Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

15 April 2021 *

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Economic activity – Supply of services for consideration – Article 2(1)(c) and Article 9(1) – Exemptions – Article 132(1)(g) – Supply of services closely linked to welfare and social security work – Services performed by a lawyer under powers of representation for the protection of adults lacking legal capacity – Body recognised as being devoted to social wellbeing)

In Case C-846/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal d'arrondissement (District Court, Luxembourg), made by decision of 20 November 2019, received at the Court on 21 November 2019, in the proceedings

EQ

v

Administration de l'Enregistrement, des Domaines et de la TVA,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of Chamber, N. Wahl, F. Biltgen, L.S. Rossi and J. Passer, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Luxembourg Government, by C. Schiltz and T. Uri, acting as Agents,

– the European Commission, initially by R. Lyal and N. Gossement, and subsequently by R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2021,

* Language of the case: French.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 9(1) and Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between EQ and the administration de l'Enregistrement, des Domaines et de la TVA (the Registration, Land and VAT Authority, Luxembourg) ('the Luxembourg tax authority') concerning the imposition of value added tax (VAT) on the supply of services performed by a lawyer under powers of representation for the protection of adults lacking legal capacity entrusted to him in pursuance of the law by the competent judicial authority.

Legal context

EU law

3 Article 2(1)(c) of the VAT Directive provides:

'The following transactions shall be subject to VAT:

…

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

4 Under Article 9(1) of that directive:

'"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.'

5 According to Article 24(1) of the VAT Directive:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods.'

6 Article 25 of the VAT Directive is worded as follows:

'A supply of services may consist, inter alia, in one of the following transactions:

(a) the assignment of intangible property, whether or not the subject of a document establishing title;

(b) the obligation to refrain from an act, or to tolerate an act or situation;

(c) the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.'

7 Under Article 73 of the directive:

'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.'

8 Article 131 of that directive, which is the only article in Chapter 1, entitled 'General provisions', of Title IX, itself entitled 'Exemptions', states:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

9 Chapter 2 of Title IX of the VAT Directive, that chapter being entitled 'Exemptions for certain activities in the public interest', comprises Articles 132 to 134 thereof.

10 In accordance with Article 132(1)(g) of the directive, Member States are to exempt the following transactions:

'the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing'.

11 Subparagraph (a) of the first paragraph of Article 133 of that directive provides:

'Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied'.

12 Article 134 of the VAT Directive provides:

'The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.'

Luxembourg law

13 Article 4(1) of the loi du 12 février 1979 concernant la taxe sur la valeur ajoutée (Law of 12 February 1979 on value added tax), in the version applicable to the dispute in the main proceedings ('the Law on VAT'), provides:

'"Taxable person" under Article 2 shall mean any person who independently and regularly carries out transactions that form part of any economic activity, whatever the purpose, results or location of that activity …'

14 Under Article 5 of the Law on VAT:

'"Economic activity" shall mean any activity aimed at generating income, and in particular activities of producers, traders and persons supplying services, including mining and agricultural activities, the activities of the professions and activities involving the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis.'

15 According to Article 15(1) of that law:

'1. "Supply of services" shall mean any transaction which does not constitute a supply or an intra-Community acquisition or an importation of goods.

That transaction may consist in the assignment of intangible property, the obligation to refrain from an act or to tolerate an act or situation and the performance of a service in pursuance of the law or in pursuance of an order made by or in the name of a public authority.

…'

16 Under Article 44(1)(o) of the Law on VAT:

'The following shall be exempted from [VAT] within the limits and under the conditions to be laid down by Grand-Ducal Regulation:

…

(o) the supply of services and of goods closely linked to social security, welfare or public health, carried out by bodies governed by public law, mutual investment funds, public bodies or those of public interest, care homes, old peoples' homes, gerontological or geriatric institutions, hospital or charitable organisations and other similar private sector institutions, where those bodies are recognised by the competent public authorities as being devoted to social wellbeing;

…'

17 Article 3 of the règlement grand-ducal du 23 décembre 1982 fixant les conditions de désignation d'un gérant de la tutelle (Grand Ducal Regulation of 23 December 1982 laying down the conditions for the appointment of a guardianship manager) provides:

'The guardianship judge may award to the guardianship manager remuneration, the amount or the method of calculation of which he shall determine, by reasoned decision, taking into account the financial position of the person lacking legal capacity.

That remuneration shall consist in either a fixed amount, a percentage of the income of the person lacking legal capacity or a fee fixed according to the duties performed.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 EQ has been a member of the Luxembourg Bar (Luxembourg) since 1994. Since 2004 he has been representing adults in his capacity as agent, curator and guardianship manager.

19 By VAT adjustment notices of 19 January 2018, relating to 2014 and 2015, confirmed by decision of 4 June 2018 on an objection, the Luxembourg tax authority determined of its own motion the amounts of VAT payable by EQ for those years, starting from the premiss that those representation activities constituted a supply of services subject to VAT.

