Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 14 January 2021 [1]

Case C-846/19

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

(Request for a preliminary ruling
from the tribunal d'arrondissement (Luxembourg) (District Court, Luxembourg))

(Reference for a preliminary ruling – Harmonisation of fiscal legislation – Value added tax (VAT) – Concepts of economic activity and of services closely linked to welfare and social security work – Concept of bodies recognised as being devoted to social wellbeing – Powers of representation of adults – Liability to VAT)

1. Are the services provided by a lawyer under a scheme for the protection of adults lacking legal capacity subject to value added tax (VAT)?

2. Can those services be likened to 'services closely linked to welfare work'?

3. Can a professional registered with a professional association be deemed to be a 'body recognised as being devoted to social wellbeing', and to what extent?

4. Those are the principal questions central to the case being brought today in a dispute between EQ and the Administration de l'Enregistrement, des Domaines et de la TVA (the Luxembourg Registration, Land and VAT Authority) ('the tax authority').

5. Essentially, the Court of Justice is being asked to rule on the scope of the concepts cited above, laid down in Article 132(1)(g) of Directive 2006/112/EC [2] ('the VAT Directive'), and on the limits on the discretion of Member States in terms of introducing additional conditions to those laid down in the directive.

1 Original language: Italian.

2 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

I. Legal framework

A. EU law

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

'The following transactions shall be subject to VAT:

…

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

7. Under Article 9(1) of the VAT 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.'

8. Article 131 of the VAT Directive provides:

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

Chapter 2 of Title IX of the VAT Directive is entitled 'Exemptions for certain activities in the public interest'. That chapter comprises Articles 132 to 134.

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

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

B. Luxembourg law

10. Article 4(1) of the Luxembourg Law on VAT of 12 February 1979 ('the Law on VAT'), in the version applicable to the facts in the main proceedings, lays down as follows:

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

11. Article 5 of the Law on VAT lays down as follows:

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

12. In accordance with Article 44(1)(o) of the Law on VAT:

'1. The following shall be exempted from value added tax within the limits and under the conditions to be laid down by Grand-Ducal Regulation:

…

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

…'

13. The implementing conditions for Article 44(1) of the Law on VAT (as amended) are laid down in the Grand-Ducal Regulation of 23 December 1981 ('the Grand-Ducal Regulation'). Article 3 of that regulation lays down as follows:

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

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

II. The facts, the main proceedings and the questions referred for a preliminary ruling

14. EQ has been a lawyer of the Luxembourg bar since 1994 and has, since 2004, exercised powers of representation under schemes for the protection of adults lacking legal capacity (primarily as a curator and as a guardian).

15. Until 2013, the tax authority took the view that that activity was not subject to VAT.

16. By two VAT notices of 19 January 2018, relating to the years 2014 and 2015, the tax authority has requested a VAT payment from EQ for his activities representing adults lacking legal capacity carried out in those years. In so doing, the tax authority has decided to make those representation activities subject to VAT for the first time.

17. By a decision of 4 June 2018, the tax authority dismissed the action brought by EQ against the two VAT notices.

18. EQ then brought an action before the referring court, the tribunal d'arrondissement of Luxembourg (District Court, Luxembourg), requesting that the decision of 4 June 2018 be set aside.

19. EQ asserts that the services in question are not economic activities subject to VAT because they perform a social function.

20. In his view, those activities are exempt from VAT under the national provision transposing Article 132(1)(g) of the VAT Directive, namely Article 44(1)(o) of the Luxembourg Law on VAT, which recognises an exemption from VAT for the supply of services closely linked to social security and welfare work carried out by bodies that have been recognised by the competent public authorities as being devoted to social wellbeing.

21. EQ submits that those activities were not subject to VAT from 2004 to 2013, so that making them subject to VAT for the years 2014 and 2015 would therefore constitute an infringement of the principle of the protection of legitimate expectations.

22. The referring court has stated that Luxembourg law covers various schemes for the protection of adults lacking legal capacity. The application of those protection schemes may result in the appointment of a special representative by the guardianship judge, pending a decision on the protection scheme to be applied, and of an ad hoc representative in the case of a conflict of interest.

23. The referring court asks, first of all, whether the activities relating to the protection of adults, undertaken for financial consideration, constitutes an economic activity under Article 9(1) of the VAT Directive.

