Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 September 2020[1]

Case C-604/19

Gmina Wrocław
v
Dyrektor Krajowej Informacji Skarbowej

(Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland))

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 14(2)(a) – Concept of 'supply' of goods – Transformation of perpetual usufruct into ownership by operation of law – Transfer of the right to dispose of tangible property as owner – Fiction of a supply – Municipality as a taxable person where it collects fees for a statutory transformation)

I. Introduction

1. In these proceedings the Court must consider the VAT treatment of acquisition of ownership by operation of law against payment of a transformation fee. In the present case, land was encumbered by a special right in rem (perpetual usufruct). This meant that the 'economic owner' – who used the land as owner – and the 'formal owner' – to whom the land belonged under civil law – were different persons. Fees paid by the holder of the right of perpetual usufruct to the owner of the land were subject to Polish VAT.

2. As part of a reform of the law on property, the previous owners of the land have now, by operation of law, lost their ownership to the holders of the right of perpetual usufruct. The latter are required to continue to pay annual instalments for perpetual usufruct for 20 years or to make a one-off payment in the same amount. Are the fees now collected by the former owners still subject to VAT as before?

3. In this case it was a municipality's land that was affected. It must therefore also be clarified whether in this instance the municipality acted as a taxable person or as a public authority such that no VAT is incurred.

1 Original language: German.

II. Legal framework

A. EU law

4. The EU law framework is determined by Articles 2, 9, 13 and 14 as well as Articles 24 and 25 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). [2]

5. Under Article 2(1) of the VAT Directive, the supply of goods for consideration (point a) and the supply of services for consideration (point c) are subject to VAT.

6. Article 9(1) of the VAT Directive provides that 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

7. Article 13(1) of the VAT Directive lays down an exemption from VAT for certain activities of bodies governed by public law:

'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.'

8. Article 14(1) and (2) of the VAT Directive specifies when a supply of goods exists:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

(a) the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;

(b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.'

9. Article 24(1) of the VAT Directive defines supply of services:

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

2 OJ 2006 L 347, p. 1.

10. Article 25(c) of the VAT Directive provides:

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

…

(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.'

B. Polish law

11. These requirements under EU law were transposed into Polish law by the Law on the tax on goods and services ('the Law on VAT').[3] Article 7(1) of the Law on VAT states:

'Supply of goods … shall mean the transfer of the right to dispose of goods as owner, including:

(1) a transfer by order made by a public authority or by a person acting in the name of that public authority or a transfer by operation of law of the ownership of goods against payment of compensation; …

(6) the leasing of land in perpetual usufruct.'

12. The right of perpetual usufruct is regulated in the Law on immovable property management.[4] Under Article 12a(1) of the Law on immovable property management, the amounts owed by perpetual usufructuaries are subject to private law.

13. Under Article 32(1) of the Law on immovable property management, land leased in perpetual usufruct may be sold only to the perpetual usufructuary.

14. Article 32(2) of the Law on immovable property management makes clear that previously established rights of perpetual usufruct expire by operation of law on the day that a contract for the sale of the property is concluded.

15. Under Article 69 of the Law on immovable property management, the purchase price to be paid by the perpetual usufructuary includes an amount equivalent to the value of the right of perpetual usufruct of the land, determined on the day of its sale.

16. The Law on the transformation of the right of perpetual usufruct of land developed for residential purposes into ownership rights over that land ('the Law on transformation')[5] provides in Article 1(1) that on 1 January 2019 the right of perpetual usufruct of land developed for residential purposes is transformed into ownership rights over that land.

17. Article 7 of the Law on transformation lays down provisions concerning the fee to be paid. Under Article 7(2), the amount of the fee is equivalent to the annual fee for perpetual usufruct. Article 7(6) stipulates that the annual payment is to be made for a period of 20 years from the day of transformation. Article 7(7) establishes the option to make a one-off payment of the same amount upon request. Article 12(2) of the Law on transformation declares Article 12a of the Law on immovable property management to be applicable.