20 EQ brought an action before the referring court, seeking annulment of the decision of 4 June 2018, arguing, inter alia, that the activities which he had carried out, during the period at issue, in the protection of adults did not constitute economic activities, that those activities were in any event exempt from VAT under the national provision transposing Article 132(1)(g) of the VAT Directive and that the Luxembourg tax authority had accepted, from 2004 until 2013, that those activities were not subject to VAT, with the result that making them now subject to VAT for 2014 and 2015 constitutes a breach of the principle of the protection of legitimate expectations.

21 In addition, EQ submits that the position of the Luxembourg tax authority is contrary to that of the ministère de la Justice (Ministry of Justice, Luxembourg), which bears the fees of the representatives responsible for the protection of adults when the latter are indigent, and which accepts that the payments received in this respect are not subject to VAT.

22 The Luxembourg tax authority disputes those arguments. In that regard, it contends, first, that the supply of services provided by EQ in the protection of adults constitutes indeed an economic activity, given that EQ performs those services in the course of his professional activity as a lawyer and obtains a significant income therefrom. Secondly, that supply is not, in the circumstances of the present case, eligible for exemption under the national provision transposing Article 132(1)(g) of the VAT Directive, since the exemption provided for in that provision cannot be relied on by a person who practises as a lawyer and does not fulfil the condition of being a body devoted to social wellbeing.

23 The referring court explains that the needs of adults lacking legal capacity, that is to say those affected by an impairment of their mental faculties as a result of illness, disability or weakening due to age, are met by various protection schemes, including curatorship and guardianship, which make it possible to provide advice to, supervise and even represent those persons in civil matters and which confer powers of management and representation on third parties. The establishment of those protection schemes may give rise to the appointment of a special representative by the guardianship judge, pending a decision on the protection regime to be put in place, and of an ad hoc representative in case of a conflict of interests. In practice, curators, guardianship managers, special representatives and ad hoc representatives are selected, inter alia, from among family members as well as from among other persons, such as lawyers.

24 The referring court states, first of all, as to whether the activities at issue constitute economic activities, within the meaning of Article 9(1) of the VAT Directive, for consideration, within the meaning of Article 2(1)(c) thereof, that the remuneration referred to in Article 3 of the Grand Ducal Regulation of 23 December 1982 laying down the conditions for the appointment of a guardianship manager does involve financial consideration in connection with those activities.

25 However, although the services provided in the present case are in every respect similar to an economic activity, the referring court is uncertain, first, as to the scope of the finding, in the case-law of the Court (see, inter alia, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.*, C-182/17, EU:C:2018:91, paragraph 32), that a supply of services is taxable only if there is a legal relationship between the person supplying services and the recipient pursuant to which there is reciprocal performance. In the protection of adults there is a triangular relationship between the person supplying services, the recipient, namely the adult protected, and the judicial authority that entrusted the person supplying services with a management role. It might also be relevant in that regard that, if the adult protected is indigent, the remuneration of the person supplying services is to be borne by the State.

26 Secondly, as regards the amount of remuneration, although it follows from the case-law of the Court that it is irrelevant that an economic transaction is carried out at a price lower than the cost price, it would appear to follow also from that case-law that the remuneration must be determined in advance and cover the operating costs of the supplier (see, inter alia, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.*, C-182/17, EU:C:2018:91, paragraph 38). In the present case, the remuneration of the person supplying services is determined on a case-by-case basis by the competent court, depending on the recipient's wealth, with the result that that remuneration is not fixed in advance and does not necessarily ensure that the operating costs incurred by that supplier are covered in all circumstances.

27 Next, as regards the question whether the activities in question are exempt from VAT, the referring court is required to examine, first, whether those activities fall within the concept of 'welfare and social security', within the meaning of Article 132(1)(g) of the VAT Directive, and, secondly, whether EQ may be covered by the concept of 'bodies recognised by the Member State concerned as being devoted to social wellbeing', within the meaning of that provision, and according to which procedure and by which authority such recognition should be implemented.

28 Finally, the referring court raises the question of the application of the principle of the protection of legitimate expectations in the circumstances of the present case. It points out in that context, inter alia, that where the Luxembourg tax authority informs the taxable person, after carrying out the transactions in question, that it intends to depart from its previous position of not making those transactions subject to VAT, the taxable person finds itself in a situation in which it has not been able to charge VAT to the recipients of the services. The taxable person is thus required to take the amounts claimed by the State by way of VAT from its own funds.

29 In those circumstances, the tribunal d'arrondissement (District Court, Luxembourg) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the concept of "economic activity" within the meaning of the second subparagraph of Article 9(1) of [the VAT Directive] to be interpreted as including or excluding supplies of services provided in the context of a triangular relationship in which the provider of the services is appointed to provide those services by an entity which is not the same person as the recipient of the supplies of services?