24. With regard to the amount of the financial remuneration, although it follows from the case-law of the Court of Justice that the fact that the price paid for an economic transaction is lower than the cost price is irrelevant, the remuneration must, however, be determined in advance and must cover the operating costs of the service provider.[3] In this case, the remuneration is determined on a case-by-case basis by the competent court, in all cases on the basis of the financial position of the recipient; the remuneration is therefore not determined in advance and does not necessarily guarantee in all circumstances that the costs incurred by the supplier of the services are covered.

25. Furthermore, the referring court asks whether activities associated with the protection of adults lacking legal capacity can be exempted from VAT, and therefore whether the abovementioned activities constitute 'the supply of services and of goods closely linked to welfare and social security work' under Article 132(1)(g) of the VAT Directive, and whether the lawyer carrying out those activities can fall within the concept of 'bodies recognised by the Member State concerned as being devoted to social wellbeing' under that same provision. On this point, EQ assumes a position that takes into account the nature of the activity carried out regardless of the legal status of the service provider, whereas the tax authority argues that the legal status of the person concerned must be taken into account and, without expressly saying so, that service providers operating for profit must be excluded.

26. The referring court also asks for clarification as to the concept of 'recognition' of the body concerned as being devoted to social wellbeing. Although the VAT Directive simply refers to recognition 'by the Member State concerned', it does not explain the recognition process or specify the body authorised for the purposes of recognition. The facts of the present case raise, inter alia, questions as to whether the authority concerned can be a judicial authority and whether recognition can be carried out on a case-by-case basis.

3 See judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.* (C-182/17, EU:C:2018:91, paragraph 38).

27. Lastly, the referring court asks about the applicability of the principle of the protection of legitimate expectation in the present case. The court notes that VAT is not a tax payable by the taxable person but by the end consumer. Where, as in the present case, the authority responsible for collecting VAT informs the taxable person after the transactions in question have been carried out that it intends to depart from its earlier position of not subjecting those transactions to VAT, the taxable person is in a position where he or she could not charge VAT to the recipient of those supplies, while having to remit it to the State. The taxable person would therefore be required to pay the amounts claimed by the State in respect of VAT from his or her own funds, which would infringe the principle of fiscal neutrality of VAT.

28. In these circumstances, the tribunal d'arrondissement (District Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the concept of "economic activity" within the meaning of the second subparagraph of Article 9(1) of Directive [2006/112] to be interpreted as including or excluding supplies of services provided in the context of a triangular relationship in which the provider of the services is appointed to provide those services by an entity which is not the same person as the recipient of the supplies of services?

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

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

(4) Is the concept of "economic activity" within the meaning of the second subparagraph of Article 9(1) of Directive [2006/112] to be interpreted as including or excluding supplies of services where the remuneration of the service provider is not a legal requirement and the amount of the remuneration, where it is awarded, (a) is based on a case-by-case assessment, (b) is always dependent on the financial position of the recipient of the services, and (c) is calculated by reference to a fixed amount, a percentage of the income of the recipient of the services or the services performed?

(5) Is the concept of "the supply of services and of goods closely linked to welfare and social security work" contained in Article 132(1)(g) of [Directive 2006/112] to be interpreted as including or excluding services performed in the context of a scheme for the protection of adults [lacking legal capacity] established by law and subject to the control of an independent judicial authority?

(6) Is the concept of "bodies recognised as being devoted to social wellbeing" contained in Article 132(1)(g) of [Directive 2006/112] to be interpreted, in view of the recognition of the social character of the body, as laying down certain requirements vis-à-vis the way in which the service provider operates or as regards the not-for-profit or profit-making objective of the activity of the service provider, or more generally as restricting by other criteria or conditions the scope of the exemption provided for in Article 132(1)(g), or is the performance of services "linked to welfare and social security work" alone sufficient to give the body at issue a social character?

(7) Is the concept of "bodies recognised as being devoted to social wellbeing" contained in Article 132(1)(g) of [Directive 2006/112] to be interpreted as requiring a recognition process based upon a pre-defined procedure and pre-determined criteria, or is ad hoc recognition possible on a case-by-case basis, where appropriate by a judicial authority?

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

III. Legal analysis

29. The questions referred are essentially intended to determine whether the activities carried out by a lawyer, as an agent, curator and guardian of adults lacking legal capacity, are subject to VAT or whether an exemption applies.