3 Ustawa o podatku od towarów i usług of 11 March 2004.

4 Ustawa o gospodarce nieruchomościami of 21 August 1997.

5 Ustawa o przekształceniu prawa użytkowania wieczystego gruntów zabudowanych na cele mieszkaniowe w prawo własności tych gruntów of 20 July 2018.

III. Facts

18. The dispute underlying the request for a preliminary ruling stems from a request for a tax ruling made by the Municipality of Wrocław (Wrocław, Poland) (the applicant in the main proceedings, 'the applicant') to the Dyrektor Krajowej Informacji Skarbowej (Director of the National Tax Information Bureau, 'the tax authority').

19. The applicant is a body governed by public law, but is also registered as an active taxable person. It was the owner of immovable property which was subject to a third-party perpetual usufruct.

20. Perpetual usufruct is a time limited, right in rem to use land, which confers on the holder a status similar to ownership. The perpetual usufructuary pays an annual fee to the owner during the perpetual usufruct. All the parties agree that such leasing in perpetual usufruct is to be classified as a supply of goods for consideration under Article 5(1)(1) in conjunction with Article 7(1)(6) of the Law on VAT. It also seems to be common ground that the municipality collects the payments from the perpetual usufructuary as a taxable person.

21. On the basis of the Law on transformation, ownership of immovable property was transferred to the respective perpetual usufructuaries on 1 January 2019. In return, the former owners receive an annual payment for a period of 20 years. The amount of the annual instalment corresponds exactly to the instalment previously payable annually for perpetual usufruct. Upon request, the transformation fee is also payable as a one-off payment.

22. The applicant wished to know from the tax authority whether these fees are also subject to VAT. By decision of 15 January 2019, the tax authority confirmed that to be the case. It considers the transformation of the right to be a continuation of the supply originally established through the leasing in perpetual usufruct. Accordingly, the transaction of transfer of ownership shares the same legal status as perpetual usufruct.

23. The applicant brought an action against that decision before the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland). It takes the view that the transformation fee is not subject to VAT. The perpetual usufructuary already had a status similar to ownership by virtue of perpetual usufruct and thus acquired the economic right of disposal over the land. If perpetual usufruct is now consolidated into ownership, the same land cannot be the object of a supply again. Furthermore, it acted here in the context of non-taxable activity as a public authority.

IV. Reference for a preliminary ruling

24. By decision of 19 June 2019, the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław) referred the following questions to the Court:

'(1) Does the transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law, such as in the circumstances of the present case, constitute a supply of goods within the meaning of Article 14(2)(a) of the VAT Directive, read in conjunction with Article 2(1)(a) thereof, which is subject to VAT?

(2) If the answer to Question 1 is in the negative, does the transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law constitute a supply of goods within the meaning of Article 14(1) of the VAT Directive, read in conjunction with Article 2(1)(a) thereof, which is subject to VAT?

(3) Does a municipality that charges fees for the transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law, such as in the circumstances of the present case, act as a taxable person within the meaning of Article 9(1) of the VAT Directive, read in conjunction with Article 2(1)(a) thereof, or as a public authority within the meaning of Article 13 of that directive?'

25. In the proceedings before the Court, written observations were submitted by the applicant, the Republic of Poland and the European Commission.

V. Legal assessment

A. The questions referred for a preliminary ruling

26. In essence, by its first and its second questions, the referring court is seeking to clarify whether the transformation of perpetual usufruct into ownership rights by operation of law is subject to VAT where in return a statutory fee is to be paid by the new owner. As these situations primarily concern land owned by bodies governed by public law, by its third question the court asks whether the municipality actually acted as a taxable person.

27. The first two questions can be answered together. However, in so far as they refer expressly to whether the transformation of the right of perpetual usufruct constitutes a supply of goods within the meaning of Article 14(2)(a) or Article 14(1) of the VAT Directive, the following should be noted.

