Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 February 2025 [1]

Case C-615/23

Dyrektor Krajowej Informacji Skarbowej
v
P. S.A.

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

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Supply of services for consideration – Taxable amount – Compensation to cover losses – Subsidy directly linked to price – Subsidised service provided by a third party in the public interest – Legal relationship and direct link between the supply of services and the consideration – Consideration from third parties)

I. Introduction

1. In the present case, the Court is addressing the fundamental question of how the subsidisation of a taxable person by a local authority acting in the public interest (here, the provision of public transport) is to be treated for VAT purposes. If the subsidy forms part of the consideration for the supply by the taxable person to the subsidy provider or its customers, the taxable person must pay VAT on the subsidy (or the subsidy must be increased accordingly). If, on the other hand, the subsidy is not part of the consideration for a supply (for the subsidy provider or the customers), but a general subsidy for the taxable person, there is no taxable transaction and no VAT is incurred.

2. The line between those two situations is not always easy to draw and has already been examined by the Court in a number of cases. [2] In the present preliminary ruling proceedings, the Court must now deal with the planned subsidisation of a public transport undertaking which receives compensation to cover losses associated with the provision of transport links. That compensation is not calculated according to the number of users, but by reference to a flat rate

[1] Original language: German.

[2] Judgments of 16 September 2021, *Balgarska natsionalna televizia* (C-21/20, EU:C:2021:743); of 9 October 2019, *C and C (VAT and agricultural subsidies)* (C-573/18 and C-574/18, EU:C:2019:847); of 15 July 2004, *Commission* v *Germany* (C-144/02, EU:C:2004:444); of 22 November 2001, *Office des produits wallons* (C-184/00, EU:C:2001:629); of 13 June 2002, *Keeping Newcastle Warm* (C-353/00, EU:C:2002:369); of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627); of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72); and of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120).

based on the vehicle-kilometres offered. The Court thus has an opportunity to develop further the criteria for differentiating a subsidy *for a* supply from a general subsidy *independent of a* supply.

II. Legal framework

A. European Union law

3. The framework of the case in EU law is formed by Directive 2006/112/EC on the common system of value added tax ('the VAT Directive').[3] Article 2(1)(a) and (c) of the VAT Directive provides:

'1. The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…

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

4. Article 73 of the VAT Directive concerns the taxable amount and states:

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

B. Polish law

5. Poland implemented the VAT Directive by the ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2011, No 177, item 1054, as amended; 'the Law on VAT').

6. Article 29a(1) of that Law provides, in essence, that the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier on account of the sale from the purchaser, customer or a third party, including subsidies, subventions and other similar amounts received which have a direct effect on the price of the goods or services supplied by the taxable person.

7. There is also the ustawa o publicznym transporcie zbiorowym (Law on public transport) of 16 December 2018 (Dz. U. of 2018, item 2016, as amended). Article 50(1)(2)(c) thereof provides that funding for public utility transport may consist, in particular, in compensating the operator for the costs incurred in connection with its provision of public transport services.

[3] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the current version, last amended by Council Directive (EU) 2022/890 of 3 June 2022 (OJ 2022 L 155, p. 1).

III. Facts and preliminary ruling procedure

8. P. S.A. ('the company') applied to the tax authority for an advance tax ruling in regard to tax on goods and services (VAT).

9. The company is an undertaking engaged in economic activity. According to the referring court, it is not an entity with capital or personal ties to any local authorities, that is to say, it is not an internal operator within the meaning of Regulation (EC) No 1370/2007. [4] This presumably means that the company is an independent private undertaking.

10. The company has a full accounting system, is subject to corporate income tax and is an active VAT taxable person. Its core business is passenger transport. In connection with the entry into force of Regulation (EC) No 1370/2007 and the Law on public transport, the company is considering the possibility of entering into contracts with local authorities for the provision of public road transport services, which would allow the company to be compensated under Article 50(1)(2)(c) of the Law on public transport. The company would act as the operator, while the other party to the contract would be the organiser of public transport.

11. As part of its public transport activities, the company would generate revenue from ticket sales, which would cover the costs of transport operations. Ticket prices would be set either by: (i) the organiser of the public transport by way of resolutions adopted by the competent authorities; or (ii) the organiser in the form of a model contract for the provision of public road transport services.