30. As suggested by the Commission, the eight questions referred can be subdivided into three groups:

(A) the first four relate to the concept of economic activity, and in particular whether the abovementioned activities fall within the concept of economic activity under Article 9(1), taken together with Article 2(1)(c) of the VAT Directive;

(B) the fifth, sixth and seventh questions relate to the scope of the exemption provided for under Article 132(1)(g) of the VAT Directive, and in particular whether those activities are exempt as 'services closely linked to welfare and social security work' and whether the lawyer carrying out those services can be considered 'a body recognised by the Member State concerned as being devoted to social wellbeing' under that same provision;

(C) the final question referred aims to clarify whether the principle of the protection of legitimate expectations precludes a situation where those activities could be liable to VAT where the tax authorities have agreed, in the past and for a lengthy period, that they were not liable to that tax.

31. As requested by the Court, this Opinion will focus on the fifth, sixth and seventh questions referred – grouped under (B) above – which relate to the scope of the exemption for services closely linked to welfare and social security work. The economic nature of the services on the basis of the criteria indicated by Article 9(1) of the VAT Directive – covered by the group of questions under (A) above – will therefore be taken as read.

32. I should note first that the interest in the questions being examined extends beyond the present case, since the Court currently has another similar action before it, referred by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) on this same issue, relating to a single question referred that broadly overlaps the questions included in group (B).[4]

33. In case C-1/20 too, the applicant is a lawyer whom the court frequently appoints as representative of adults lacking legal capacity. The tax office has determined that the revenues from the activities carried out by the lawyer in the capacity of representative are liable to the payment of VAT. The applicant brought an action before the Bundesfinanzgericht (Federal Finance Court, Austria), which dismissed the case on the basis that the professional category of lawyers cannot be regarded as bodies devoted to social wellbeing.

34. Nonetheless, a reading of the request for a preliminary ruling from the Austrian court reveals a series of elements that may also be useful in responding to the questions in the present case.

4 Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court) lodged on 3 January 2020, *B* v *Finanzamt Wien* (C-1/20).

35. In particular, for the purposes of this Opinion, it is important to note the circumstance that 'the Bundesfinanzhof [(the German Federal Finance Court)], ruling on the question of the activities governed by § 1896 of the Bürgerliches Gesetzbuch (BGB) [(the German Civil Code)], comparable in German law to those of a professional curator, reached the conclusion that those individuals could rely on the tax exemption laid down by Article 132(1)(g) of [the VAT Directive], except in the case of remunerated services carried out by a lawyer appointed as a curator who performs legal activities in the context of the curatorship [(judgment of the Bundesfinanzhof (Federal Finance Court) of 25 April 2013, V R 7/11)]. The case-law cited prompted the German legislature to include an exemption for those services in [§ 4(16)(k) of the Umsatzsteuergesetz (German Law on Turnover Tax)]'. [5]

36. To respond to the questions referred to the Court grouped under (B) above, we should note that, according to the Court's settled case-law, Article 132(1)(g) of the VAT Directive states that the exemption from payment of VAT provided for under that provision will apply only if two conditions are met: the services in question must be 'closely linked to welfare and social security work' and they must be carried out by 'bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing'. [6]

37. We must therefore determine whether the activities carried out by a lawyer in the capacity of agent, curator or guardian of an adult lacking legal capacity fall within the scope of the VAT exemption laid down in Article 132(1)(g) of the VAT Directive, and therefore whether those activities are 'closely linked to welfare and social security work' and whether the lawyer responsible for carrying them out can be considered as a 'body recognised by the Member State concerned as being devoted to social wellbeing'.

38. Specifically, we must determine whether the interpretation proposed by the Luxembourg Government – whereby a lawyer carrying out those activities should be excluded from the VAT exemption – is in line with a textual, systematic and purposive interpretation of Article 132(1)(g) of the VAT Directive [7] and, moreover, whether Member States have a degree of discretion to introduce such an exclusion for interpretative purposes.

39. According to the settled case-law of the Court, 'the wording used to describe the exemptions provided for in Article 132 of the VAT Directive should be interpreted restrictively', [8] since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.

40. However, that strict interpretation on the part of the Member State when transposing the directive must not go so far as to render the implementation of the scheme of exemptions so excessively difficult as to rob them of their effect as autonomous concepts.

41. It is therefore necessary to consider the underlying purpose of the provision concerned.

42. The purpose of the VAT Directive is to harmonise national laws so as to establish a common system of value added tax and, thus, a uniform basis of assessment.