28. The court is incorrect in its assumption, which evidently underlies the first two questions, that liability to VAT in this case is dependent on the existence of a supply. Taxable transactions exist not only in the case of a supply of goods under Article 2(1)(a) in conjunction with Article 14 of the VAT Directive, but also in the case of a supply of services under Article 2(1)(c) in conjunction with Article 24 of the VAT Directive. For the purposes of the VAT Directive, anything which does not constitute a supply of goods is a supply of services (Article 24(1) of the VAT Directive).

29. The distinction whether a taxable transaction is a supply of goods or a supply of services is important for the place of performance, the time of performance and the tax rate. However, it is immaterial for determining whether VAT is incurred in principle. In order to give the court an answer which will be of use to it, the questions therefore require some clarification.

30. Specifically, the court in fact wishes to know whether the transfer of ownership by operation of law in return for payment of a transformation fee constitutes a taxable transaction (supply of goods or supply of services for consideration) (see B) and whether the applicant acted as a taxable person in this regard (see C). If that is the case, the transformation of the right of perpetual usufruct into ownership by operation of law in return for a transformation fee is subject to VAT, as no exemption is applicable.

B. The first and second questions: transformation of the right of perpetual usufruct into ownership as a taxable transaction (supply of goods or supply of services for consideration)

31. With regard to the first and second questions, there are two conceivable solutions in my view. Either there are two isolated actions: the leasing of land in perpetual usufruct and the acquisition of land ownership rights by operation of law. If the latter does not constitute a supply of goods, then the transformation into ownership is a supply of services (see 1.). Or, taking an economic overview, the transformation represents the continuation of perpetual usufruct in that the Law on transformation subsequently extends the object of the supply (see 2.).

32. Regardless of which approach the Court may take (analysis in isolation or economic overview), a taxable transaction exists in both cases. Therefore, the question asked by the referring court regarding the interpretation of Article 14(2)(a) of the VAT Directive ultimately does not arise (see 3.).

1. Analysis in isolation of the transfer of ownership

33. On a formal analysis, the owner first transfers the right of disposal over the land to the perpetual usufructuary, which constitutes a taxable supply of goods within the meaning of Article 14(1) of the VAT Directive. In a second step, the right of perpetual usufruct is transformed into ownership by operation of law. If the transformation is not a supply of goods because the right of disposal had already been transferred to the holder of the right of perpetual usufruct, there is in any case a taxable supply of services under Article 24(1) of the VAT Directive.

34. Under Article 24(1) of the VAT Directive, transactions which do not constitute a supply of goods are taxable as a supply of services. According to the Court's case-law, a taxable supply of services for consideration requires only that there is a legal relationship between a provider of the service and a recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.[6] This is the case if there is a direct link between the service supplied and the consideration received.[7]

35. Not all payments necessarily result in taxable reciprocal performance. Taxation in the form of a tax on consumption occurs only where the recipient also obtains a consumable benefit.[8] There is thus no supply of services within the meaning of Article 24(1) of the VAT Directive where a payee receives a payment not as consideration for an identifiable service, but for other reasons (for example compensation for damage caused by delay[9] or for loss of profit[10]).[11]

36. In the present case, a consumable benefit for the previous perpetual usufructuary can be readily affirmed. Such a benefit exists here because, from an economic point of view, the perpetual usufructuary, as holder of the right of disposal, used the land as owner even before the transformation. As owner, however, it can now not only derive income from the land, but also transfer the land to third parties. The transformation of the right of perpetual usufruct into ownership is thus a consumable benefit. On an analysis in isolation, there is therefore a supply of services under Article 24(1) of the VAT Directive.

