration. The additional wording would, in short, be otiose if other subsidies were included in the basis of assessment.

3 — Case C-16/93 [1994] ECR I-743, paragraph 14.

17. In the proceedings before the VAT and Duties Tribunal, the Commissioners of Customs and Excise claimed that a grant was only payable if the other party to the contract in question (here KNW) and the customer had entered into an agreement complying with the formal requirements of Regulation 8(2) of the Regulations. Although payment under Regulation 10(2) may be made direct through the network installer, there still has to be a contract between the network installer and the householder, and the grant is paid to the householder's benefit. The grant forms part of the consideration and therefore of the basis of assessment.

18. By an order of the judge of the High Court with jurisdiction, the VAT and Duties Tribunal, Manchester Centre, referred the following questions to the Court of Justice in a decision of 8 September 2000.

IV — Questions referred

19. The questions referred are as follows:

'(1) Is a payment made by the Energy Action Grants Agency to the Appellant, which receives it in respect of energy advice given to an eligible householder, a subsidy within the meaning of that

word in Article 11A(1)(a) of the EC Sixth Council Directive (77/388/EEC)?

(2) If the answer to the first Question is yes, is that payment also directly linked to the price of the supply of energy advice, so as to form part of the taxable amount of that supply by reason of the concluding words of Article 11A(1)(a)?

(3) If the answer to Question 2 is no, is that payment none the less part of the taxable amount by reason of constituting the consideration (or part of the consideration) for a supply?'

V — Arguments of the parties

20. *Keeping Newcastle Warm* (KNW) considers that the concept of a 'subsidy' is to be understood, both in ordinary language and pursuant to the interpretation of the Court of Justice in the case of *Steenkolenmijnen*,[4] as meaning 'a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces'. The payment of GBP 10 is such a subsidy. KNW submits that a subsidy can only represent consideration within the meaning of Article 11A(1)(a) of the Sixth Directive if it is directly linked to the price of the supply.

21. There is no such direct link in this case. Either the price is the amount charged by KNW for energy advice, in which case — because, first, there is a cap of GBP 10 and, secondly, it is common ground that the advice cannot be given for less — it always corresponds to the cap, so that there is no direct link. Or one goes by the actual cost to the consumer, in which case, since the consumer incurs no cost, the payment can in fact be regarded as a flat-rate subsidy to the general operating costs of KNW and not directly linked to the price.

22. KNW submits that the purpose of the closing words of Article 11A(1)(a) of the Sixth Directive, which provides that subsidies directly linked to the price of supplies are to be regarded as constituting consideration, is to distinguish between subsidies on the basis of the way in which the amount of the subsidy is calculated — not according to whether the subsidy is directly linked to the supply — so as, where applicable, to exclude them from the scope of VAT. The general position is that, in the absence of

4 — Case 30/59 [1961] ECR 1

any express provision to the contrary, subsidies are not subject to VAT. That interpretation is confirmed by Article 19 of the Sixth Directive which governs calculation of the deductible proportion of tax.

23. The test for including a subsidy within the 'consideration' is therefore narrower than that for determining what constitutes consideration. For that reason, it is not the test laid down by the Court in the *Tolsma* case, but Article 11A(1)(a), that is decisive.

24. The United Kingdom, on the other hand, considers that the only relevant question is whether the grant is to be viewed as 'consideration' according to the general principles applicable to VAT as established by the relevant case-law of the Court of Justice, [5] and that the fact that the grant is paid by way of a subsidy is not relevant. The energy advice grant satisfies the criteria laid down by the Court of Justice for finding that there is consideration and for determining the amount. The United Kingdom refers, *inter alia,* to the fact that there is a direct link between the subsidies and the supplies made by KNW.

25. The United Kingdom further submits that, under the case-law of the Court of Justice, VAT is very wide in its scope, and that the concept of 'consideration' should be given the broadest possible meaning so as to ensure that the principle of the neutrality of tax is observed. In the light of this, the words 'including subsidies directly linked to the price of such supplies' in Article 11A(1)(a) should merely be regarded as clarificatory. The whole of the last sentence of that provision is intended to emphasise that the origin of the consideration is not relevant. That interpretation is confirmed both by the historical context of the provision and by the legislative preparatory documents.

26. In the view of the United Kingdom, therefore, the applicability of Article 11A(1)(a) of the Sixth Directive to subsidies does not depend on there being a direct link between the subsidy and the price. It is possible to conceive of a subsidy which, though not directly linked to the price of the supply, is directly linked to the supply itself, and therefore constitutes consideration for the purposes of VAT.