5 Case C-1/20, request for a preliminary ruling, paragraph 41. In the written answers to the Court's questions, and in particular in the response to question 3, EQ states that in Belgium lawyers appointed as temporary guardians for adults lacking legal capacity are not liable to VAT on their remuneration for those activities but they are liable to VAT for other services that they provide as lawyers.

6 See judgments of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 30); of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 21); and of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 34).

7 See judgment of 21 September 2017, *DNB Banka* (C-326/15, EU:C:2017:719, paragraph 29 and the case-law cited).

8 See, most recently, judgment of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 28).

43. The interpretation of the terms contained in the VAT Directive must therefore be consistent with the objectives underlying the exemptions and must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. The terms used to describe the exemptions laid down in Article 132 must therefore not be construed in such a way as to deprive them of their intended effects. [9]

44. By treating certain supplies of services in the public interest in the social sector more favourably for the purposes of VAT, that exemption is indeed intended to reduce the cost of those services and to make them more accessible to the individuals who may benefit from them. [10]

45. The case file would seem to indicate, at least in the applicant's arguments in the main proceedings, that even the Luxembourg Ministry of Justice is of the view that welfare and social services should be exempt from VAT, even if carried out by lawyers, so as not to increase the cost charged to society. [11]

(a) The condition whereby the supply of services must be 'closely linked to welfare and social security work'

46. The concept of a 'close link', therefore, according to the social care rationale that characterises it on the basis of its purpose, does not require a particularly strict interpretation, in particular given the fact that the exemption provided for in Article 132(1)(g) of the VAT Directive is subject to the further condition that the services concerned must be 'essential' to the welfare and social security work in accordance with Article 134(a) of that directive. [12]

47. Although the concepts of 'welfare and social security work' are not defined in the VAT Directive, the case-law of the Court has on several occasions recognised the social nature of certain activities associated with the care, assistance and protection of adults who are not self-sufficient.

48. In the judgment in *Kügler*, [13] the Court held that the provision of general care and domestic help by an out-patient care service to persons in a state of physical or economic dependence amounts to the supply of services closely linked to welfare and social security work within the meaning of Article 13A(1)(g) of the Sixth Directive. [14]

49. Similarly, in the judgment in *Zimmerman*, [15] it was not disputed by the parties that the out-patient services, provided by a professional nurse, could be regarded as 'closely linked to welfare and social security work' in accordance with Article 13A(1)(g) of the Sixth Directive.

9 See judgments of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 28), and of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 22). To that effect, still with reference to the interpretation of that provision, see judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing* (C-407/07, EU:C:2008:713, paragraph 30 and the case-law cited). The Court asserts that, although a strict interpretation is necessary, this does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive them of their intended effects or such as to make them more or less inapplicable in practice.

10 See judgments of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 29); of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 41); and of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 30).

11 See request for a preliminary ruling, p. 3, in the description of the arguments of the applicant in the main proceedings.

12 See judgment of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 31).

13 See judgment of 10 September 2002 (C-141/00, EU:C:2002:473, paragraph 61).

14 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'). The Sixth Directive was repealed and replaced, from 1 January 2007, by the VAT Directive.

15 See judgment of 15 November 2012 (C-174/11, EU:C:2012:716, paragraph 24).

50. It must also be acknowledged that the wording of Article 132(1)(g) of the VAT Directive expressly mentions the supply of services by old people's homes among the supply of services and of goods closely linked to welfare and social security work, which thus come under the exemption provided for by that provision. This circumstance has been noted by the Court in the judgment in *Les Jardins de Jouvence*.[16]

51. According to the case file, the appointment of a legal representative assumes that the adult is not able to take care of his or her own interests independently because that person is suffering from a psychiatric illness or mental disability, disabling ageing or another form of incapacity.

52. To assess the social nature of the activities carried out by the legal representative, and therefore to determine whether those activities are closely linked to welfare work, consideration should first be given to the specific nature of those activities. For this purpose, the written answers provided by the parties to the Court's question on this issue are particularly valuable.

53. In the view of the applicant in the main proceedings, the majority of the services carried out by lawyers appointed as agents, curators or guardians for adults lacking legal capacity involve the following: (1) visiting the persons concerned in their homes to ascertain their wellbeing and determine their needs; (2) contacting family members, social workers and individuals providing care; (3) deciding where they should live; (4) applying for pensions and social benefits; (5) organising home help; (6) paying invoices, obtaining reimbursements of medical expenses, preparing declarations of income and providing money for everyday expenses.