12. The company would generate revenue from the following sources:

1. revenue from ticket sales and other fares, which is subject to VAT (in principle at the 8% rate);

2. compensation for lost revenue due to the application of statutory concessionary fares, which is subject to VAT (at the 8% rate);

3. compensation for lost revenue due to the application of concessionary fares applicable within the area for which the organiser is competent;

4. other revenue (for instance, from the provision of advertising space); however, the sources of revenue listed in items 2 to 4 may all be present, or may be present only in part or not at all, depending on the provisions of the relevant contract or on statutory provisions.

13. The above sources of revenue would not cover the entire cost of the public transport services provided and the company would thus receive compensation from the organiser to cover the losses incurred while providing those services. The amount of compensation may not exceed the amount corresponding to the net financial effect of the provision of public urban transport services calculated in accordance with Regulation No 1370/2007.

14. The contract with the organiser would stipulate the detailed rules for calculating the net financial effect of service provision, the manner in which compensation is paid and the maximum amount of compensation for a given period. A negative financial effect would form a

[4] Regulation of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

basis for compensation. The compensation would not affect ticket prices, that is to say, the price of the service provided, since it is of a general nature and is meant to subsidise the overall cost of transport services provided under the contract.

15. The company asked the tax authority, among other things, whether such compensation ('the subsidy') constituted turnover subject to VAT for the purposes of Article 29a(1) of the Law on VAT. According to the company, the subsidy would not increase the taxable amount within the meaning of Article 29a(1) of the Law on VAT, as it does not have a direct effect on the price of the public transport services provided.

16. In an advance tax ruling issued on 14 May 2019, the tax authority found that position to be incorrect and stated that, when it is engaging in the activities described in the application, which are business activities as defined in Article 15(2) of the Law on VAT, the company is acting as a VAT taxable person. The tax authority stated that such a subsidy constitutes a subsidy for the purposes of Article 29a(1) of the Law on VAT which has a direct effect on the price of the services supplied.

17. By judgment of 26 November 2019, the court of first instance set aside the contested advance tax ruling. In its reasoning, the court stated that it was clear from the application that the subsidy would not affect the price of tickets (the price of the service provided) as ticket prices were set by the organiser. It rejected an unambiguous and clearly discernible link between the price of the transport services provided and the subsidy. The tax authority has appealed against that judgment.

18. The Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), which is now hearing the case, referred the following question to the Court:

'Must Article 73 of [the VAT Directive] be interpreted as meaning that compensation, such as that described in the application for an advance tax ruling, paid to a separate entity (operator) by a local authority for the provision of public transport services, is included in the taxable amount referred to in that provision?'

19. The Polish tax authority, the Republic of Poland, Hungary and the European Commission submitted written observations on that question in the proceedings before the Court. In accordance with Article 76(2) of the Rules of Procedure, the Court did not consider it necessary to hold a hearing.

IV. Legal assessment

A. The question referred and the course of the investigation

20. By its question, the referring court wishes to know, in essence, the criteria on the basis of which the payment of a subsidy (here in the form of compensation to cover losses) is to be included in the taxable amount of a taxable and not exempted transaction – carried out by the recipient of the subsidy – under Article 73 of the VAT Directive.

21. It is not unusual for a local authority ('the 'subsidy provider') acting in the public interest (here, in the interest of maintaining public transport) to pay compensation to cover costs, since it has a certain (public) interest in it.

22. The general inclusion of all State subsidies in the taxable amount for VAT purposes would mean that either every subsidy is reduced by the amount of VAT payable, since the recipient can no longer use that share for the intended purpose of the support, or the amount of the support would have to be increased by the amount of the VAT, which will not always be possible in times of tight public budgets. It is probably also for that reason that it is agreed that not every payment made to an undertaking from public funds in the public interest can be regarded as consideration for a supply of goods or services which is relevant for VAT purposes [5] and is subject to VAT.

23. It is also clear from the wording of Article 73 of the VAT Directive that not every subsidy forms part of the taxable amount for VAT purposes. Rather, only subsidies directly linked to the price of the supply are included. A distinction must therefore be made between subsidies which are irrelevant for VAT purposes and subsidies which are directly linked to the price of the supply. The latter can also be described as the consideration (here, from a third party in the form of the subsidy provider).

24. It is nevertheless apparent from the referring court's reasoning in the request for a preliminary ruling that that court considers that a direct supply made by the company to the subsidy provider (provision of public transport) is possible. In that case too, the subsidy would have to be regarded as consideration in return for a taxable and not exempted supply. Consequently, the court actually wishes to know whether the subsidy at issue falls under Article 2(1)(c) (supply of services for consideration) or under Article 73 of the VAT Directive (consideration from a third party, including subsidies).

25. The Court has made a number of attempts to develop criteria for making that interpretation. For example, the Court did not regard payments by members of a sales promotion association, [6] as well as subsidies to farmers for the discontinuation of milk production [7] or for a non-harvest, [8] as consideration for a supply of goods or services. The same applies to the subsidy to a public television body to maintain its programming. [9] On the other hand, the Court has held that there is possibly a consideration where a definite link exists between the subsidy and the price for a supply to a third party. [10] That was taken to be the case for a subsidy of 10 pounds sterling (GBP) for each piece of energy advice provided [11] and for additional payments from an operational fund for specific deliveries made by a producer organisation to its members, [12] but not for a subsidy to producers of dried fodder to enable them to produce at world market prices. [13]

26. The starting point for answering the question whether the subsidised activity of the company here can be regarded as a supply for consideration is – as is often the case – the nature of VAT as a general tax on consumption (B.1.). I will then outline the necessary criteria under the VAT Directive for answering that question (B.2.) in order then to be able to give a useful answer in the case at issue (B.3.).

5 See, inter alia, the judgments in which this was rejected by the Court: judgments of 16 September 2021, *Balgarska natsionalna televizia* (C-21/20, EU:C:2021:743); of 15 July 2004, *Commission* v *Germany* (C-144/02, EU:C:2004:444); of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627); of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72); and of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120).

6 Judgment of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120).

7 Judgment of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72).

8 Judgment of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627).

9 Judgment of 16 September 2021, *Balgarska natsionalna televizia* (C-21/20, EU:C:2021:743).

10 Judgment of 22 November 2001, *Office des produits wallons* (C-184/00, EU:C:2001:629).

11 Judgment of 13 June 2002, *Keeping Newcastle Warm* (C-353/00, EU:C:2002:369).

12 Judgment of 9 October 2019, *C and C (VAT and agricultural subsidies)* (C-573/18 and C-574/18, EU:C:2019:847).

13 Judgment of 15 July 2004, *Commission* v *Germany* (C-144/02, EU:C:2004:444).

B. Differentiation between a subsidy which is irrelevant for VAT purposes and consideration which is relevant for VAT purposes

1. The nature of VAT

27. By its nature, VAT is a general tax on consumption, which seeks to tax the recipient's expenditure (generally a monetary payment) on a supply of goods or services [14] obtained by the supplier from the recipient. That amount is extended in Article 73 of the VAT Directive to include expenditure borne by a third party. Accordingly, the consideration obtained by the supplier from a third party 'in return for the supply' is also covered. However, in both cases it must constitute consideration in return for a supply by the recipient of the monetary payment, in this case the company.

28. What constitutes a taxable transaction is defined in Article 2(1)(a) and (c) of the VAT Directive. Under that provision, the following transactions are subject to VAT: the supply of goods and services within the territory of a Member State by a taxable person acting as such. In particular, it is clear from the definition of a supply in Article 14 of the VAT Directive ('transfer of the right') that the supplier must provide to the recipient a specific consumable benefit (in the case of the supply: goods). It is thus a matter of taxation of a transfer of consumer goods between two persons for consideration.

29. VAT is a tax on consumption which aims to tax a consumer's financial capacity, as reflected in his or her expenditure of wealth to procure a consumable benefit. Therefore, a transaction for the purposes of VAT can exist only where the taxable person provides a *specific* benefit to a *particular* consumer. If, on the other hand, the recipient of the subsidy merely provides a *general* benefit to the *general public*, that does not result in a taxable transaction.

30. It is an inherent characteristic of subsidies that the subsidy provider always grants the subsidy partly in its own interest or, in the case of subsidies from public funds, within the area for which it is responsible. However, the mere fact that the recipient of the subsidy (here, the company) pursues an objective which overlaps or even coincides with the objectives of the subsidy provider (here, the interest in functioning public transport in its own area) cannot lead to the assumption of a consumable benefit for the purposes of VAT law. Otherwise, the wording in Article 73 of the VAT Directive according to which the subsidy must be *directly* linked to the price of the supply would be redundant and every subsidy would constitute consideration for a consumable benefit.

2. Differentiating criteria

31. The Court has thus differentiated, from the very beginning, according to whether there exists a supply for the purposes of VAT law in return for which the subsidy was granted. [15] This was rejected by the Court [16] where the operator merely agreed to produce less milk and to receive

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

[15] See the Court's case-law in that regard: judgments of 22 November 2001, *Office des produits wallons* (C-184/00, EU:C:2001:629, paragraph 12 et seq.); of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraph 21 et seq.); and of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72, paragraph 19 et seq.).

[16] Judgment of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72).

compensation (a subsidy) in return. The Court found that the discontinuation of milk production by the farmer was in the interest of the subsidy provider, but did not provide a consumable benefit to it, and was instead in the common interest of promoting the proper functioning of the EU milk market.[17] In particular, as the Court expressly stated, the farmer did not provide 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.[18]

32. The same applied to an association which carried out advertising for certain regional products and received a subsidy from the region. In that case, the Court made clear that the subsidy must be paid specifically to enable the subsidised body to provide particular goods or services,[19] that is to say, it had to be verified 'whether each activity gives rise to a specific and identifiable payment'.[20] The mere fact that the region had an interest in the better marketing of products from the region was not sufficient for the Court. The assessment was similar for State subsidies to a television company which did not receive any remuneration from its viewers.[21] The subsidies to finance broadcasting operations were not regarded as consideration for a specific service for a specific viewer. Nor did the existence of broadcasting operations constitute a benefit for the subsidy provider in return for which it granted a subsidy as consideration.

33. By contrast, the Court ruled with regard to a subsidy of GBP 10 for each piece of energy advice provided[22] that the sum paid by a public authority to an economic operator in connection with the service of energy advice supplied to certain categories of householders did constitute consideration for a supply. Similarly, it regarded payments from operational funds to a producer organisation for the supply of capital goods, which benefited the producers concerned, as consideration from a third party in return for a supply.[23]

34. In view of the nature of VAT and the Court's case-law, there is therefore no supply of goods or services for consideration where the payment of the subsidy is made to the recipient of the subsidy primarily in the interest of the general public.[24] In that case, there is no specific recipient of the supply. The subsidy provider also does not become a specific recipient of the supply simply because it indirectly has an interest of its own in the subsidised activity.

35. It must therefore be clarified whether the payment of the subsidy is in return for the provision of a specific benefit for a specific recipient of the supply. To that end, a distinction should be drawn between two conceivable situations. The subsidy can be paid in return for a supply to the subsidy provider (here, for example, the provision of public transport for the local authority (a)) or in return for a supply to the persons being transported (transport service for passengers (b)).

17 As is expressly stated in the judgment of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72, paragraph 21 et seq.).

18 As is expressly stated in the judgment of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraph 23).

19 Judgment of 22 November 2001, *Office des produits wallons* (C-184/00, EU:C:2001:629, paragraph 12); see also judgment of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120, paragraph 14 et seq.).

20 Judgments of 22 November 2001, *Office des produits wallons* (C-184/00, EU:C:2001:629, paragraph 15)8 March 1988; and of *Apple and Pear Development Council* (102/86, EU:C:1988:120, paragraph 14 et seq.).

21 Judgment of 16 September 2021, *Balgarska natsionalna televizia* (C-21/20, EU:C:2021:743).

22 Judgment of 13 June 2002, *Keeping Newcastle Warm* (C-353/00, EU:C:2002:369).

23 Judgment of 9 October 2019, *C and C (VAT and agricultural subsidies)* (C-573/18 and C-574/18, EU:C:2019:847).

24 The Court also differentiates according to whether a company promotes the general interests of members (no specific supply) or not; see judgments of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C-515/07, EU:C:2009:88, paragraph 31), and of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120, paragraph 14, which refers to common interests).

(a) Supply of services for consideration (Article 2(1)(c) of the VAT Directive)

36. Only where the recipient of the subsidy provides a specific benefit to the subsidy provider in return for the subsidy can there be a supply for consideration within the meaning of Article 2(1)(c) of the VAT Directive and therefore a taxable supply of services.

37. According to the Court's case-law, however, a supply of services is carried out 'for consideration', within the meaning of that provision, only 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 an identifiable service supplied to the recipient. This is the case if there is a *direct link* between the service supplied and the consideration received. [25]

38. That is doubtful in the case of a subsidy for *ex post* compensation for losses. There is generally an agreement between the subsidy provider and the subsidy recipient. However, a subsidy for *ex post* compensation for losses from previous activity is not made in return for any activity specifically to be provided, as Hungary also asserts in its written observations. In that respect, no specific benefit is provided to the subsidy provider.

39. The situation would probably be different if the local authority is obliged by law to provide public transport and, *in order to comply with that obligation*, engages a private operator which it subsidises accordingly. In that case, the direct link between the payment of the subsidy and the specific benefit for the local authority (release from the statutory obligation) is clear. In the absence of any such obligation, however, the existence of public transport is primarily in the interest of the general public and not in the (specific) interest of the subsidy provider.

40. Even though the Court made clear in *Fluvius* that the legal relationship required for the existence of a taxable transaction must be given a broad meaning [26] in accepting a supply of goods or services for consideration, this still requires a specific, individualisable benefit to be provided to the subsidy provider. Illegal consumption of electricity by an electricity thief is indisputably a specific, individualised benefit. If, in return, consideration must be paid depending on actual consumption (of stolen electricity), this may be referred to as damages, but it does not differ in the slightest from a payment for legal electricity consumption, [27] that is to say, remuneration for a specific, individualised benefit.

41. The same holds for a subsidy. It is likewise immaterial from the point of view of VAT law whether that monetary sum is described as a subsidy or as consideration. An individualised benefit to a local authority can therefore be taken to exist as a matter of course if, for example, a taxable person undertakes particular activities (park maintenance) in return for payment of a sum which is referred to as 'compensation'. [28] Park maintenance for a municipality in return for payment is an archetypal supply of services for consideration, especially since, in the case in question, [29] the municipality was obliged by law to maintain the parks and, in order to comply

[25] Judgment of 16 September 2021, *Balgarska natsionalna televizia* (C-21/20, EU:C:2021:743, paragraph 31); see, to that effect, judgments of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia* (C-295/17, EU:C:2018:942, paragraph 39); of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470, paragraph 22); and of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120, paragraphs 11, 12 and 16).

[26] Judgment of 27 April 2023, *Fluvius Antwerpen* (C-677/21, EU:C:2023:348, paragraph 31). A statutory legal relationship may also therefore be sufficient.

[27] Judgment of 27 April 2023, *Fluvius Antwerpen* (C-677/21, EU:C:2023:348, paragraph 33).

[28] Judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.* (C-182/17, EU:C:2018:91, paragraph 35 et seq.).

[29] Judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.* (C-182/17, EU:C:2018:91; paragraphs 38 and 39).

with that obligation, engaged a third party which it compensated for its costs. The compensation paid to the third party, like any normal consideration, was neither limited nor determined only *ex post*.

42. By contrast, the maintenance of an institution in the general interest (such as a museum), for whose operating costs the municipality pays a subsidy which is independent of the specific number of visitors, is not an archetypal specific supply of services for consideration. That operation is, in principle, not taxable (in the absence of a specific benefit in return for the subsidy). It would be a different matter again if the municipality were obliged by law to maintain a museum and, in order to comply with that obligation, engage a third party and make payment accordingly.

(b) Supply of services and consideration from a third party (Article 73 of the VAT Directive)

43. The subsidy may, however, also be regarded as consideration (from a third party) if the recipient of the subsidy (here, the company) provides a specific benefit (here, public transport) to another party (here, the passengers) and the subsidy provider pays specifically for that (price support). This is made clear by Article 73 of the VAT Directive.

44. In accordance with its terms, that provision applies where the subsidy is directly linked to the price of the transaction in question. For that to be the case, the subsidy must first be paid specifically to the subsidised operator to enable it to supply particular services. Only in that case can the subsidy be regarded as consideration for the supply of services. [30]

45. Moreover, it is also necessary to verify that the recipients of the supply (here, the passengers) benefit from the subsidy granted to the recipient. According to the Court's case-law, the price payable by the recipient must be fixed in such a way that it diminishes in proportion to the subsidy granted to the supplier. [31] Accordingly, 'subsidies directly linked to the price of the supply' for the purposes of Article 73 of the VAT Directive include only subsidies which constitute the whole or part of the consideration for a supply of goods or services and which are paid by a third party to the seller or supplier. [32]

(c) Interim conclusion

46. If both the nature of VAT as a tax on consumption and the wording of Article 73 of the VAT Directive are taken seriously, a distinction must therefore be drawn between payments which are not made in return for a specific, individualised benefit or which are related only indirectly to the price of the supply and payments which are related directly to an individualised benefit and related directly to the price of the supply by the recipient of the subsidy.

[30] Judgments of 15 July 2004, *Commission* v *Germany* (C-144/02, EU:C:2004:444, paragraphs 27 and 28); and of 9 October 2019, *C and C (VAT and agricultural subsidies)* (C-573/18 and C-574/18, EU:C:2019:847, paragraph 31).

[31] See, to that effect, judgments of 15 July 2004, *Commission* v *Germany* (C-144/02, EU:C:2004:444, paragraph 29 and the case-law cited; and of 9 October 2019, *C and C (VAT and agricultural subsidies)* (C-573/18 and C-574/18, EU:C:2019:847, paragraph 32).

[32] See, with regard to the predecessor provision in the Sixth Directive, judgments of 15 July 2004, *Commission* v *Germany* (C-144/02, EU:C:2004:444, paragraph 31 and the case-law cited); and of 9 October 2019, *C and C (VAT and agricultural subsidies)* (C-573/18 and C-574/18, EU:C:2019:847, paragraph 34).

47. Such a direct relationship is only apparent from the specific conditions governing the subsidy and the circumstances of the individual case. The assessment of those factors is primarily a matter for the referring court. The Court can nevertheless provide useful guidance as, ultimately, the interpretation of a provision and its application cannot really be separated.

3. Application to the case at issue

(a) Consideration for a supply to the subsidy provider

48. In the present case, the local authority undoubtedly has an interest in the provision of public transport in the area for which it is responsible. The purpose of the subsidy is also to place the recipient of the subsidy in a position to continue to offer such services. The question is only whether that is sufficient to accept the existence of a specific benefit for the subsidy provider in return for the subsidy or whether the subsidisation is in fact in the interest of the general public.

49. In the case at issue, the subsidy is not linked to specific obligations for the benefit of the subsidy provider, as it is granted only *ex post* as compensation for any losses incurred. The decision on which routes and how many routes are offered does not lie with the subsidy provider, but is taken autonomously by the recipient of the subsidy. In addition, the amount of the subsidy to cover the losses arising from the provision of those services is limited and assessed by reference to a flat rate based on the vehicle-kilometres made available to the general public by the recipient of the subsidy, without the number of specific users of the transport services being relevant.

50. An individual activity of the recipient of the subsidy does not therefore give rise to a specific and identifiable payment by the subsidy provider, but the subsidy merely compensates for losses, up to a certain amount (which is determined by an EU regulation), so that the recipient of the subsidy is actually placed in a position to continue to provide the transport services to the specific passengers. A specific obligation on the part of the subsidy provider to provide such public transport, from which the recipient of the subsidy would release it, is not evident from the reference for a preliminary ruling.

51. Although the provision of public transport is therefore partly in the interest of the subsidy provider, it does not provide it with a specific, consumable benefit, but only the users of public transport when they use it. In my view, the 'existence of a direct link between the service provided and the consideration received', which is necessary for a taxable supply of services according to the Court's case-law,[33] is thus absent, which is clearly also the position taken by the Polish tax authority itself in its written observations.

52. In accordance with paragraph 37 of the Court of Justice's decision in *Balgarska natsionalna televizia*,[34] the following statement could also be made: in the present case, there is no relationship between the State, which pays a subsidy from its budget in order to finance public transport, and the passengers, who benefit from those services, which would be analogous to that between a sickness fund and its insured.[35] Those services do not benefit persons who are likely to

[33] Judgment of 8 March 1988, *Apple and Pear Development Council* (102/86, EU:C:1988:120, paragraph 12).

[34] Judgment of 16 September 2021 (C-21/20, EU:C:2021:743, paragraph 37).

[35] The Court expressly refers in this regard to *Le Rayon d'Or*; see judgment of 27 March 2014, *Le Rayon d'Or* (C-151/13, EU:C:2014:185).

be clearly identified, but all potential passengers. In addition, the amount of the subsidy in question is calculated by reference to a flat rate based on vehicle-kilometres, without taking into account the identity or the number of users of the service provided.

(b) Consideration from a third party for the supplies to passengers

53. Assuming that assessment of the facts to be correct, only the users to whom the recipient of the subsidy provides its public transport (service) may be considered specific recipients of the subsidised transport services. Only if the subsidy from the local authority constitutes a 'subsidy directly linked to the price of the supply' would it increase the taxable amount of the transport services by the amount of the subsidy.

54. Unlike the subsidies, also mentioned in the order for reference, for concessionary fares to be granted by the company – which are related to a specific service for a specific user – there is no specific relationship to a particular supply in the case of the subsidies to cover losses. There is merely a general link to the (loss-making) activity. Consequently, there is only an indirect link to the individual transport services. The subsidy, the amount of which is limited, cannot affect the price of the individual transport services because, first, it is granted *ex post* and, second, it does not depend on actual use of the transport services. Instead, it is based on the vehicle-kilometres offered and thus on the potential usability by the general public.

55. In that regard, the court at first instance stated that it is clear from the company's application for an advanced tax ruling that the compensation would not affect the price of tickets (the price of the service provided) as ticket prices are set by the organiser. Under those circumstances, the subsidy is intended to place the recipient of the subsidy in a position only generally to offer such services, without being directly linked to the price of those services. If the prices for passenger transport users are not set by the recipient of the subsidy, but in advance by the competent authorities or the subsidy provider, the *ex post* subsidy to cover costs also cannot directly affect the prices of the service provided.

56. In that respect, this case also differs – contrary to the view evidently taken by the Commission and the Republic of Poland – from the situation in *Le Rayon d'Or*,[36] which is expressly mentioned by the referring court. In that case, the sickness insurance fund paid a healthcare lump sum for each patient requiring care. The Court rightly regarded that 'compensation' as payment of a consideration (in so far as the patients were still also required to pay a contribution, it would be a price-support payment), since both the supply of services and the recipient, as well as the amount, were 'determined in advance on the basis of well-established criteria'.

57. In addition, this is not affected by the fact highlighted by the referring court in the request for a preliminary ruling and by the Republic of Poland in the written observations that, as a result of the compensation, the total price paid is likely to be lower than without the subsidy. First of all, this is highly doubtful if the price paid for the transport service cannot be set by the supplier. In that situation, it is likely that without the subsidy there would be no supply of services for consideration at all.

[36] Judgment of 27 March 2014, *Le Rayon d'Or* (C-151/13, EU:C:2014:185, paragraph 32 et seq.).

58. Second, that consequence is, in the final analysis, inherent in any subsidy. Any subsidy enables its recipient to make a different price calculation. As the Court has previously stated, 'however, the mere fact that a subsidy may affect the price of the goods or services supplied by the subsidised body is not enough to make that subsidy taxable'. [37]

59. The fact that such an indirect link cannot be sufficient is also shown by the Court's decision in *Commission* v *Germany* [38] as, using that reasoning, the subsidy to the dried fodder manufacturers would also have been assessable and taxable. That subsidy too enabled the manufacturers to make a different price calculation. Because, however, the subsidy was granted in the general interest and not in the interest of the individual purchasers of dried fodder and, in particular, was not linked to the respective quantities of dried fodder sold, the Court – correctly – rejected the existence of a consideration from a third party. Consequently, general effects on the price calculation – which are inherent in any subsidy – are not sufficient to accept the existence of a corresponding consideration from a third party in the form of that subsidy.

V. Conclusion

60. I therefore propose that the Court answer the question referred for a preliminary ruling by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) as follows:

Article 2(1)(c) and Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax'

must be interpreted as meaning that an *ex post* compensation for financial losses, the amount of which is limited by an EU regulation and is not based on the number of users, but on the vehicle-kilometres offered by reference to a flat rate, does not constitute consideration for a supply of services to the local authority making the payment. Nor does such compensation constitute consideration from a third party for the benefit of specific users of public transport because it does not affect directly, but at most indirectly, the price calculation made by the subsidised undertaking.

[37] Judgment of 22 November 2001, *Office des produits wallons* (C-184/00, EU:C:2001:629, paragraph 12).

[38] Judgment of 15 July 2004, *Commission* v *Germany* (C-144/02, EU:C:2004:444, paragraph 34 et seq.).