(2) Is the answer to the first question different according to whether the supplies of services are provided in the context of a role entrusted to the provider by an independent judicial authority?

(3) Is the answer to the first question different according to whether the remuneration of the service provider is borne by the recipient of the services or by the State, an entity of which appointed the service provider to provide those services?

(4) Is the concept of "economic activity" within the meaning of the second subparagraph of Article 9(1) of [the VAT Directive] to be interpreted as including or excluding supplies of services where the remuneration of the service provider is not a legal requirement and the amount of the remuneration, where it is awarded, … is based on a case-by-case assessment, … is always dependent on the financial position of the recipient of the services and … is calculated by reference to a fixed amount, a percentage of the income of the recipient of the services or the services performed?

(5) Is the concept of "the supply of services and of goods closely linked to welfare and social security work" contained in Article 132(1)(g) of [the VAT Directive] to be interpreted as including or excluding services performed in the context of a scheme for the protection of adults established by law and subject to the control of an independent judicial authority?

(6) Is the concept of "bodies recognised … as being devoted to social wellbeing" contained in Article 132(1)(g) of [the VAT Directive] to be interpreted, in view of the recognition of the social character of the body, as laying down certain requirements vis-à-vis the way in which the service provider operates or as regards the not-for-profit or profit-making objective of the activity of the service provider, or more generally as restricting by other criteria or conditions the scope of the exemption provided for in Article 132(1)(g), or is the performance of services "linked to welfare and social security work" alone sufficient to give the body at issue a social character?

(7) Is the concept of "bodies recognised by the Member State concerned as being devoted to social wellbeing" contained in Article 132(1)(g) of [the VAT Directive] to be interpreted as requiring a recognition process based upon a pre-defined procedure and pre-determined criteria, or is ad hoc recognition possible on a case-by-case basis, where appropriate by a judicial authority?

(8) Does the principle of [the protection of] legitimate expectations as interpreted by the case-law of the Court … allow the authority responsible for recovering VAT to require that a person liable to VAT pays the VAT on economic transactions relating to a period which had ended when the authority's decision to apply VAT was made after that authority has, for an extended time prior to that period, accepted VAT returns from that taxable person which do not include economic transactions of the same kind in its taxable transactions? Is that possibility on the part of the authority responsible for recovering VAT subject to certain conditions?'

Consideration of the questions referred

The first to fourth questions

30 By its first to fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 9(1) of the VAT Directive must be interpreted as meaning that the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters, the performance of which is entrusted to the person supplying services by a judicial authority in pursuance of the law and remuneration for which is fixed by the same authority as a fixed amount or is based on a case-by-case assessment by taking into account in particular the financial situation of the person lacking legal capacity – and such remuneration may moreover be borne by the State in the event that that person is indigent – constitutes an economic activity within the meaning of that provision.

31 It should be observed that although the VAT Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that tax (judgment of 17 December 2020, *WEG Tevesstraße*, C-449/19, EU:C:2020:1038, paragraph 24 and the case-law cited).

32 In that regard, the Court has stated that an activity may be regarded as an economic activity, within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, only where the activity corresponds to one of the chargeable events defined in Article 2(1) of that directive (judgment of 12 May 2016, *Gemeente Borsele et Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraph 21).

33 According to Article 2(1)(c) of the VAT Directive, concerning taxable transactions, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT, together with other transactions. Furthermore, under the first subparagraph of Article 9(1) of that directive, 'taxable person' means any person who, independently, carries out an economic activity, whatever the purpose or results of that activity (judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, point 21).

34 Thus, it is necessary to determine, in the first place, whether activities such as those at issue in the main proceedings, which the referring court has classified as a supply of services within the meaning of Article 2(1)(c) of the VAT Directive, are for consideration, as required by that provision.

35 While it is ultimately for the referring court to carry out that verification, it is nonetheless for the Court to provide the former with all the guidance as to the interpretation of EU law which may be of assistance in adjudicating on the case pending before it (see, to that effect, judgment of 17 December 2020, *Franck*, C-801/19, EU:C:2020:1049, paragraph 27).

36 In that regard, according to settled case-law, the possibility of classifying a supply of services as a transaction for consideration requires only that there be a direct link between that supply and the consideration actually received by the taxable person. Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient (judgments of 29 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraph 32).

37 In the present case, it is apparent from the explanations provided by the referring court that EQ actually received payments in the context of the exercise of the powers of management and of representation entrusted to him.

38 However, that court notes, first, that the performance of those services was entrusted to EQ not by their recipients, but by the competent authority in pursuance of legislation aimed at protecting adults lacking legal capacity in civil matters.

39 The Court has already held that the fact that the activity in question consists in the performance of duties conferred and regulated by law in the public interest is irrelevant for the purposes of determining whether that activity can be classified as a supply of services effected for consideration (judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 42). Article 25(c) of the VAT Directive expressly provides that a supply of services may consist in the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.

40 As regards, secondly, the relevance, in that context, of the circumstance that, in the event that the recipients of the services at issue in the main proceedings are indigent, the remuneration for those services may be borne by the State, it should be recalled that it is not a requirement of the directive, as is also apparent from Article 73 thereof, that for a supply of services to deemed to be 'for consideration', within the meaning of the VAT Directive, the consideration for that supply must be obtained directly from the recipient thereof, since it may be obtained from a third party (see, to that effect, judgment of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraph 34).

41 Thirdly, as regards the procedures for fixing the remuneration for the supply of services such as those provided by EQ, it is apparent from the explanations provided by the referring court, and from the written answers submitted by EQ and by the Luxembourg Government following the questions put by the Court on that subject – the validity of which is a matter for that court to determine – that that remuneration is fixed, on the basis of a case-by-case assessment taking into account the financial situation of the person lacking legal capacity, by the competent judicial authority at the request of the person supplying services, which must regularly report to that authority on his or her transactions. In addition, it is apparent that the remuneration is generally made up of a monthly lump sum in respect of the day-to-day management of the business of the person lacking legal capacity and, where appropriate, a sum in respect of additional services, determined, as a rule, on an hourly basis, with the remuneration thus granted not necessarily corresponding in every case to the actual value of the service provided.

42 In that context, it must be borne in mind, first, that the fact that the payment for the supply of services in question is made in the form of a lump sum is not such as to affect the direct link between the supply of services made and the consideration received (see, to that effect, judgment of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraph 37).

43 Secondly, 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 (see, to that effect, judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraphs 45 and 46, and the case-law cited).

44 Furthermore, the fixing of the remuneration as described above, which occurs as the person supplying the services in question deploys his or her activities and submits the relevant statements of account to the competent judicial authority, does not in any way prevent the view being taken that the amount thus fixed has been determined in advance and according to well-established criteria, in accordance with the case-law cited in the preceding paragraph above, provided that the procedures for fixing that amount are foreseeable and capable of ensuring that the person supplying services will receive, in principle, payment for those services.

45 In the light of the foregoing, it does not appear from the circumstances referred to by the referring court that there is reason to doubt that the supply of services at issue in the main proceedings was effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive.

46 That said, it is important, in the second place, that the supply of services at issue in the main proceedings is covered by the concept of 'economic activity' within the meaning of the second subparagraph of Article 9(1) of the VAT Directive.

47 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. 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. Thus, an activity is generally classified as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 17 December 2020, *WEG Tevesstraße*, C-449/19, EU:C:2020:1038, paragraph 34 and the case-law cited).

48 Furthermore, it follows from the Court's case-law that, in order to determine whether a service is supplied in return for remuneration, so 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 (judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraph 29).

49 In that regard, as noted by the referring court, the question whether the amount of the 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 (see, to that effect, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.*, C-182/17, EU:C:2018:91, paragraph 38 and the case-law cited) as well as, more generally, the amount of earnings and other factors, such as the number of customers (see, to that effect, judgment of 12 May 2016, *Gemeente Borsele et Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraph 31).

50 In the light of the facts set out by the referring court, it appears that the activity carried out by EQ is of a continuing nature. Furthermore, as is apparent from paragraph 45 above, it also seems established that EQ's activity is carried out in return for remuneration. The referring court explains, however, that it harbours doubts in that regard given that the services provided by that service provider are not necessarily in all circumstances remunerated in such a way as to cover the operating costs incurred by him.

51 The circumstance that each supply of services, considered individually, is not remunerated at a level corresponding to the costs incurred is not sufficient to show that the activity as a whole is not remunerated on the basis of criteria ensuring that the operating costs of the provider of the service are covered.

52 In the present case, and subject to verification by the referring court, it appears that the main proceedings differ from those giving rise to the judgments of 29 October 2009, *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 50), and of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 33), in which it was found that there was no economic activity on the ground, inter alia, that the contributions paid by the recipients of the services concerned were intended to cover only a small part of the total operating costs incurred by the provider of the service.

53 In the case in the main proceedings, there is nothing to suggest that the level of income which EQ obtained from his activity is insufficient in respect of his operating costs. Moreover, the results of the activity concerned cannot, in themselves, be decisive for the purposes of the analysis, referred to in paragraph 48 above, of whether the proposed activity is of an economic nature, since that analysis must be made by taking into account all the circumstances in which that activity is carried out (see, by analogy, judgment of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352, paragraph 29).

54 Consequently, it does not appear, subject to verification by the referring court, that the activity carried out by EQ is not of an economic nature.

55 In the light of the foregoing, the answer to the first to fourth questions is that Article 9(1) of the VAT Directive must be interpreted as meaning that the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters, the performance of which is entrusted to the person supplying services by a judicial authority in pursuance of the law and remuneration for which is fixed by the same authority as a fixed amount or is based on a case-by-case assessment by taking into account in particular the financial situation of the person lacking legal capacity – and such remuneration may moreover be borne by the State in the event that that person is indigent – where that supply is for consideration, the person supplying services obtains income therefrom on a continuing basis and the overall amount of the compensation for that activity is determined on the basis of criteria intended to ensure that the operating costs incurred by the person supplying services are covered, constitutes an economic activity within the meaning of that provision.

On the fifth to seventh questions

56 By its fifth to seventh questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 132(1)(g) of the VAT Directive must be interpreted as meaning, first, that the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters constitutes a 'supply of services closely linked to welfare and social security work', and, secondly, that a lawyer providing such services may benefit, for the purposes of the business he or she operates, within the meaning of the VAT Directive, from recognition as a body devoted to social wellbeing.

57 It must be borne in mind at the outset that the terms used to specify the exemptions laid down in Article 132 of the VAT Directive are to be interpreted strictly, as they are a departure from the general principle that VAT is to be paid on each supply of services made for consideration by a

taxable person. However, the interpretation of those terms must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT and be consistent with the objectives underlying those exemptions. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 must be construed in such a way as to deprive the exemptions of their intended effect (judgment of 12 March 2015, *'go fair' Zeitarbeit*, C-594/13, EU:C:2015:164, paragraph 17).

58 As is clear from the wording of Article 132(1)(g) of the VAT Directive, the exemption provided for in that provision applies to the supply of services and of goods which is, first, 'closely linked to welfare and social security work' and, secondly, made 'by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing'.

59 As regards, in the first place, the requirement that the supply of services must be closely linked to welfare and social security work, that requirement must be read in the light of Article 134(a) of the VAT Directive, which requires, in any event, that the supply of goods or services concerned be essential to the transactions relating to welfare and social security work (judgment of 8 October 2020, *Finanzamt D*, C-657/19, EU:C:2020:811, paragraph 31).

60 In the present case, it is apparent from the documents before the Court that the services at issue in the main proceedings are supplied under various schemes provided for under Luxembourg law intended to support adults lacking legal capacity in civil matters, and the legal incapacity of those persons may be established in the event of impairment of their mental faculties as a result of illness, disability or weakening due to age. Under those schemes, a third party is entrusted by the competent court with powers of management and, where appropriate, of representation in respect of the person lacking legal capacity with regard to that person's civil matters and to the management of his or her assets. Members of the family of the person lacking legal capacity, social assistants, not-for-profit associations or lawyers, among others, may be appointed for that purpose.

61 More specifically, it is apparent from the written answers submitted by EQ and by the Luxembourg Government to the questions put by the Court in that regard that, where a lawyer is so instructed, such a lawyer is generally required to provide multiple services, for the benefit of the person lacking legal capacity, as summarised in points 52 to 57 of the Advocate General's Opinion, which include services relating to civil matters and covering the management of everyday life and of the assets of the person lacking legal capacity as well as those of a legal nature.

62 Although the VAT Directive contains no definition of the concept of 'welfare and social security work' used, in particular, in Article 132(1)(g) thereof, the Court has already held that the provision of care and domestic help by an out-patient care service to persons in a state of physical or economic dependence is in principle closely linked to welfare and social security work within the meaning of that provision (see, to that effect, judgment of 10 September 2002, *Kügler*, C-141/00, EU:C:2002:473, paragraph 44).

63 Similarly, the supply of services provided to persons in a state of mental dependence and intended to protect them in civil matters must also be regarded as such where those persons are not in a position to do so themselves without running the risk of damaging their own financial or other interests, that risk precisely justifying the finding that they lack legal capacity.

64 As the Advocate General has, in essence, also observed in points 63 and 64 of his Opinion, in so far as such services serve to alleviate such a risk by allowing the specific activities of those persons' everyday life, including those of a financial nature, to be managed with the necessary prudence, they are essential to protect them from acts which may be prejudicial to them or even jeopardise their being able to live with dignity.

65 Consequently, the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters falls within the concept of 'the supply of services closely linked to welfare and social security work' within the meaning of Article 132(1)(g) of the VAT Directive.

66 By contrast, where such services are provided by a service provider who also engages, in the context of the powers referred to in paragraph 60 above, in more general activities providing assistance or legal, financial or other advice, such as those which may be linked to the specific skills of a lawyer, a financial adviser or an estate agent, it should be noted that the services provided in the context of those latter activities do not, as a rule, fall within the scope of the exemption provided for in Article 132(1)(g) of the VAT Directive, even if they are performed in the context of assistance to a person lacking legal capacity. Given the strict interpretation to which that exemption must be subject, such transactions cannot be regarded as essential and closely linked to welfare.

67 That finding must also be made, moreover, in order to comply with the principle of fiscal neutrality, which is expressly laid down in Article 134(b) of the VAT Directive and which precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see, to that effect, judgment of 4 May 2017, *Brockenhurst College*, C-699/15, EU:C:2017:344, paragraph 35). That principle would be infringed if, when suppliers entrusted with powers of representation for protection, such as those at issue in the main proceedings, carry out not only transactions inherent in the protection of persons lacking legal capacity but also transactions similar to those carried out outside such powers, the latter transactions being exempt from VAT solely because they are carried out in the context of those powers.

68 In the second place, as regards the requirement that, in order to be exempt, the services must be supplied by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social wellbeing, it is common ground that EQ, a member of the Bar of Luxembourg, is not covered by the concept of 'body governed by public law', with the result that he could benefit from the exemption in question only if he could be regarded as covered by that of 'other bodies recognised by the Member State concerned as being devoted to social wellbeing' within the meaning of Article 132(1)(g) of the VAT Directive.

69 Article 132(1)(g) of the VAT Directive does not specify the conditions or the procedures for recognising bodies other than those governed by public law as being devoted to social wellbeing. In consequence, it is generally for the national law of each Member State to lay down the rules in accordance with which that recognition may be granted to such bodies, the Member States having a discretion in that regard (see, to that effect, judgment of 21 January 2016, *Les Jardins de Jouvence*, C-335/14, EU:C:2016:36, paragraphs 32 and 34).

70 In that regard, it is clear from the case-law of the Court that, when considering whether to recognise bodies other than those governed by public law as being devoted to social wellbeing, it is for the national authorities, in accordance with EU law and subject to review by the national courts, to take various factors into account. These may include the existence of specific

provisions, be they national or regional, legislative or administrative, or tax or social security provisions; the public interest nature of the activities of the taxable person concerned; the fact that other taxable persons carrying on the same activities already enjoy similar recognition; and the fact that the costs of the supplies in question may be largely met by health insurance schemes or other social security bodies, in particular when the private operators maintain contractual relations with those bodies (judgment of 8 October 2020, *Finanzamt D*, C-657/19, EU:C:2020:811, paragraph 44 and the case-law cited).

71 It is only where the Member State has failed to observe the limits of its discretion that the taxable person may rely on the exemption provided for in Article 132(1)(g) of the VAT Directive in order to oppose national legislation incompatible with that provision. In such a case, it is for the national court to determine, in the light of all relevant factors, whether the taxable person must be recognised as being devoted to social wellbeing within the meaning of that provision (see, to that effect, judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraphs 28 and 32), as also explained by the Advocate General in points 114 to 119 of his Opinion.

72 In the present case, with regard to the referring court's questions, it should be noted, first, that the application of the exemption provided for in Article 132(1)(g) of the VAT Directive is not only subject to a condition relating to the social nature of the supply of services concerned, but is, moreover, limited to the supply of services by bodies recognised as being devoted to social wellbeing, as recalled in paragraph 58 above. It would be inconsistent with that dual requirement to allow a Member State to classify private profit-making entities as bodies devoted to social wellbeing merely because those entities provide, inter alia, services related to social wellbeing (see, to that effect, judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:605, paragraphs 61 and 63).

73 Secondly, the fact that the service provider in question is a natural person and operates, by virtue of his activity, for profit does not preclude his being recognised as being devoted to social wellbeing under Article 132(1)(g) of the VAT Directive. Indeed, the Court has already held that the concept of 'bodies recognised as being devoted to social wellbeing' is in principle sufficiently broad to include also private profit-making entities, including natural persons operating a business, in so far as the latter also constitute individualised entities performing a particular function (see, to that effect, judgments of 7 September 1999, *Gregg*, C-216/97, EU:C:1999:390, paragraphs 17 and 18; of 17 June 2010, *Commission* v *France*, C-492/08, EU:C:2010:348, paragraphs 36 and 37; and of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 57).

74 Moreover, it does not follow from the information provided to the Court that the Grand Duchy of Luxembourg availed itself of the option, provided for in subparagraph (a) of the first paragraph of Article 133 of the VAT Directive, to refuse, inter alia, to grant the exemption provided for in Article 132(1)(g) of that directive to bodies which systematically aim to make a profit, with the result that that Member State cannot object to the taxable person wishing to be granted that exemption if that person pursues such an objective.

75 That limitation on the rule excluding liability to tax is purely contingent in nature and a Member State which has omitted to adopt the measures necessary for that purpose cannot rely on its own omission in order to refuse a taxpayer entitlement to an exemption which he or she may legitimately claim under the VAT Directive (see, to that effect, judgment of 10 September 2002, *Kügler*, C-141/00, EU:C:2002:473, paragraph 60). The application of that limitation in that situation would, moreover, be liable to infringe the principle of fiscal neutrality, resulting in

different treatment for VAT purposes of supplies referred to in Article 132(1)(g) depending on whether the entities which provide them are profit-making or not (see, to that effect, judgment of 26 May 2005, *Kingscrest Associates and Montecello*, C-498/03, EU:C:2005:322, paragraph 42).

76 Thirdly, although, for the purposes of recognising a person supplying services as being a body devoted to social wellbeing, the form of exploitation chosen by the person supplying services is not irrelevant, since it must not prove incompatible with the classification of 'body devoted to social wellbeing', the fact remains that Member States cannot refuse such recognition without a precise examination of the specific circumstances of the case, in order to ascertain whether they are capable of establishing that the business operated by such a person is devoted to social wellbeing, with the result that, if it is established that it is devoted to social wellbeing and in so far as that person supplies services closely linked to welfare and social assistance work, those supplies fall within the exemption provided for in Article 132(1)(g) of the VAT Directive.

77 As regards, specifically, the fact that, in the present case, the services concerned were supplied by a member of the Bar, it must be noted that the Court has indeed held that, in the light of its overall objectives and the fact that any engagement in welfare work is not permanent, the professional category of lawyers as a whole cannot be regarded as devoted to social wellbeing (judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:605, paragraph 62).

78 However, it does not follow from that case-law that a taxable person carrying out activities closely linked to welfare and social security work may, in all circumstances and a priori, be excluded from the possibility of being recognised as being a body devoted to social wellbeing solely on the ground that that person belongs to the professional category defined in the preceding paragraph, without examining whether that person operates his or her business in conditions justifying recognition as being a body devoted to social wellbeing within the meaning of Article 132(1)(g) of the VAT Directive. Such an approach would, moreover, be liable to conflict with the principle of fiscal neutrality, as also noted, in essence, by the Advocate General in points 90 and 95 of his Opinion.

79 Even if the professional category of lawyers cannot be characterised, as a whole, as being devoted to social wellbeing, it is conceivable that, in a specific case, a lawyer providing services closely linked to welfare and social security work may show a stable social engagement and, in the light of the factors to be taken into account for the purposes of establishing the social nature of his or her business, cannot be distinguished from other natural or legal persons providing such services except by the fact that that person is a member of the Bar.

80 In such a situation, the mere fact that the person supplying services is a lawyer is a purely formal element which cannot call into question the social nature of his or her business.

81 It will therefore be for the referring court to examine, in the light of all the other relevant circumstances prevailing in the dispute before it, whether the Grand Duchy of Luxembourg exceeded the limits of its discretion by not providing that a person supplying services which is in a situation such as that of the applicant in the main proceedings may benefit, for the purposes of his or her business, from recognition as a body devoted to social wellbeing. It is only if that Member State has exceeded those limits that it will be for the referring court itself to grant such a recognition in respect of the period at issue in the main proceedings, if necessary by disapplying the substantive or procedural provisions of domestic law precluding that recognition.

82 That being said, in order to give an answer which will be of use to the referring court, it must be observed that, subject to verification by that court, some of the information contained in the documents before the Court appears to be of some relevance for the purposes of the examination seeking to establish whether the applicant in the main proceedings, despite being a lawyer, has shown a stable social engagement in operating his business during the period at issue in the main proceedings.

83 The circumstance that the person concerned has carried on his transactions, some of which, in any event, appear to be devoted to social wellbeing, in the context of the powers of representation for protection that have been granted to him, under the various protection schemes provided for in Luxembourg law, by a judicial authority which supervises also the exercise thereof, may be taken into consideration in that regard. Such a circumstance tends to indicate not only that the person supplying the services concerned is required to carry out those transactions in accordance with the specific legislative provisions laid down in Luxembourg law in that regard, but also that that person may act only after an express decision has been taken by the judicial authority with jurisdiction to appoint the persons entrusted with the performance of those services falling within the field of welfare and social security work.

84 Moreover, the circumstance that the remuneration for the transactions concerned is always determined under the supervision of that judicial authority (see, to that effect, judgment of 21 January 2016, *Les Jardins de Jouvence*, C-335/14, EU:C:2016:36, paragraph 38) and that that remuneration is liable to be borne by the State in the event that the recipient is indigent may also be relevant.

85 It should also be borne in mind that the Court has already held, in the case of a nurse running her own business as a sole trader and relying on the exemption provided for in Article 132(1)(g) of the VAT Directive, that a Member State may, in principle, require, without exceeding the discretion granted to it in that context, that the medical and pharmaceutical costs of such a taxable person be borne wholly or in part by the statutory social security and welfare bodies in at least two thirds of cases, in order to ensure that that service provider may be recognised as being devoted to social wellbeing (see, by analogy, judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraphs 10 and 35 to 37).

86 Similarly, there is nothing to prevent the Member State concerned from making such recognition subject to the requirement that the person supplying services must take certain procedural steps to that end, since such steps are likely to enable the authorities concerned to ascertain whether the person supplying services is devoted to social wellbeing. It seems, however, that, as regards the exemption provided for by the national provision transposing Article 132(1)(g) of the VAT Directive, Luxembourg law does not require such steps to be taken, which is, however, a matter for the referring court to verify.

87 The application of such criteria must, however, comply with the principle of fiscal neutrality. Thus, in the main proceedings, it is necessary to determine whether other taxable persons, including not-for-profit associations, already enjoy similar recognition in circumstances similar to those prevailing in the situation of the applicant in the main proceedings, an aspect on which he and the Luxembourg Government, in their written replies to the questions put by the Court, have adopted diverging views.

88 In the light of all of the foregoing considerations, the answer to the fifth to seventh questions is that Article 132(1)(g) of the VAT Directive must be interpreted as meaning, first, that the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters constitutes a 'supply of services closely linked to welfare and social security work', and, secondly, that it is not excluded that a lawyer supplying such services of a social nature may benefit, for the purposes of the business he or she operates and within the limits of those supplies, from recognition as a body devoted to social wellbeing, and such recognition must however necessarily be granted by a judicial authority only if the Member State concerned, by refusing that recognition, exceeded the limits of the discretion which it enjoys in that regard.

The eighth question

89 By its eighth question, the referring court asks, in essence, whether the principle of the protection of legitimate expectations precludes the tax authority from imposing VAT on certain transactions relating to a previous period, in a situation where that authority has, over a number of years, accepted the taxable person's VAT returns which do not include transactions of the same kind in its taxable transactions and where the taxable person is unable to recover the VAT due from those who have remunerated those transactions.

90 It should be recalled that the principle of the protection of legitimate expectations extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him or her (judgment of 5 March 2020, *Idealmed III*, C-211/18, EU:C:2020:168, paragraph 44).

91 It is apparent from the documents before the Court that the Luxembourg tax authority, after accepting the non-taxation of the transactions carried out by EQ since 2004, changed that practice, in respect of EQ, by its tax adjustment decision of 19 January 2018, with regard to the transactions carried out from 2014 onwards, by demanding payment of VAT for transactions of the same nature.

92 The mere acceptance, even for several years, by the Luxembourg tax authority of the VAT returns submitted by EQ, which did not include the amounts relating to the transactions at issue in the main proceedings, does not amount to a precise assurance provided by that authority that VAT is not to be applied to those transactions and cannot, therefore, give rise to a legitimate expectation on the part of that taxable person that the transactions concerned are not taxable.

93 As regards, moreover, the situation, referred to by the referring court, in which the person supplying services supplied services without collecting the VAT for which that person is liable, and in which that person would not be in a position to recover from those who have paid those supplies the VAT subsequently required by the tax authority, it is necessary, if that is the case, to take the view that the remuneration received in that regard by the person supplying services already includes the VAT due, so that the collection of VAT is compatible with the basic principle of the VAT Directive that the VAT system is aimed at taxing only the end consumer (see, to that effect, judgment of 7 November 2013, *Tulică and Plavoşin*, C-249/12 and C-250/12, EU:C:2013:722, paragraphs 34, 42 and 43).

94 In the light of those considerations, the answer to the eighth question is that the principle of the protection of legitimate expectations does not preclude the tax authority from imposing VAT on certain transactions relating to a previous period, in a situation where that authority has, over a number of years, accepted the taxable person's VAT returns which do not include transactions of

the same kind in its taxable transactions and where the taxable person is unable to recover the VAT due from those who have remunerated those transactions, with the remuneration already paid then deemed to include this VAT already.

Costs

95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters, the performance of which is entrusted to the person supplying services by a judicial authority in pursuance of the law and remuneration for which is fixed by the same authority as a fixed amount or is based on a case-by-case assessment by taking into account in particular the financial situation of the person lacking legal capacity – and such remuneration may moreover be borne by the State in the event that that person is indigent – where that supply is for consideration, the person supplying services obtains income therefrom on a continuing basis and the overall amount of the compensation for that activity is determined on the basis of criteria intended to ensure that the operating costs incurred by the person supplying services are covered, constitutes an economic activity within the meaning of that provision.**

2. **Article 132(1)(g) of Directive 2006/112 must be interpreted as meaning, first, that the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters constitutes a 'supply of services closely linked to welfare and social security work', and, secondly, that it is not excluded that a lawyer supplying such services of a social nature may benefit, for the purposes of the business he or she operates and within the limits of those supplies, from recognition as a body devoted to social wellbeing, and such recognition must however necessarily be granted by a judicial authority only if the Member State concerned, by refusing that recognition, exceeded the limits of the discretion which it enjoys in that regard.**

3. **The principle of the protection of legitimate expectations does not preclude the tax authority from imposing value added tax (VAT) on certain transactions relating to a previous period, in a situation where that authority has, over a number of years, accepted the taxable person's VAT returns which do not include transactions of the same kind in its taxable transactions and where the taxable person is unable to recover the VAT due from those who have remunerated those transactions, with the remuneration already paid then deemed to include this VAT already.**

[Signatures]