54. The representative may also be required to provide legal services, although those activities are not the exclusive province of lawyers: negotiating, signing or terminating lease agreements, selling real estate or personal property, or supporting or representing the adult in matters of inheritance. It is true that, according to Luxembourg national law, the close relatives of the recipient or institutions responsible for protecting individuals suffering from mental or physical problems can also be appointed as agents, curators and guardians.

55. Lastly, those activities can include services that fall within the exclusive remit of lawyers, such as representing an adult lacking legal capacity in a legal dispute, but services of this type are much less common.

56. The response provided by the Luxembourg Government on this point is that, according to the information collected by the Luxembourg Bar Association, the activities of a lawyer in this sector are numerous and varied and do not involve merely everyday representation but, rather, 'some of the activities of the lawyer could be classified as "social" activities: contact with social workers, doctors, banks and families. For example, lawyers are often required to manage care home admissions, to request financial support and to manage a move'.[17]

57. The responses provided by the parties to the Court's question as to the specific nature of the activities carried out by legal representatives do not therefore seem to diverge in substance: lawyers carry out a range of different activities for the adults lacking legal capacity and some of those activities can be classified as 'social' activities, including in the aforementioned sense of 'closely linked to welfare work'.

16 See judgment of 21 January 2016 (C-335/14, EU:C:2016:36, paragraph 42).

17 Written answers from the Luxembourg Government, paragraph 16.

58. What does diverge in the factual information provided by the parties is the extent and proportion of the activities undertaken: the applicant in the main proceedings contends that 'social' activities outweigh other activities, while the Luxembourg Government takes the view that such activities represent 'some' of the many types of activities carried out.

59. To determine the social nature of those representation activities, we must also consider certain elements laid down in the detailed provisions (in the present case, the Grand-Ducal Regulation): (a) the cost of those agents is borne by the State, if the adult lacking legal capacity does not have sufficient financial means; (b) the remuneration for the services, which must be set by the court, is determined in particular on the basis of the income and financial position of the adults lacking legal capacity; (c) the representative is subject to review by the court; and (d) the allowance paid is most often a flat-rate allowance and only rarely corresponds to services provided.

60. On the basis of the case file, those elements seem to be present in the present case.

61. We can therefore state, on the basis of the unanimous interpretation of the statements made by the parties, including the public sector party represented by the Luxembourg Government, that some of the activities carried out by the lawyer as agent, curator or guardian of adults lacking legal capacity can be considered to be 'closely linked to welfare work' because they are linked to the care of individuals who are lacking legal capacity and to their personal life choices, and are also 'essential' to the performance by the agent, guardian or curator of welfare actions, as they are necessary to guarantee the recipients decent living conditions in view of their mental or physical problems.[18] Those activities therefore represent activities that are an expression of the requirement for care, assistance and protection of individuals suffering from mental or physical problems, who would not otherwise be able to manage on their own. In particular, this covers the decision as to whether to place the person concerned in a care home appropriate for that person's needs or whether to organise care in the home.

62. As has also been recognised by the Luxembourg Government, in fact, the concept of 'welfare work' can also be described as assistance that enables a natural person to live with dignity in times of need.[19]

63. Asset management can be (at least in some cases) an activity that contributes to ensuring that the recipient can live with dignity and to protecting that individual from prejudicial acts of disposal.

64. Furthermore, living with dignity is definitely jeopardised if the specific activities of everyday life, including those of a financial nature, are not managed with the necessary prudence.

65. With reference to the second category of activities carried out by lawyers acting as agents, curators or guardians for adults lacking legal capacity, relating exclusively to the profession of lawyer, those activities represent a portion of the activities carried out by lawyers acting as agents, curators or guardians.

66. I do not believe that those activities carried out by lawyers acting as agents, curators or guardians in their capacity as professionals can be considered to be activities that are closely linked to welfare work and are essential to the services exempted. They are, in fact, professional activities that are the exclusive province of lawyers, which are undertaken in the exercise of an independent profession rather than to fulfil the social function of agent, curator or guardian.