2. Economic overview: transfer of ownership as the mere continuation of the original supply of goods

37. Like Poland, however, I consider an economic overview to be more compelling in this case. Contrary to the view taken by the applicant, the transformation of perpetual usufruct into ownership is not irrelevant for VAT purposes, but is to be regarded as the continuation of a supply of goods under Article 14(1) of the VAT Directive.

6 See, most recently, judgments of 11 June 2020, *Vodafone Portugal* (C-43/19, EU:C:2020:465, paragraph 31); of 11 March 2020, *San Domenico Vetraria* (C-94/19, EU:C:2020:193, paragraph 21); and the leading judgment of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 14).

7 Judgments of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia* (C-295/17, EU:C:2018:942, paragraph 39); of 23 December 2015, *Air France-KLM and Hop!-Brit Air* (C-250/14 and C-289/14, EU:C:2015:841, paragraph 22); and of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440, paragraph 19).

8 See my Opinion in *MEO – Serviços de Comunicações e Multimédia* (C-295/17, EU:C:2018:413, points 35 and 36), with reference to the judgments of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraph 13), and of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72, paragraph 20).

9 Judgment of 1 July 1982, *BAZ Bausystem* (222/81, EU:C:1982:256, paragraph 8 regarding default interest).

10 Judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440, paragraph 35 regarding compensation for loss of profit suffered as a result of default).

11 Judgment of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72, paragraph 21); see also my Opinion in *MEO – Serviços de Comunicações e Multimédia* (C-295/17, EU:C:2018:413, points 35 and 36).

38. According to the Court's case-law, a supply of goods covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner.[12] If the recipient of a supply cannot dispose of property 'as owner', this does not exclude a supply if he can at least deal with it 'like an owner'.[13] This is made clear in certain language versions of the VAT Directive at least.[14]

39. This is also confirmed by the Court's case-law. The principles of the uniform application of EU law and equality require an autonomous and uniform interpretation of concepts in EU law.[15] This would be jeopardised if the existence of a supply of goods, which determined the acquisition of ownership under civil law, depended on the arrangements under national civil law. It is therefore immaterial to the concept of supply of goods whether ownership is transferred.[16] Accordingly, the right of disposal for the purposes of Article 14 of the VAT Directive cannot be equated with legal ownership. A supply of goods is not precluded, in the view of the Court, in the absence of a transfer of ownership under civil law.[17]

40. The economic right of disposal was acquired by the current owners upon the transfer of the right of perpetual usufruct. The perpetual usufructuary is able to use the land as owner. The transfer of perpetual usufruct is thus correctly regarded by all the parties as a taxable supply of goods under Article 14(1) of the VAT Directive, such that the annual fees are subject to VAT. This is explicitly mentioned by the referring court.

41. However, the applicant's conclusion that the transformation transaction is irrelevant for VAT purposes is incorrect. Previously the annual payments made by the perpetual usufructuaries to the owner served as consideration for the acquisition of the right of disposal over the land. They were therefore subject to VAT, as consideration for the supply of goods under Article 5(1) and Article 7(7)(6) of the Law on VAT. The fact that ownership has now also been transferred to the previous perpetual usufructuary, who pays a transformation fee rather than perpetual usufruct instalments, cannot affect the status of the payments for VAT purposes.

42. The payments still relate to the supply of the land. The previous perpetual usufructuary continues to pay a fee for the acquisition of the right of disposal over the land. The transformation transaction consists merely in a modification of the object of the supply. Originally the consideration was paid for perpetual usufruct alone, now it is for perpetual usufruct consolidated into ownership.

43. This is also clear from the arrangements governing the transformation fee, as is rightly asserted by Poland. The previous perpetual usufructuary still pays the instalments it owes for perpetual usufruct, but under modified terms. The amount of the fee paid in connection with the transformation of ownership corresponds exactly to the amount payable annually for perpetual usufruct.