27. The United Kingdom also considers KNW's view that subsidies are in principle exempt from the scope of VAT, and that the closing words of the provision here at issue merely extends its scope to subsidies, to be misguided. It is illogical in the light of

5 — Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445; Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365; Case C-16/93 (cited at footnote 3); and Case C-33/93 *Empire Stores* [1994] ECR I-2329.

the principle that as a rule everything obtained by a supplier for his supply goes to make up the value of the consideration.

28. Finally, the United Kingdom draws attention to the fact that energy advice is not free. Indeed, even where no grant is made, there is still a price to be paid. In such a case the total amount is taxable. Whether there is a direct link between the subsidy and the price is a question of fact best determined by the national courts.

29. At the hearing the United Kingdom advanced the view, in reliance on the *Office des produits wallons* case, [6] that there is here a direct link within the meaning of Article 11A(1)(a) of the Sixth Directive between the subsidy and the price.

30. The *Commission* submits that the reference to subsidies in Article 11A(1)(a) of the Sixth Directive makes it clear that the notion of consideration obtained from a third party includes subsidies directly related to the price. The rule that payment made by a third party, including a public body, in respect of the supply of a service or of goods to an individual forms part of the basis of assessment does not apply to general subsidies such as those made towards ongoing operating costs. The Commission refers in this connection to the judgments of the Court in the cases of *Mohr* [7] and *Landboden-Agrardienste.* [8]

31. Irrespective of whether energy advice is regarded as a separate service or as part of a complex supply, the grant represents a reduction in, or even the entirety of, the amount payable.

32. In contrast to KNW, the Commission does not consider that it follows from the fact that the amount of GBP 10 is paid systematically that the subsidy is not directly linked to the price, since the grant is awarded to cover the cost of energy advice, subject to a ceiling of GBP 10.

33. Finally, the Commission argues that the issue is not so much the notion of a subsidy, but rather whether the subsidy constitutes

6 — Case C-184/00 [2001] ECR I-9115, paragraph 10.

7 — Case C-215/94 [1996] ECR I-959.

8 — Case C-384/95 [1997] ECR I-7387

part of the consideration. In these proceedings it does. KNW provides a service, namely advice to householders on energy saving measures, for which it receives a specific sum. That sum therefore represents the basis of assessment, irrespective of whether the payment constitutes a subsidy within the meaning of Article 11A(1)(a), third party consideration for a service provided to the householder, or indeed consideration for the supply to the EAGA of a service consisting in the provision of energy advice to the householder.

34. The Commission pointed out at the hearing that the test established by the Court of Justice for including subsidies in the basis of assessment in *Office des produits wallons* is satisfied in this case.

VI — Opinion

35. The questions referred by the national court relate to the interpretation of the words 'subsidies directly linked to the price' for the purposes of Article 11A(1)(a) of the Sixth Directive, and specifically the question whether a payment such as that in the main proceedings made by a national agency to an undertaking for energy advice dispensed to householders should be included in the basis of assessment. The three questions referred are considered together here.

36. First of all, I concur with the view of KNW and the United Kingdom that a subsidy is ordinarily understood to mean a sum paid from public funds, usually in the general interest. The Sixth Directive does not provide any particular definition of the term, and the Court of Justice also seems to use the word 'subsidy' in this sense. [9]

37. In any event, by its reference to subsidies in Article 11A(1)(a) of the Sixth Directive, the Community legislature clearly established the principle that subsidies can be subject to VAT. What remains unclear, as in this case, is the extent to which, and the conditions upon which, that is so.

38. Article 2(1) of the Sixth Directive, which defines the scope of VAT, provides that 'the supply of goods or services for consideration' is to be subject to VAT. It is therefore a feature of a taxable transaction

9 — Cf. judgment in Case C-384/95 (cited in footnote 8), paragraph 20.

that there should be a supply to which consideration may be attributed and vice versa.

39. A subsidy from public funds may, however, take the most diverse forms. It could, for example, comprise a global subsidy to cover general operating costs, in which case no parties other than the donor and the recipient of the subsidy are affected in any way, or only indirectly. Or it could comprise a subsidy granted by the donor to the recipient to enable a third party to obtain a specific service (or to obtain it more cheaply). As a rule, there can only be a taxable transaction where the subsidy is of the latter type, that is to say one granted in the context of a tripartite relationship.

40. The reason for this is that subsidies from public funds are made in the furtherance of the public interest, not to procure goods or services for the State. In order for there to be a supply, and therefore a taxable transaction for the purposes of Article 2 of the Sixth Directive, the beneficiary of the supply must be a third party.