18 See judgment of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 54).

19 Written answers from the Luxembourg Government, paragraph 14.

67. To assess whether the exemption applies for a lawyer carrying out activities that have a definite welfare and social security purpose such as those described above, we must determine whether the second condition required by the VAT Directive is met (recognition by the Member State as a body devoted to social wellbeing). It is my view that the two conditions are closely linked, in the sense that a significant prevalence of welfare activities can serve to determine the nature of the person performing the services, characterising that person as engaged in social work on a continuing basis and therefore deserving of recognition in that regard.

68. As we will see, in my view, if a lawyer undertakes predominantly social functions (closely linked to welfare work) different from those activities that are strictly law-related, that individual may enjoy the exemption in relation to the welfare and social security services provided. That exemption cannot be excluded solely by the fact that those activities are performed by a lawyer.

(b) The condition relating to recognition by the Member State as a body devoted to social wellbeing

69. Article 132(l)(g) of the VAT Directive does not specify either the conditions or the procedures for recognising bodies other than those governed by public law as being devoted to social wellbeing.

70. Consequently, it is in principle for the national law of each Member State to lay down the rules in accordance with which that recognition may be granted to such bodies. [20]

71. Specifically, under Article 132 of the VAT Directive Member States may grant the exemption provided for in subparagraph (g) of Article 132(1) to bodies other than those governed by public law, making this exemption subject to compliance with one or more conditions indicated in that article. Member States are free to impose those optional conditions on a supplementary basis for the granting of the exemption in question. [21]

72. It follows that Article 132(1)(g) of the VAT Directive grants the Member States discretion to recognise certain bodies not governed by public law as being devoted to social wellbeing. [22]

73. However, it should be noted that the first paragraph of Article 131 circumscribes the extent of the discretionary power available to the Member States, stating that they may introduce additional conditions to those stated in the directive for the purposes of 'ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse'.

74. The discretion that the Member States have in laying down the conditions for entitlement to the exemption cannot extend, therefore, to altering the substantive definition of the exemptions listed in the directive.

75. The words 'for the purposes of ensuring the correct and straightforward application of exemptions' are, in my view, intended to allow Member States to introduce national regulations that will not make it excessively difficult for economic operators to apply exemptions and that will possibly also streamline inspection procedures.

20 See judgments of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 43); of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 32); and of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 26 and the case-law cited).

21 See judgments of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 33), and of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 27 and the case-law cited).

22 See judgment of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 51 and the case-law cited).

76. Furthermore, the purpose of 'preventing any possible evasion, avoidance or abuse' clearly cannot refer to mere subjective exclusions not related to the specific nature of the activities carried out.

77. In any case, in the light of the general principles, it should be noted that the discretion available to the Member States must be exercised in line with EU law. [23]

78. When a taxpayer contests the recognition – or non-recognition – of a body as being devoted to social wellbeing under Article 132(1)(g) of the VAT Directive, it is for the national courts to examine whether the competent authorities have observed the limits on discretionary power granted by the abovementioned article while applying the principles of EU law, in particular the principle of equal treatment, which is represented in terms of VAT by the principle of fiscal neutrality. [24]

79. In the present case, the Luxembourg Government has not recognised EQ as a body devoted to social wellbeing in relation to the activities that he carries out as agent, curator and guardian. As I understand it, the Luxembourg Government believes this is precluded by his position as a lawyer.

80. The Court has already rejected in previous rulings the position that the professional category of lawyers may be considered, in principle, as a body devoted to social wellbeing. According to the Court, a Member State cannot apply a reduced rate of VAT to supplies of services provided by private profit-making entities merely on the basis of an assessment of the nature of those services without taking into account, inter alia, the objectives pursued by those entities viewed as a whole and whether they are engaged in social work on a continuing basis. In the light of its overall objectives and the fact that any engagement in social work is not permanent, the Court has determined that the professional category of lawyers and legal practitioners as a whole cannot be regarded as devoted to social wellbeing. [25]

81. On the basis of the same argument, the Court has ruled that the services rendered by lawyers under the national legal aid scheme are not exempt from VAT under Article 132(1)(g) of the VAT Directive. [26]

82. A case such as that at issue here does, however, seem to have some specific characteristics that could suggest that the applicability of the VAT exemption should not be excluded a priori.

83. As can be seen from the information provided above in relation to the types of services rendered by a lawyer in the role of agent, curator or guardian for an adult lacking legal capacity, at least some of those services have a definite social aspect and could therefore be considered closely linked to the concept of 'welfare work' as described above.

