Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

29 October 2015*

(Reference for a preliminary ruling — Value added tax — Directive 2006/112/EC — Article 13(1) — Treatment as a non-taxable person — Concept of 'body governed by public law' — Limited company which is responsible for the provision of services in respect of the planning and management of the health service of the Autonomous Region of the Azores — Determination of the detailed arrangements for those services, including their remuneration, in programme agreements concluded between that company and that region)

In Case C-174/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 12 March 2014, received at the Court on 9 April 2014, in the proceedings

Saudaçor — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA

v

Fazenda Pública,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 March 2015,

after considering the observations submitted on behalf of:

— Saudaçor — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA, by G. Leite de Campos, M. Clemente and J. Batista Pereira, advogados,

— the Portuguese Government, by L. Inez Fernandes and R. Campos Laires, acting as Agents,

— the United Kingdom Government, by L. Christie, acting as Agent, and by P. Mantle, Barrister,

— the European Commission, by P. Guerra e Andrade and L. Lozano Palacios, acting as Agents,

* Language of the case: Portuguese.

after hearing the Opinion of the Advocate General at the sitting on 25 June 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Saudaçor — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA ('Saudaçor') and the Fazenda Pública (Public Treasury) concerning that company's liability to value added tax (VAT) in respect of its activities concerning the planning and management of the health service of the Autonomous Region of the Azores ('the RAA').

Legal context

EU law

3 Directive 2006/112 repealed and replaced, with effect from 1 January 2007, the existing Community VAT legislation, in particular the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

4 According to the first and third recitals in the preamble to Directive 2006/112, the recasting of the Sixth Directive was necessary in order to present all the applicable provisions in a clear and rational manner and in an improved structure and drafting which would not, in principle, bring about material change.

5 Article 2(1)(c) of Directive 2006/112 states:

'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.'

6 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.'

7 Article 13 of that directive provides:

‘1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.

2. Member States may regard activities, exempt under Articles 132 ..., engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.’

8 Pursuant to Article 1(9) of Directive 2004/18:

‘“Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. ...’

Portuguese Law

Legislation in respect of VAT

9 Article 2(2) of the VAT Code (Código do IVA) provides that the State and other legal persons governed by public law are not taxable persons for VAT purposes where they engage in transactions in the exercise of their powers conferred by public law, even where they collect fees or other consideration in that connection, in so far as their treatment as non-taxable persons does not cause distortions of competition.

10 Article 2(3) of that code provides that the State and other legal persons governed by public law are in any event taxable persons for VAT purposes where they engage in certain activities and for the ensuing taxable transactions, unless it is shown that those activities are negligible.

The legal regime for Saudaçor

11 Saudaçor was created by Regional Legislative Decree No 41/2003/A of the RAA transforming the Institute of Financial Management of the Health Service of the Autonomous Region of the Azores into a limited company with exclusively public capital called SAUDAÇOR — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA, and amending Regional Legislative Decree No 28/99/A of 31 July (Decreto Legislativo Regional n.° 41/2003/A, Transforma o Instituto de Gestão Financeira da Saúde da Região Autónoma dos Açores em sociedade anónima de capitais exclusivamente públicos, passando a designar-se SAUDAÇOR — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores, SA, e altera o Decreto Legislativo Regional n.° 28/99/A, de 31 de Julho), of 17 October 2003 (*Diário da República* I, Series A No 257, 6 November 2003, p. 7430), that company being wholly owned by that region.

12 Under Article 2(1) of that regional legislative decree, Saudaçor has the task of providing services of general economic interest in the field of health. The object of that task is the planning and management of the regional health system and associated information systems, infrastructure and facilities and the completion of construction, conservation, rehabilitation and reconstruction work on health establishments and services, in particular in areas covered by natural disasters and in areas regarded as risk areas.

13 Under Article 3 of Regional Legislative Decree No 41/2003/A:

‘In the context of its task of providing services of general economic interest, Saudaçor shall have the following functions:

(a) providing centralised supplies to the regional health service;

(b) providing goods and services to member entities of the regional health service;

(c) granting financing to health establishments in accordance with the health-care objectives to which each establishment has contractually committed;

(d) defining rules and guidelines for budget management of health establishments and monitoring its implementation;

(e) evaluating the economic and financial management of institutions and services forming part of the regional health service or financed by it and drawing up periodic reports on its financial situation and on the management of its human and material resources;

(f) encouraging the development of information systems for institutions under the aegis of the regional health service;

(g) carrying out works on the regional health service which are desirable in the public interest;

(h) providing support to the services and establishments of the regional health service in areas where this proves necessary.’

14 Article 4(1) of that regional legislative decree provides that Saudaçor is governed by that instrument, by the articles of association annexed thereto, by the legal regime for public undertakings as provided for by Decree-Law No 558/99 (Decreto-Lei n.° 558/99) of 17 December 1999 (*Diário da República* I, Series A No 292, 17 December 1999, p. 9012), and by private law. Under Article 4(2) of the same regional legislative decree, in its activities Saudaçor must respect the rules governing the organisation and operation of the regional health service of the RAA.

15 Article 10 of Regional Legislative Decree No 41/2003/A provides that, in the performance of its functions, Saudaçor holds the same powers conferred by public law as the RAA and then lists, by way of example, some of those powers, including the power to carry out expropriations.

16 Under Article 7(3) of Decree-Law No 558/99, as amended, public undertakings are taxed, directly and indirectly, in accordance with the common regime. An identical provision is found in Article 9(2) of Regional Legislative Decree No 7/2008/A governing public sector undertakings of the Autonomous Region of the Azores (Decreto Legislativo Regional n.º 7/2008/A, Regime do sector público empresarial da Região Autónoma dos Açores) of 5 March 2008 (*Diário da República* I, Series A No 58, 24 March 2008, p. 1649), in respect of regional public undertakings.

17 Saudaçor performs its activities within the framework of programme agreements concluded, in accordance with Article 21(1) of its articles of association, with the Government of the RAA, which define, inter alia, the services which it must provide for the planning and management of the regional health service and the compensation, called the 'financial contribution', to be paid by that region in consideration for those services and designed to cover the operating costs of Saudaçor.

18 Thus, a first programme agreement was concluded on 23 July 2004, covering the period 2004–2008, which provided for total compensation of EUR 15 905 000, including a sum of EUR 3 990 000 for 2007 and a sum of EUR 4 050 000 for 2008. Clause 5 of that agreement provided that that total amount could be revised by a joint order issued by the members of the government responsible for finance and health if, on account of a change in circumstances, that amount was manifestly insufficient to allow performance of that agreement. A second programme agreement was concluded on 1 January 2009, covering the period 2009–2012, which provided for annual compensation of EUR 8 500 000 and a revision clause similar to that stipulated in the previous agreement. By joint order of 8 March 2010 issued by the members of the Government of the RAA responsible for finance and health, that amount was reduced to EUR 6 599 147 for 2009.

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

19 On 2 March 2011, the Public Treasury drew up a draft inspection report proposing corrections concerning the VAT payable by Saudaçor in respect of the financial years 2007 to 2010 totalling EUR 4 750 586.24.

20 On 6 April 2011, the inspection report was adopted, after Saudaçor had been heard.

21 In that report, the Public Treasury held, inter alia, that, in view of its legal regime, Saudaçor could not rely on the rule under which bodies governed by public law are not regarded as taxable persons for VAT purposes, laid down in Article 2(2) of the VAT Code, a provision which seeks to transpose the first subparagraph of Article 4(5) of the Sixth Directive, the content of which is the same as that of the first subparagraph of Article 13(1) of Directive 2006/112.

22 According to the Public Treasury, the services provided by Saudaçor in respect of the planning and management of the regional health service under the programme agreements concern areas of activity involving private initiative, which means that treatment as a non-taxable person for VAT purposes might lead to distortions of competition. That is the case, for example, with the management and maintenance of the computer system for the region's health sector. There is, in actual fact, in the Public Treasury's view, an activity of an economic nature, with the result that the contributions laid down in the programme agreements and paid by the regional authorities in consideration for those services are subject to VAT. Furthermore, Saudaçor had accepted that it was subject to VAT in so far as it claimed a total sum of EUR 2 300 273.17 as VAT deductions on its purchases of goods and services.

23 Saudaçor brought an action before the Tribunal Administrativo e Fiscal de Ponta Delgada (Ponta Delgada Administrative and Tax Court) against the notices requiring payment of VAT and compensatory interest concerning the financial years 2007 to 2010, which demanded that it pay a total of EUR 5 157 249.72.

24 By its judgment, that court dismissed that action on the ground, inter alia, that, for the purpose of interpreting the rule laid down in the first subparagraph of Article 13(1) of Directive 2006/112, under which bodies governed by public law are not regarded as taxable persons for VAT purposes, there is no need to refer to the concept of 'body governed by public law' defined, in the context of public procurement law, in Article 1(9) of Directive 2004/18 since the latter concept is understood in a broad sense, whereas the concept of 'body governed by public law' within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 must be interpreted strictly when applying the rule of treatment as a non-taxable person for VAT purposes because that rule constitutes an exception to the general rule of taxation of any economic activity.

25 According to that court, that rule of treatment as a non-taxable person for VAT purposes does not cover an entity like Saudaçor which, although created by the RAA, is a limited company which is distinct from the region and subject to the rules of private law and which pursues its functions and objectives independently.

26 The Tribunal Administrativo e Fiscal de Ponta Delgada (Ponta Delgada Administrative and Tax Court) also considered that the services provided by Saudaçor in connection with the programme agreements constitute an activity of an economic nature, since they are provided for consideration. According to that court, the contributions paid by the RAA represent consideration for the services provided by Saudaçor and cannot be regarded as constituting budgetary transfers between public entities.

27 Hearing an appeal against that judgment, the referring court considers that the central issue in the case in the main proceedings is whether an entity such as Saudaçor can rely on the rule laid down in Article 2(2) of the VAT Code, the content of which corresponds to that of Article 13(1) of Directive 2006/112, under which bodies governed by public law are not regarded as taxable persons for VAT purposes, and whether the amounts to which the notices of payment of VAT relate constitute budgetary transfers between public entities.

28 It considers that, whilst it is clearly established in the Court's case-law that only the activities of bodies governed by public law acting as public authorities are excluded from liability to VAT, it cannot be determined on the basis of that case-law whether an entity such as Saudaçor, having regard to its legal status as a limited company originating from the transformation of a State entity, comes within that concept of body governed by public law. The question arises in particular whether the scope of that concept tallies with the scope of the concept of 'body governed by public law' in Article 1(9) of Directive 2004/18 in the context of the definitions of the various categories of 'contracting authorities'.

29 In those circumstances the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the concept of body governed by public law within the meaning of the first paragraph of Article 13(1) of Directive 2006/112 be interpreted ... by reference to the concept of "body governed by public law" [as defined in] Article 1(9) of Directive 2004/18?

(2) Is an entity established as a limited company, with exclusively public capital and 100% owned by the RAA, and whose object is the exercise of consultancy and management activities in matters relating to the regional health service, with the purpose of developing and reorganising it through the performance of programme agreements concluded with that region, which holds by delegation

the public-authority powers conferred in those matters on the region which was originally responsible for providing the public health service, covered by the concept of a "body governed by public law" acting as a public authority for the purpose of the first subparagraph of Article 13(1) of Directive 2006/112?

(3) In the light of the provisions of that directive, may the consideration received by that company, which consists in the making available of the financial resources necessary for the performance of those programme agreements, be regarded as payment for the services provided, for the purposes of liability to VAT?

(4) If so, does that company satisfy the requirements necessary in order to be entitled to rely upon the rule governing not being regarded as a taxable person laid down in Article 13(1) of Directive 2006/112?'

Consideration of the questions referred

The third question

30 By its third question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 9(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, constitutes an economic activity within the meaning of that provision.

31 The Court has already ruled that it is clear from the scheme and purpose of that directive, as well as from the place of Article 13 of that directive in the common system of VAT established by the Sixth Directive, that any activity of an economic nature is, in principle, to be taxable. As a general rule and in accordance with Article 2(1) of Directive 2006/112, the supply of services for consideration, including those provided by bodies governed by public law, is to be subject to VAT. Articles 9 and 13 of that directive thus give a very wide scope to VAT (judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraph 76 and the case-law cited).

32 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 (see, inter alia, judgment in *Serebryannay vek*, C-283/12, EU:C:2013:599, paragraph 37 and the case-law cited).

33 In view of the nature of the analysis to be carried out and as the Court has already held, it is for the national court to classify the activities at issue in the main proceedings in the light of the criteria adopted by the Court (judgment in *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraph 23, and order in *Gmina Wrocław*, C-72/13, EU:C:2014:197, paragraph 18).

34 In the present case, it is for the referring court to establish whether it is apparent from the documents in the court file and in particular from the programme agreements concluded between Saudaçor and the RAA that the activities of that company are effected for consideration and, therefore, are of an economic nature. None the less, the Court may provide the referring court, in the light of the information in the order for reference, with the points of interpretation which are likely to enable the referring court to give its ruling.

35 In that regard, it is apparent from the order for reference that, in the actual wording of those agreements, the RAA is required to pay to Saudaçor, 'as consideration' for the services in respect of the planning and management of the regional health service to be provided by it, compensation, called the 'financial contribution', the amount of which is stated in those agreements.

36 In the light of the permanent and continuous nature of the planning and management services provided by Saudaçor, the fact that that compensation is determined not on the basis of individualised services but on a flat-rate and annual basis to cover the operating costs of that company is not in itself such as to affect the direct link between the supply of services made and the consideration received, the amount of which is determined in advance on the basis of well-established criteria (see, to that effect, judgment in *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraphs 36 and 37).

37 The existence of that direct link also does not appear to be called into question by the fact that the programme agreements concluded between Saudaçor and the RAA contain clauses which stipulate that the amount of compensation payable to Saudaçor may be adjusted where, because of a change of circumstances, that amount is manifestly insufficient to allow for the performance of those agreements.

38 In so far as those clauses seek to determine in advance the level of that compensation on the basis of well-established criteria which ensure that that level is sufficient to cover the operating costs of Saudaçor, it may be held that those clauses are designed to adapt the amount of the flat-rate consideration for the services provided on a continuous and permanent basis by that company. In addition, whilst, as is apparent from the order for reference, for 2009, the annual compensation initially provided for was reduced by the RAA, the Portuguese Government explained at the hearing, without being contradicted by Saudaçor, that the sole purpose of that reduction was to correct a manifest calculation error.

39 The direct link between the supply of services and the consideration received also does not appear to be called into question by the fact that, as Saudaçor maintains, its activity is intended to fulfil a constitutional obligation exclusively and directly incumbent upon the State under the Portuguese constitution, namely the obligation to implement a national health service which is universal and potentially free, to be financed, in essence, by public resources.

40 Under Article 9(1) of Directive 2006/112, a taxable person means any person who, independently, carries out any economic activity, whatever the purpose or results of that activity.

41 Moreover, whilst the objective of the implementation of a national health service which is universal and potentially free, which has to be financed, in essence, by public resources, is taken into account in the common system of VAT, in so far as, under Article 132(1) of that directive, certain provisions of medical care undertaken, in particular, by bodies governed by public law must be exempted from VAT, it is common ground that the activity of planning and managing the regional health service at issue in the main proceedings does not fall within one of those exemptions.

42 Having regard to the foregoing considerations, the answer to the third question is that Article 9(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, constitutes an economic activity within the meaning of that provision.

The first, second and fourth questions

43 By its first, second and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 13(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region

with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, falls under the rule of treatment as a non-taxable person for VAT purposes, laid down by that provision, in a situation where that activity constitutes an economic activity within the meaning of Article 9(1) of that directive.

44 In that context, the referring court asks whether, as maintained by Saudaçor, the concept of 'other bodies governed by public law' within the meaning of Article 13(1) of that directive must be interpreted by reference to the definition of the concept of 'body governed by public law' in Article 1(9) of Directive 2004/18.

45 Such an interpretation of Article 13(1) of Directive 2006/112 cannot be accepted.

46 By defining in broad terms the concept of 'body governed by public law' and, as a result, the concept of 'contracting authorities', Article 1(9) of Directive 2004/18 seeks to define the scope of that directive in a sufficiently extensive manner so as to ensure that the rules on, in particular, transparency and non-discrimination which are required in connection with the award of public contracts apply to all State entities which do not form part of the public administration but which are nevertheless controlled by the State, in particular by means of their financing or their management.

47 However, the context of the concept of 'other bodies governed by public law' referred to in Article 13(1) of Directive 2006/112 is fundamentally different.

48 That concept is not intended to define the scope of VAT but, on the contrary, makes an exception to the general rule on which the common system of that tax is based, namely the rule that the scope of that tax is defined very broadly as covering all supplies of services for consideration, including those provided by bodies governed by public law (see, to that effect, judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraphs 76 and 77).

49 As an exception to the general rule that any activity of an economic nature be subjected to VAT, Article 13(1) of Directive 2006/112 is to be interpreted strictly (see, inter alia, judgment in *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 60, and order in *Gmina Wrocław*, C-72/13, EU:C:2014:197, paragraph 19).

50 It follows that, in the absence of any guidance in the wording of Article 13(1) of Directive 2006/112, it is necessary to take into account the scheme and purpose of that directive, as well as the place of that provision in the common system of VAT established by it (see, by analogy, judgment in *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 25).

51 As the Court has consistently held, it is clear from Article 13(1) of Directive 2006/112, when examined in the light of the aims of the directive, that two conditions must both be fulfilled for the rule of treatment as a non-taxable person to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see to that effect, inter alia, order in *Mihal*, C-456/07, EU:C:2008:293, paragraph 16 and the case-law cited, and judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraph 79).

52 In addition, the Court has also consistently held that it follows both from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the objective pursued by the legislation in question (see, inter alia, judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 42).

53 It must be noted that Article 13(1) of Directive 2006/112 makes no express reference to the law of the Member States.

54 It follows that the concepts referred to in that provision, including that of 'other bodies governed by public law', must be given an autonomous and uniform interpretation throughout the European Union.

55 Moreover, since, as has been noted in paragraph 49 of the present judgment, Article 13(1) of Directive 2006/112 must, as an exception, be interpreted strictly, it must be held that the list in that provision is exhaustive, the concept of 'other bodies governed by public law' constituting a residual category of bodies falling within the public authority other than those specifically mentioned in that provision.

56 As regards, specifically, the first of the two conditions laid down in Article 13(1) of that directive, namely the condition that the body be governed by public law, the Court has already held that a person which, not being part of the public administration, independently performs acts falling within the powers of the public authority cannot be classified as a body governed by public law within the meaning of that provision (see to that effect, inter alia, order in *Mihal*, C-456/07, EU:C:2008:293, paragraph 18 and the case-law cited).

57 The Court has also made it clear that the status as a 'body governed by public law' cannot stem from the mere fact that the activity at issue consists in the performance of acts falling within powers conferred by public law (see to that effect, inter alia, order in *Mihal*, C-456/07, EU:C:2008:293, paragraph 17 and the case-law cited).

58 Nevertheless, whilst the fact that the body in question has, under the applicable national law, powers conferred by public law is not decisive for the purposes of that classification, it does constitute, in so far as it is an essential characteristic specific to any public authority, a factor of definite importance in determining that the body must be classified as a body governed by public law.

59 Article 10 of Regional Legislative Decree No 41/2003/A provides that, in the performance of its functions, Saudaçor holds the same powers conferred by public law as the RAA and then lists, by way of example, some of those powers, including the power to carry out expropriations.

60 In addition, in the light of the Court's case-law cited in paragraph 56 of the present judgment and having regard to the applicable national law, it does not seem, subject to verification by the referring court, that it can be ruled out that Saudaçor is to be considered to be part of the public administration of the RAA.

61 In that regard, as is apparent from the documents submitted to the Court, in so far as it was established by the State as a limited company following a process of transformation by decentralising the functions of an existing State body, Saudaçor resembles in some respects a legal person governed by private law and enjoys a degree of autonomy vis-à-vis the State in its operation and day-to-day management.

62 However, and still subject to verification by the referring court, some of the characteristics of Saudaçor seem to support its classification as a body governed by public law within the meaning of Article 13(1) of Directive 2006/112.

63 Genuine autonomy on the part of Saudaçor seems limited because of the fact that its capital, which is not open to equity investments by individuals, is 100% owned by the RAA, which, with the exception of services provided to third parties in connection with so-called 'ancillary' activities, which, it is undisputed, are of marginal importance, is in addition its only 'client'. Those considerations are capable of showing that the RAA is in a position to exercise decisive influence over the activities of Saudaçor.

64 This is also confirmed by the fact that, in accordance with Clause 3(a) of the first of the programme agreements concluded between Saudaçor and the RAA and Clause 3(1)(a) of the second of those agreements, Saudaçor is to accomplish its task in accordance with the guidelines set by the RAA and that, pursuant to Clause 3(h) of the first of those agreements and Clause 3(1)(g) of the second of those agreements, Saudaçor is subject to supervision by the RAA.

65 Moreover, Article 4(1) of Regional Legislative Decree No 41/2003/A provides that Saudaçor is governed by that instrument, by the articles of association annexed thereto, by the legal regime for public undertakings as provided for by Decree-Law No 558/99 and by private law. It is apparent that, within that framework, private law is secondary in relation to the rules establishing the legal regime for Saudaçor as a public undertaking.

66 Furthermore, whilst the detailed arrangements for the supply of services in respect of the planning and management of the regional health service must be covered by programme agreements, in particular regarding the compensation payable in respect of those services, which might suggest that Saudaçor operates on the market in question in competition with other private operators, the fact remains that, in the RAA, those services are performed exclusively by Saudaçor in accordance with its task provided for in Article 2(1) of Legislative Decree No 41/2003/A and that they are not awarded to private operators by means of, for example, a tender procedure.

67 In addition, an organisational link seems to exist between Saudaçor and the RAA, if only due to the fact that that company was established by a legislative act adopted by the legislature of the RAA for the purpose of providing that region with 'services of general economic interest in the field of health', as is apparent from Article 2(1) of Regional Legislative Decree No 41/2003/A.

68 Subject to the verification of that information by the referring court, it cannot therefore be ruled out that, in the light of an overall assessment taking account of the provisions of national law applicable to Saudaçor, that court will conclude that Saudaçor may be classified as a body governed by public law within the meaning of Article 13(1) of Directive 2006/112.

69 However, as has been noted in paragraph 51 of the present judgment, if the rule of treatment as a non-taxable person for VAT purposes laid down in that provision is to apply, a second condition laid down in that provision must also be satisfied, namely the condition that only activities carried out by a body governed by public law acting as a public authority are to be exempted from VAT.

70 The Court has consistently held that such activities are activities carried out by those bodies under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators.

The Court has also made it clear that the subject-matter or purpose of the activity is in that regard irrelevant and that the fact that the pursuit of the activity at issue in the main proceedings involves the use of powers conferred by public law shows that that activity is subject to a public law regime (see to that effect, inter alia, judgment in *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraphs 17, 19 and 22).

71 In that context, the Court has stated that the exemption provided for in the first subparagraph of Article 13(1) of Directive 2006/112 covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of powers conferred by public law (judgment in *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 31).

72 However, that second condition laid down in the first subparagraph of Article 13(1) of that directive would not be satisfied if, as the Portuguese Government submitted and subject to verification by the referring court, the powers conferred by public law available to Saudaçor under Article 10 of Regional

Legislative Decree No 41/2003/A did not amount to an instrument that could be used by Saudaçor in order to carry out the activities at issue in the main proceedings, namely the activities concerning the planning and management of the regional health service, the liability of which to VAT is disputed, since they are used for carrying out other activities.

73 Moreover, even if it were to be concluded that Saudaçor is a body governed by public law and it were held that it exercises the economic activity at issue in the main proceedings as a public authority, it follows from the second subparagraph of Article 13(1) of Directive 2006/112 that an entity such as Saudaçor would not, however, be exempted from VAT if it were to be found that its treatment as a non-taxable person would lead to significant distortions of competition.

74 In that regard, the Court has stated that the significant distortions of competition to which treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical (judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraph 91).

75 In the light of all of the foregoing considerations, the answer to the first, second and fourth questions is that Article 13(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, falls under the rule of treatment as a non-taxable person for VAT purposes, laid down by that provision, in a situation where that activity constitutes an economic activity within the meaning of Article 9(1) of that directive, if, which it is for the referring court to ascertain, it can be considered that that company must be classified as a body governed by public law and that it carries out that activity as a public authority, in so far as the referring court finds that the exemption of that activity is not such as to lead to significant distortions of competition.

In that context, the concept of 'other bodies governed by public law' within the meaning of Article 13(1) of that directive must not be interpreted by reference to the definition of 'body governed by public law' in Article 1(9) of Directive 2004/18.

Costs

76 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 (Fourth 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 an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, constitutes an economic activity within the meaning of that provision.**

2. **Article 13(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, falls under the**

rule of treatment as a non-taxable person for value added tax purposes, laid down by that provision, in a situation where that activity constitutes an economic activity within the meaning of Article 9(1) of that directive, if, which it is for the referring court to ascertain, it can be considered that that company must be classified as a body governed by public law and that it carries out that activity as a public authority, in so far as the referring court finds that the exemption of that activity is not such as to lead to significant distortions of competition.

In that context, the concept of 'other bodies governed by public law' within the meaning of Article 13(1) of that directive must not be interpreted by reference to the definition of 'body governed by public law' in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[Signatures]