41. The Court of Justice ruled to that effect in its judgment in the *Office des products wallons* case, stating as follows: 'Article 11A of the Sixth Directive deals with situations where three parties are involved: the authority which grants the subsidy, the body which benefits from it and the purchaser of the goods or services delivered if supplied by the subsidised body. Thus, transactions covered by Article 11A of the Sixth Directive are not those carried out for the benefit of the authority granting the subsidy.' [10]

42. The main proceedings here do involve such a tripartite relationship, between the Energy Action Grants Agency as the authority which grants the subsidy, KNW as the body which provides the service of energy advice and receives the subsidy, and the householder as the beneficiary of the service provided by KNW.

43. The rule on subsidies in the closing words of Article 11A(1)(a) of the Directive is therefore directed at subsidies such as that in the main proceedings where there is such a tripartite relationship.

44. Where there is, and the supply is not made or the service provided to benefit the

10 — Judgment in Case C-184/00 (cited in footnote 6), paragraph 10.

body which grants the subsidy, it is clear from the requirement that there be a direct link between the subsidy and the price of the transaction that the subsidy should — as the general rule in Article 11A(1)(a) envisages — only be taxed if it constitutes part of the consideration, i.e. if it is paid specifically to the subsidised body to enable it to provide particular goods or services. [11]

45. According to the settled case-law of the Court of Justice, in order for a payment to be classified as consideration for the supply of a service or of goods, there must be a 'direct link' between the supply of the goods or service and the consideration paid in respect thereof. [12]

46. The direct link required by the case-law must therefore also be present between a subsidy and the supply of the goods or service. [13]

47. The Court of Justice has laid down the following criteria for determining whether there is a direct link between a subsidy and a supply, and so whether the subsidy constitutes consideration. [14] First, the price of the goods or service must in principle be determined no later than the time of the triggering event. Secondly, the undertaking to pay the subsidy made by the person who grants it must have as its corollary the right of the beneficiary to receive the subsidy where a taxable supply has been made by him. Finally, the price of the goods or services must be ascertainable.

48. As is clear from the facts as they are described by the national court, KNW provides to householders the service of energy advice pursuant to an agreement which stipulates that the service is to be provided at a specific, stated price ('in section 3 on the front page'). The price of the energy advice is therefore fixed and ascertainable.

49. Furthermore, KNW's right to receive the subsidy only arises where it agrees to provide the energy advice. This too follows from the agreement and from Regulation 10.

50. The subsidy is therefore clearly attributable to the supply of energy advice; it is intended to pay in full or in part for that

11 — Judgment in Case C-184/00 (cited in footnote 6), paragraph 12.

12 — Cf. *inter alia*, the judgments in Case 154/80 (cited in footnote 5), paragraph 12; Case 230/87 (cited in footnote 5), paragraph 11; and Case C-16/93 (cited in footnote 3), paragraph 13.

13 — Cf. the first sentence of paragraph 14 of the judgment in Case C-184/00 (cited in footnote 6).

14 — Judgment in Case 184/00 (cited in footnote 6), paragraph 13.

service and is therefore granted by way of consideration, not globally, in order, say, to cover KNW's general running costs. [15] A subsidy in the latter sense would not constitute consideration, because there is no link with any supply, and would therefore not be subject to VAT.

51. The fact that the subsidy is granted by a third party is no reason not to regard it as consideration. The situation is comparable to that of refund vouchers, where part of the consideration consists in a voucher presented to the retailer by the end-user to obtain a reduction in the price. In such cases, upon presentation of the voucher, a third party — namely the issuer of the voucher — subsequently pays the retailer the difference between the price actually paid by the end-user and the 'usual', non-discounted, price.

52. A refund of this kind by a third party covering part only of the consideration has also been determined by the Court of Justice to constitute consideration. [16]

53. The fact that the subsidy for energy advice is capped at GBP 10, and therefore covers part only of the cost of the energy advice in some cases, is immaterial vis-à-vis KNW's argument, since it does not alter the circumstance that the subsidy represents remuneration for the energy advice.

54. In that connection, reference must be made to the Court's case-law [17] pursuant to which the decisive factor for determining consideration is its subjective rather than its objective value.

55. As the Commission rightly pointed out at the hearing, it is precisely in cases where the price consists in the subsidy that there is a direct link between the price and the subsidy.

56. The reply to be given to the national court is therefore that a payment such as that in the main proceedings should, as a subsidy in the sense of Article 11A(1)(a) of the Sixth Directive, be included in the basis of assessment.

15 — Cf the judgment in Case 184/00 (cited in footnote 6), paragraph 15.

16 — Case C-288/94 *Argos Distributors* [1996] ECR I-5311, paragraph 18.

17 — Case C-288/94 (cited in footnote 16), paragraphs 16 and 17, and the cases therein referred to.

VII — Conclusion

57. In the light of the foregoing I propose that the Court answer the questions referred by the national court as follows:

Payment of a subsidy such as that in the main proceedings constitutes consideration for a transaction, and is to be included in the taxable basis for calculating turnover tax under Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment.