OFFICE DES PRODUITS WALLONS

OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 27 June 2001 [1]

I — Introduction

1. In this reference for a preliminary ruling, the Tribunal de Première Instance (Court of First Instance), Charleroi (Belgium), asks the Court to interpret Article 11A(1) of the 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 (hereinafter: the 'Directive'). [2] More specifically, the question seeks a determination as to whether a subsidy paid to a body supplying goods and services is liable to value added tax.

II — Legal framework

2. Article 11A(1) of the Directive sets out the basis of liability to value added tax on transactions within the territory of the country as follows:

'The taxable amount shall be: (a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, 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.'

This article was incorporated into Belgian law by the first paragraph of Article 26 of the Belgian Value Added Tax Code.

1 — Original language: Dutch.

2 — OJ 1977 L 145, p. 1.

III — Facts and procedure

3. The Office des Produits Wallons ASBL (hereinafter: 'OPW') is engaged in advertising and selling Walloon products, and is subject to VAT in that respect. It also publishes a magazine. It receives a subsidy from the Région wallonne (Walloon Region) with which it has concluded a framework agreement.

4. On 19 February 1997, the VAT authorities carried out an audit of OPW's accounts of which a formal record was made dated 25 April 1997. The VAT authorities allege that OPW has not paid VAT on the subsidy paid to it by the Région wallonne. For that reason, the authorities claim an amount of BEF 6 712 500 for the period from 1994 to 1996, together with an uncontested amount of BEF 33 833.

5. On 7 December 1998 a final demand was issued for payment of the amounts of BEF 6 746 333 (VAT) and BEF 1 349 000 (fines), together with interest at a rate of 0.8% per month as from 21 January 1997. In an action dated 14 January 1999, OPW challenged the final demand before the Tribunal de Première Instance, Charleroi. It sought a declaration that it was null and void as regards the sum exceeding BEF 33 833 and an order that the Belgian State repay all amounts unduly received, together with interest as provided for by law.

6. The proceedings between OPW and the Belgian State before the national court were based on Article 26 of the Belgian Value Added Tax Code.

7. It is common ground between the parties to the litigation that a subsidy forms part of the taxable amount if it is directly linked to the price. Such is the case when:

— it is paid to the producer, supplier or provider of goods or services;

— it is paid by a third party;

— it constitutes consideration or part of the consideration for a supply of goods or services.

The parties disagree as to the scope of that third condition.

8. By a decision of 11 May 2000, received at the Court Registry on 16 May 2000, the

Tribunal de Premiere Instance, Charleroi (Second Civil Chamber) subsequently asked the Court for a preliminary ruling on the following questions:

'(1) For the purpose of applying Article 11 A of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes..., do operating subsidies covering part of a taxable person's running costs (investment aid, contribution to general or current expenses, staff costs) and affecting the final cost price of its goods or services, but without being able to be distinguished from a transaction price, constitute a taxable amount?

(2) Is their taxable nature conditional on the existence of a distinct service to the body paying the subsidy and on the benefit derived by that body being equivalent to the consideration supplied?

(3) If the answer to that question is in the affirmative, how is the value of the benefit derived by the body paying the subsidy to be determined?'

IV — Applicable case-law

9. The final limb of Article 11A(1)(a) of the Directive is referred to in certain interesting observations made by Advocate General Jacobs in his Opinion in the case of *Landboden-Agrardienste*: [3]

'12. One might, with some justification, take the view that there is little, if any, point in imposing VAT on subsidies. By doing so a public authority simply claws back money which has been granted by itself or by another public authority; in the latter case taxation of subsidies amounts to a rather circuitous — and costly — way of reallocating revenue between public authorities....

13. Moreover, unless the amount clawed back in tax is offset by a corresponding increase in the amount of the subsidy, taxation will reduce the economic effects which the subsidy seeks to attain. Where the recipient has a choice between selling his produce and accepting a subsidy in return for not marketing it, taxation of the subsidy will make the latter option less attractive.

3 — Case C-384/95 *Landboden-Agrardienste* [1997] ECR I-7387.

14. The Sixth Directive makes only limited provision for taxation of subsidies. Article 11A(1)(a) includes in the taxable amount "subsidies directly linked to the price" of supplies. Thus, a subsidy will be included in the taxable amount if it is paid subject to the condition that the recipient makes a supply of goods or services. For example, a support measure whereby a farmer receives a certain sum for each product sold forms part of the consideration for the supply. On the other hand, subsidies that are more remote from particular supplies and intended more generally to improve the undertaking's economic position do not form part of the basis of assessment. Examples of such subsidies include subsidies for the purchase of assets, for covering losses and for the restructuring of an undertaking.

15. The distinction made by the Sixth Directive is not without its difficulties. As the Commission noted in its First Report [on the application of the Directive]:

"Article 11A(1)(a) of the Directive stipulates that subsidies received by a taxable person which are 'directly linked to the price' of the supplies made by that person must be included in the taxable amount as components of the prices paid by third parties. While it is relatively easy to decide straight away that subsidies are 'directly linked to the price' when their amount is determined either by reference to the selling price of the goods or services supplied, or in relation to the quantities sold, or again in relation to the cost of goods or services supplied to the public free of charge, it is extremely difficult to decide in the case of other types of subsidy such as deficit subsidies or operating subsidies, which are paid with the aim of improving a firm's economic position and which are granted without specific reference to any price. The absence of any substantial difference between these two types of subsidy (those 'directly linked to the price' are usually also aimed at improving a firm's position), together with the fact that a Member State can convert a subsidy of the first type into a subsidy of the second type, illustrate the fragility of a distinction based on purely formal criteria (the manner in which the subsidy is granted) and thus the inadequacy of the Directive in this respect."

16. Nevertheless the treatment of subsidies in the Directive may be seen to conform to the general rule that there should be a direct link between a supply and the consideration paid. It might also be justified on the ground that subsidies granted with reference to specific supplies are likely to have a more direct impact on competition. Superficially at least, there seems to be a greater case for treating such subsidies as

part of the price paid by (or on behalf of) the consumer'.

10. The Court has had occasion in two cases to examine the liability to VAT on certain subsidies paid by public authorities to individuals. Both the *Mohr* judgment [4] and *Landboden-Agrardienste* [5] turned on remuneration paid to farmers who, in exchange for that remuneration, undertook to reduce their production. The Court confirmed in those judgments that a subsidy paid by public authorities in the general interest may constitute consideration for a service within the meaning of the Directive. 'Thus, in order to determine whether a supply of services is caught by the Sixth Directive, it is necessary to examine the transaction in the light of the objectives and nature of the common system of VAT'. [6] However, in that case, 'the farmer does not supply services to an identifiable consumer or any benefit capable of being regarded as a cost component of the activity of another person in the commercial chain'. [7]

11. The second point of relevance to this case is to determine what is the consideration. According to the Court's settled case-law, 'consideration is the "subjective" value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria'. [8]

12. In the case of a subsidy, the existence of a subjective value is swiftly established. What is more interesting is to determine whether that value also constitutes consideration for a supply of goods or of services. That therefore raises the issue of the direct link. In accordance with settled case-law, 'provision of services is only taxable if there is a direct link between the service provided and the consideration received'. [9] An instructive illustration of the interpretation given by the Court of the concept of 'direct link' may be found in the *Tolsma* judgment. I quote: 'If a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them'. [10] There is in reality no contract between the parties, nor the necessary link between the activity and the payment. The payment is in truth quite independent of the enjoyment of the musical performance.

13. I would also refer to the judgment in the *Apple and Pear Development Council* case. [11] That case concerned a body whose

4 — Case C-215/94 *Mohr* [1996] ECR I-959.

5 — See footnote 3 above.

6 — Judgment in *Landboden-Agrardienste*, paragraph 21, cited in footnote 3 above.

7 — Judgment in *Landboden-Agrardienste*, paragraph 23, cited in footnote 3 above.

8 — See, in particular, Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraph 27.

9 — Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 13.

10 — See footnote 9 above, paragraphs 16 and following.

11 — Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443.

object was to advertise, promote and improve the quality of apples and pears produced in England and Wales. That object is comparable with that of OPW. The Council's revenue derived however from charges paid by the growers. The Court considered that 'mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with benefits accruing to individual growers as a result of the exercise of the Development Council's functions'. [12] I emphasise that that case did not concern a subsidy. The Court had to determine whether the charges paid by the growers were to be regarded as consideration for the service provided to them.

14. In his Opinion, Advocate General Slynn attached importance to the fact that the Council had been set up in the public interest and that the charge was intended to cover administrative costs and other costs linked to a series of activities.

15. The judgment in *First National Bank of Chicago* [13] provides clarification on two points relating to the strength of the link between the activity and the consideration. That case concerned commission charged by a bank for currency transactions. The commission consists of the margin between the purchase and sale price of currency. In the first place, it is unnecessary to establish an identifiable link between the activity (the currency transactions) and the consideration charged therefor. The Court accepted that the 'consideration, that is to say the amount which the bank can actually apply to its own use, must be regarded as consisting of the overall result of its transactions over a given period of time.' [14] Secondly: 'Nor is it necessary for either the taxable person supplying the goods or performing the service or the other party to the transaction to know the exact amount of the consideration serving as the taxable amount in order for it to be possible to tax a particular type of transaction'. [15]

V — Assessment

A — *Preliminary observations*

16. It is not immediately clear that a VAT regime should include a provision requiring subsidies to be liable to VAT. As Advocate General Jacobs correctly pointed out in his Opinion in *Landboden-Agrardienste*, [16] public authorities are in effect taking back with one hand a percentage of what they have given with the other. Nor am I

12 — See footnote 11 above at paragraph 16.

13 — Case C-172/96 *First National Bank of Chicago* [1998] ECR I-4387.

14 — Paragraph 47.

15 — Paragraph 49.

16 — See footnote 3 above.

persuaded by the argument put forward by the Commission in support of its point of view that certain subsidies are liable to VAT, specifically because they influence competition. It is a general characteristic of subsidies paid to traders that they influence competition. In order to prevent them from having undesirable effects on competition, Article 87 et seq. of the EC Treaty provide for a (preventive) system of supervision by the Commission. Why then, in addition, should certain types of subsidy be liable to VAT? A further factor is that the effect of the charge to VAT is to be limited. The knowledge that VAT must be deducted from the subsidy may prompt the provider of the subsidy to increase it by a certain percentage in order to compensate for the VAT.

17. None the less, the Community legislature has opted to impose liability to VAT in respect of certain subsidies. That being so, it is necessary to interpret the criterion 'subsidies directly linked to the price of the transactions' in such a way as to enable the charge to be levied effectively. In practice, however, the criterion laid down in the Directive is not always appropriate. Whatever the interpretation given by the Court, it will encourage the body providing the subsidy to grant it in such a way as to escape application of the criterion. No VAT will therefore be payable. Alternatively, if a Member State grants a subsidy 'directly linked to the price', it will increase the amount of the subsidy in such a way that the beneficiary will suffer no adverse consequence from the levying of VAT. I would emphasise for the sake of completeness that the Commission has indicated that it envisages making a proposal on this point to amend the Directive.

18. None the less, the Court is naturally bound by the wording of the Directive, as it currently applies. An interpretation of Article 11A(1)(a) of the Directive must distinguish between two types of subsidy:

— firstly, subsidies directly related to an economic activity engaged in by the beneficiary and which thus result in a reduction in the price of goods or services, and

— secondly, subsidies not related to a specific economic activity.

In making this distinction, regard must be had to the beneficiary's economic activities. That enables the practical effect of the

provision to be preserved as far as possible. It is not the form of the subsidy but its economic effect which is the decisive factor.

B — *The first question*

Arguments of the parties

19. OPW, the Belgian Government, the French Government and the Commission submitted observations to the Court. At the hearing on 22 March 2001, OPW, the Belgian Government and the Commission further elucidated their arguments. All the parties are agreed that an indirect link with the price is insufficient to render the subsidy liable to tax.

20. OPW maintains that the subsidies granted in the present case are not liable to VAT. For they are operating subsidies which cannot be linked to an individual, taxable transaction, on the one hand because there is no direct link between the taxable transaction (the supply of goods and services) and the subsidy and, on the other, because the subsidy benefits the consumer only indirectly.

21. The criterion of the 'direct link' requires the subsidy to be calculated on the basis of a reference price corresponding to the price calculated by the beneficiary for the goods or services. The subsidy results in a lower price being charged to the client.

22. However, the dispute in the main proceedings concerns a subsidy whose objective is to promote a region. The task of the beneficiary is to achieve that objective. The subsidy is not directly linked to the price but is aimed at operating costs, with only an indirect effect on the price.

23. The Belgian Government distinguishes between three types of subsidy. The first type involves three parties: the authority granting the subsidy, the beneficiary and the beneficiary's customer. It is argued that, with this kind of subsidy, the requirement of a direct link does not mean that the amount of the subsidy is necessarily related to the price of each subsidised transaction or to the volume of such transactions. The amount of the subsidy may be either fixed or at a flat rate. That gives the beneficiary the opportunity of limiting his costs and thus of offering a lower price.

24. In the case of the second type of subsidy, there is a bilateral link between the granting authority and the beneficiary. The authority is therefore the customer in respect of the goods or services. In that case there is always liability to VAT.

25. The third type of subsidy concerns operating subsidies which include subsidies to finance specific transactions. The Belgian Government maintains that all operating subsidies affect the price of goods and services supplied to third parties. However, the indirect effect of that subsidy on those goods and services is insufficient as a basis for liability to VAT. The question whether the subsidy is also liable to VAT must be determined by the facts of the case.

26. At the hearing the Belgian Government further stated that the requirement of a direct and identifiable link between the subsidy and the price would result in nearly all operating subsidies being excluded from liability to VAT.

27. The Belgian Government goes on to draw a parallel with the facts in *Naturally Yours Cosmetics*.[17] It considers it important in this respect that the subsidy paid to OPW was reduced, since OPW had not published the magazine, *Wallonie nouvelle* (Walloon News) in accordance with the requirements under the framework agreement.

28. The French Government lays down two criteria for the existence of a direct link between the taxable transaction (the supply of goods and services) and the subsidy. Firstly, the subsidy must be granted in connection with the taxable transactions which the beneficiary carries out on behalf of his customers. Secondly, the subsidy must be linked with the price or the contribution to the client. It infers from the judgment in *First National Bank of Chicago*[18] that a global link between the subsidy and the price is sufficient.

29. The Commission states that the subsidy must be paid in contemplation of the supply of specific goods or services. An operating subsidy which affects the price only indirectly is not liable to VAT. According to the Commission, three conditions apply: the subsidy must be paid to the person providing the goods or services, it must be paid by a third party and it must constitute consideration for the supply of goods or services or a part thereof.

17 — Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365. This judgment concerned the supply of a 'motivating product' with a view to the organisation of parties at which those products, amongst others, could be purchased.

18 — See footnote 13 above.

30. Whether the subsidy constitutes an element of the consideration must be determined on a case-by-case basis. At the hearing, the Commission cited a further example of facts which may play a role in this connection. There may be presumed to be a direct link if it is clearly shown that the reduction in the subsidy in 1996 resulted in the magazine *Wallonie nouvelle* being sold at a higher price the following year.

Determination

31. The question raised by the referring court concerns the scope of the concept of 'subsidies directly linked to the price of the transactions'. More particularly, the question arises as to whether operating subsidies, which are not paid out directly in connection with the supply of goods or services but may result in their being sold at a lower price, attract liability to VAT.

32. I would first draw attention to a condition determining application of the system laid down in Article 11A(1)(a) which may be inferred from the judgments in *Mohr* and *Landboden-Agrardienste*.[19] The beneficiary must provide, for consideration, goods and services to a consumer or to another trader in the economic cycle. Accordingly, I note that the question posed by the referring court concerns a subsidy paid in connection with third party activities and not payment for goods or services. The present case can be distinguished in this respect from *Apple and Pear Development Council*[20] which raised the question of whether a charge was to be regarded as payment for services.

33. In the case of a subsidy it is sufficient for there to be a less close link with the price of goods or services than in the case of a payment. In any event, it is not necessary, on the grant of the subsidy, for account to be taken of the price of the goods or services to be supplied. I infer as much from *inter alia* the judgment in *First National Bank of Chicago*.[21] The price of the transaction need not play any part in the context of the grant of the consideration, in this case the subsidy. The authority granting the subsidy does not itself need to know the price. I therefore consider the argument of OPW to be incorrect on this point also.

19 — See footnotes 3 and 4 above.
20 — See footnote 11 above.
21 — See point 15 of this Opinion.

34. In his Opinion in *Landboden-Agrardienste*,[22] Advocate General Jacobs cites several examples of subsidies which have no direct link with the price of a transaction. Those concern subsidies granted for the purpose of acquisition of assets, security against loss and business restructuring. It is clear from those examples that there is no direct relationship with the price. The position in the case of operating subsidies is less clear. In fact, if the operation of an organisation is paid for in part by the public authorities, it is possible to achieve production at a lower cost.

35. In order to answer the question raised by the referring court, I consider the decisive factor to be whether the operating subsidies are directly related to a specific economic activity pursued by the beneficiary which consists in the supply of specific goods or services. That will be the case if the subsidies lead to a reduction in the price of goods or services which the beneficiary supplies to the consumer or if as a result there is an increase in the quantity of the goods or services supplied. An operating subsidy can also lead to the beneficiary's producing an increased quantity, knowing that a proportion of the costs is incurred at the risk of the authority which granted the subsidy.

22 — See point 9 of this Opinion.

36. In determining whether there is a direct effect on price or quantity, the following factors, *inter alia*, may play a role:

— If the supply of goods or services to consumers constitutes a principal activity of the beneficiary, it may be more readily assumed that the subsidy has a direct effect on price or quantity.

— If the subsidy is granted in respect of the beneficiary's fixed costs, direct influence may be less readily assumed than where the subsidy is in respect of variable costs linked to the activities actually carried on by the beneficiary.

— In regard to the intention of the authority granting the subsidy, direct influence may be more readily assumed if the authority granting the subsidy is specifically seeking to promote the supply of goods or services (at a reasonable price). The supply of goods or services can even be a condition of the grant of the subsidy.

— In the same way, a direct influence may be more readily assumed if there is an arithmetical relationship between progression of the amount of the subsidy, the quantity produced and progression of the actual price of the goods or services concerned.

37. In light of the circumstances of the case it must be determined whether an operating subsidy leads to a reduction in the price or to an increase in the quantity of the goods or services supplied by the beneficiary of the subsidy. That determination must primarily be based on business considerations relating to the undertaking. In case of doubt, an accountant's report can provide a solution.

C — *The second and third questions*

38. In essence, these two questions do not stem directly from the dispute in the main proceedings, as both OPW and the Belgian Government submitted in their observations to the Court. As can be established in the light of the information before the Court, OPW does not supply any service to the Walloon Region in consideration for the subsidy granted to it.

39. If my reading of the facts is correct, the Court does not need to reply to the second and third questions. It is true that it is for the referring court to determine the questions to be referred to the Court in accordance with the second paragraph of Article 234 EC. However, the Court has consistently held — *inter alia* in the *Butterfly Music* judgment [23] — that the Court should dismiss the application of a court if it is apparent that the interpretation of Community law which is requested has no direct link with the real dispute or the subject-matter of the main proceedings.

40. However, if the Court is of the opinion that the second and third questions do in fact have a link with the main dispute, it will be necessary to take account of the following matters. In line with the Commission, I consider, in the circumstances described by the referring court, that there is no subsidy but rather a payment for a service supplied to public authorities. In particular, this service may be considered to consist in the publication by OPW of the magazine *Wallonie nouvelle* at the behest or at any rate on behalf of the Walloon Region. The payment made by the Walloon Region is the consideration itself (the price of the transaction) and not a subsidy which is linked to the price. Such a payment is liable to VAT. Article 11A(1), final sentence, does not apply to such a payment.

23 — Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 13.

Conclusion

41. In light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred to it by the Tribunal de Première Instance, Charleroi:

'(1) First question:

Under Article 11A(1)(a) of the Sixth 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, the subsidies covering a part of the operating costs of a taxable person are liable to tax in so far as those subsidies are directly linked to a specific economic activity pursued by the beneficiary and thus lead to a reduction in the price of goods or services supplied by the beneficiary to a consumer or to an increase in the quantity of goods or services supplied. In light of the circumstances of the case it must be determined whether an operating subsidy leads to a reduction in price or an increase in quantity. That determination must be based, primarily, on business considerations relating to the undertaking.

(2) Second and third questions:

It is not necessary to reply to these two questions since they are not connected with the subject-matter of the main proceedings.

If the Court does not share that view, its reply to the questions might be as follows: in the situation described by the referring court there is no subsidy, but rather a payment for a service provided to the public authorities. Such payment is liable to VAT.