12 Judgments of 2 July 2015, *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 29); of 18 July 2013, *Evita-K* (C-78/12, EU:C:2013:486, paragraph 33); of 3 June 2010, *De Fruytier* (C-237/09, EU:C:2010:316, paragraph 24); of 14 July 2005, *British American Tobacco and Newman Shipping* (C-435/03, EU:C:2005:464, paragraph 35); and of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraph 7).

13 My Opinion in *Herst* (C-401/18, EU:C:2019:834, point 34).

14 Thus, according to the German and French language versions, 'wie ein Eigentümer' and 'comme un propriétaire' respectively, whereas in the English and Estonian language versions ('as owner' and 'Kaubatarne on materiaalse vara omanikuna käsutamise õiguse üleminek' respectively). See my Opinion in *Herst* (C-401/18, EU:C:2019:834, footnote 16 in point 34).

15 Judgments of 21 June 2018, *Oberle* (C-20/17, EU:C:2018:485, paragraph 33), and of 29 July 2019, *B (Turnover of a second-hand car dealer)* (C-388/18, EU:C:2019:642, paragraph 30).

16 Judgments of 13 June 2018, *Gmina Wrocław* (C-665/16, EU:C:2018:431, paragraph 39); of 2 July 2015, *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 29); of 16 February 2012, *Eon Aset Menidjmunt* (C-118/11, EU:C:2012:97, paragraph 39); of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73, paragraph 32); and of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraphs 7 and 8).

17 Judgment of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraph 9).

44. Where the option of a one-off payment is available upon request under Article 7(7) of the Law on transformation or a limit of 20 annual instalments is established under Article 7(6) of the Law on transformation, this is merely an adjustment of the terms of payment. It does not affect the legal basis for the payment. The aim of the Law on transformation seems to be solely to resolve the previous divergence between formal and material ownership. Both the payment obligation and the amount of the fee follow from the original transfer of perpetual usufruct and should therefore also be regarded from an economic point of view uniformly as consideration for that supply.

3. Supply of goods within the meaning of Article 14(2) of the VAT Directive?

45. Whatever approach is adopted by the Court, the interpretation of Article 14(2)(a) of the VAT Directive, under which the transfer, in pursuance of the law, of the ownership of property against payment of compensation is to be regarded as a supply of goods, is therefore immaterial. A taxable transaction exists in any case.

46. The referring court is nevertheless seeking clarification of the relationship between Article 14(1) and Article 14(2)(a) of the VAT Directive. In the context of the relationship of cooperation with the national courts the Court answers their questions as far as possible. However, the question asked by the referring court appears to be based on a false assumption. It seemingly assumes that Article 14(2)(a) of the VAT Directive deems a supply of goods to exist in the absence of a transfer of the right of disposal within the meaning of Article 14(1) of the VAT Directive.

47. The Court has once ruled[18] – albeit in a case where there was a supply of goods under Article 14(1) of the VAT Directive[19] – that Article 14(2)(a) constitutes a *lex specialis* in relation to Article 14(1) of the VAT Directive. It also deemed a supply to exist in the absence of the acquisition of control.[20] However, on closer analysis, this is precluded by the wording and the scheme of that provision (see points 48 and 49), its history (see points 50 and 51) and teleological considerations (see point 52 et seq.).

48. It follows from the wording and the scheme of Article 14 of the VAT Directive that Article 14(2)(a) of the VAT Directive always presumes a supply of goods to exist. It refers to the 'transfer of the ownership'. A transfer of ownership is the classic case of a supply of goods under Article 14(1) of the VAT Directive.[21]

49. The parallel provision in Article 25(c) of the VAT Directive also militates against a *lex specialis* relationship. It makes it absolutely clear ('inter alia') that the supply of services in accordance with the basic requirement under Article 24(1) of the VAT Directive includes those which are forced to be performed. Article 25 of the VAT Directive is thus important only as a standard example. That provision certainly does not deem anything to exist. This understanding can also be applied to the relationship between Article 14(1) and Article 14(2)(a) of the VAT Directive.[22]

18 Judgment of 13 June 2018, *Gmina Wrocław* (C-665/16, EU:C:2018:431, paragraph 36), in which the Court followed the Opinion of Advocate General Bobek (*Gmina Wrocław* (C-665/16, EU:C:2018:112, point 47)).

19 In that case the conveyed property merely continued to be managed by the municipality that had lost ownership rights. However, the management of a third-party property cannot be equated with the right of disposal for the purposes of Article 14(1) of the VAT Directive. Because of the imprecise questions referred for a preliminary ruling, this was not addressed by the Court.

20 Judgment of 13 June 2018, *Gmina Wrocław* (C-665/16, EU:C:2018:431, paragraph 36 et seq.).

21 See, for example, judgment of 19 December 2018, *AREX CZ* (C-414/17, EU:C:2018:1027, paragraph 78).

22 See judgment of 4 May 2017, *Commission* v *Luxembourg* (C-274/15, EU:C:2017:333, paragraph 88), in which the Court itself makes links between Article 14(2)(c) of the VAT Directive and the parallel provision applicable to the supply of services (Article 28 of the VAT Directive).

50. This also reflects the will of the legislature. Article 14(2)(a) of the VAT Directive goes back to Article 5(4) of Sixth VAT Directive,[23] which is in turn based on Article 5(2)(f) of the Proposal for a Sixth Council Directive,[24] which states: 'The following shall also be considered supplies within the meaning of paragraph 1: … (f) the transfer, by order made by or in the name of a public authority, of the ownership in property against payment of compensation, where the transfer of such property by private agreement would attract liability to the tax.'

51. The provision was therefore intended to ensure a parallelism between the VAT treatment of a normal transfer by private agreement and of a transfer of ownership by order made by a public authority.

52. From a teleological point of view too, the view that Article 14(2)(a) of the VAT Directive implies the fiction of a supply of goods in the absence of the transfer of the right of disposal[25] is unconvincing.

53. This is confirmed if we consider the other two alternatives in Article 14(2) of the VAT Directive. Article 14(2)(b) or (c) of the VAT Directive also do not simply establish the fiction of a supply. Article 14(2)(b) of the VAT Directive merely makes clear that a supply of goods exists overall in the case of finance leasing, for example,[26] regardless of the order in which the economic right of disposal and ultimately ownership are transferred.

54. A specific purpose is also apparent in Article 14(2)(c) of the VAT Directive, which relates to commission transactions. Although the agency work provided by the commission agent to the principal should be treated in principle as a supply of services under Article 24(1) of the VAT Directive, Article 14(2)(c) reclassifies it as a supply of goods in the case of a sales commission. The provision thus creates a fiction of two identical supplies of goods made consecutively[27] in order to ensure a parallelism in the assessment for VAT purposes between the transactions between the commission agent and the principal, on the one hand, and between the commission agent and the purchaser, on the other.

55. However, there is no clear reason, in the context of Article 14(2)(a) of the VAT Directive, why a supply of goods should be deemed to exist in a case where ownership is transferred separately from the right of disposal. On the contrary, such an interpretation in cases like the present one would lead to duplication of the supply of goods which runs counter to the system. Goods which have already been supplied once to the purchaser cannot be supplied to the same purchaser a second time. There is no risk of a gap in taxation in view of the catch-all definition of supply of services under Article 24(1) of the VAT Directive.

56. The regulatory content of Article 14(2)(a) of the VAT Directive thus amounts to no more than a clarification that a (forced) transfer of ownership on the basis of public law is subject to VAT as a supply of goods within the meaning of Article 14(1) of the VAT Directive if a comparable transaction under private law would constitute such a supply. This is ultimately also suggested by the fact that the legislature may have had in view above all situations such as expropriation or enforcement.[28] In both these cases the right of disposal over the goods is undoubtedly transferred.

23 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 1977 L 145, p. 1).

24 Proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes, COM(73) 950 final.

25 See Opinion of Advocate General Bobek in *Gmina Wrocław* (C-665/16, EU:C:2018:112, point 52).

26 Opinion of Advocate General Szpunar in *Mercedes-Benz Financial Services UK* (C-164/16, EU:C:2017:414, point 41).

27 Judgments of 4 May 2017, *Commission* v *Luxembourg* (C-274/15, EU:C:2017:333, paragraph 88), and of 14 July 2011, *Henfling, Davin, Tanghe* (C-464/10, EU:C:2011:489, paragraph 35).

28 With regard to supplies of goods effected through enforcement, see for example judgment of 26 March 2015, *Macikowski* (C-499/13, EU:C:2015:201, paragraph 33 et seq.).

C. The third question: no activity as a public authority

57. By the third question, the referring court asks whether in the present case the municipality is actually acting as a taxable person within the meaning of Article 9 of the VAT Directive. If the municipality collects the transformation fee as a body governed by public law in the exercise of an activity in which it engages as a public authority, the exception under the first subparagraph of Article 13(1) of the VAT Directive could preclude a taxable transaction.

58. Even if – as is suggested in the written observations submitted by Poland – the statutory transformation of the right of perpetual usufruct in Poland was intended to apply above all or even exclusively to land owned by bodies governed by public law, Article 13 of the VAT Directive is not relevant here.

59. The background to this provision is that certain activities, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority[29] which are reserved solely for bodies governed by public law. A distortion of competition can then be ruled out.

60. Bodies governed by public law therefore act as public authorities, according to the Court's case-law, only where they act under a special legal regime applicable to them and specifically do not pursue activities under the same legal conditions as those that apply to private economic operators.[30]

61. Neither the loss of ownership nor the collection of the transformation fee appears to be an exercise of public authority here. It is true that the Law on transformation requires the municipality to conduct an administrative procedure. However, the fee payable by the previous perpetual usufructuaries is not fixed by the municipality in an administrative procedure as a public authority under a special legal regime applicable to it.

62. Instead, the municipality receives the payment in its capacity as the previous owner of the land. It is also immaterial that the transformation by operation of law forms part of the revision of property law relating to the acquisition of public land, which was evidently prohibited during communist times and which is why at that time recourse was had to the instrument of perpetual usufruct. From an economic point of view, the current transfer of ownership constitutes a continuation of the supply of goods connected with the leasing of land in perpetual usufruct (see above, 2.). As the Commission rightly asserts, the obligation to pay a fee is thus connected with the surrender of the perpetual usufruct of the municipal land. This has its basis in civil law, however.

63. Consequently, the municipality also acted as a taxable person in the collection of perpetual usufruct instalments. There is therefore no reason to classify the municipality's activity now any differently than previously.

64. In this regard, the Law on transformation is without prejudice to the (civil-law) legal character of the fee. This is confirmed by Article 12(2) of the Law on transformation. It refers expressly to Article 12a of the Law on immovable property management, which establishes the civil-law legal character of the fees paid by the perpetual usufructuary.

29 Judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 31).

30 Judgments of 13 June 2018, *Gmina Wrocław* (C-665/16, EU:C:2018:431, paragraph 48); of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 21); of 12 September 2000, *Commission* v *Greece* (C-260/98, EU:C:2000:429, paragraph 35); and of 14 December 2000, *Fazenda Pública* (C-446/98, EU:C:2000:691, paragraph 17).

D. Conclusion

65. I therefore propose that the Court should rule as follows:

(1) The transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law, such as in the case at issue, constitutes a supply of goods within the meaning of Article 14(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 2(1)(a) thereof, which is subject to value added tax (VAT).

(2) A municipality that charges fees for the transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law, such as in the circumstances of the present case, acts as a taxable person within the meaning of Article 9(1) and not as a public authority within the meaning of Article 13 of Directive 2006/112.