84. They are not, in fact, the exclusive province of lawyers, and indeed do not require that the individual performing them be a lawyer.

23 See judgments of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraphs 54 and 57), and of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraphs 51 and 52).

24 See judgments of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 56), and of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraphs 52 and 54).

25 See judgment of 17 June 2010, *Commission* v *France* (C-492/08, EU:C:2010:348, paragraphs 45 and 46).

26 See judgment of 28 July 2016, *Conseil des ministres* (C-543/14, EU:C:2016:605, paragraph 65).

85. I think at this point it is important to verify certain additional conditions that must be met for the VAT exemption to be compatible with a situation similar to the one in the present case: the importance of classification as a lawyer for a person carrying out the functions of agent, curator or guardian for an adult lacking legal capacity, and the extent and continuing nature of the engagement in social work by the person requesting the exemption, also for the purposes of establishing compliance with the limits on discretion by Member States in introducing additional conditions to those laid down in the directive for the recognition of the exemption.

86. All of those conditions must be specifically established by the national courts, but the Court is required to provide those courts with parameters to ensure that the determination is made in accordance with EU law.

87. If it is established that the condition whereby the services carried out must be closely linked to welfare work has been met, this would not be sufficient to hold that the second condition relating to recognition has also been met. That condition expressly requires that the person offering those services be recognised as a 'body devoted to social wellbeing'. [27]

88. In my view, the case-law of the Court should be interpreted as meaning that 'the intention of the [EU] legislature to make the option of applying a reduced rate refer only to supplies of services provided by organisations meeting that dual requirement would be frustrated if a Member State were free to classify private profit-making entities as organisations within the meaning of point 15 merely because those entities provide inter alia services related to social wellbeing'. [28]

89. However, I believe that the opposite is also true: the intention of the EU legislature would also be frustrated if a Member State were to refuse to classify as 'bodies devoted to social wellbeing' private bodies that, despite being profit-making (to a limited extent), provide social services in such a way as to demonstrate the continuing nature of their social engagement.

90. I do not believe, in fact, that the case-law of the Court cited above can be interpreted as precluding a priori the possibility of a VAT exemption under Article 132(1)(g) of the VAT Directive for persons who provide predominantly services that are closely linked to welfare work, demonstrating the continuing nature of their social engagement, solely because of the fact that they are professionally registered as lawyers.

91. This conclusion is based, in the first place, on the principle of proportionality, which is one of the general principles of EU law. The Court has on several occasions pointed out that the means employed for the implementation of the Sixth Directive must be appropriate to achieve the objectives stated in that measure and must not go beyond what is necessary in order to attain them. [29]

92. A failure to grant the exemption to a person simply because that person is professionally registered as a lawyer, however, could upset the balance of the provision of EU law with an 'exclusionary' intention that is alien to the spirit of the directive.

93. It would appear to be more correct to focus, in the implementation of the exemption, on the activity that the person is engaged in, rather than on the nature of the person himself or herself.

27 See judgments of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 30); of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 21); and of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 34).

28 See judgment of 17 June 2010, *Commission* v *France* (C-492/08, EU:C:2010:348, paragraph 44).

29 See judgments of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 25), and of 26 April 2012, *Commission* v *Netherlands* (C-508/10, EU:C:2012:243, paragraph 75).

94. In the second place, we must consider the application of the principle of fiscal neutrality. The circumstance that the taxpayer is classified as a lawyer should not result in different tax treatment compared to a taxpayer that, despite essentially providing the same services, is covered by the exemption, in the case that they are individuals or associations that provide similar services and have been recognised. [30]

95. Indeed, such an approach would be tantamount to focusing on the name of the taxable person concerned and could therefore conflict with the fact that consideration of the economic and commercial realities is a fundamental criterion for the application of VAT. This could also be problematic in terms of the principle of fiscal neutrality, which does not permit situations where similar economic transactions, which are thus in competition with each other, are treated differently for VAT purposes.

96. In the third place, it should be noted that the activities in question are carried out by the lawyer not by virtue of the lawyer's professional status, but following appointment by the court as an agent, curator or guardian for adults lacking legal capacity. The judicial authority grants the person appointed a specific function provided for by law for adults who are lacking legal capacity, conferring the power and duty to represent and protect the adults in question and to carry out the activities required to achieve that purpose. I would therefore ask whether the figure of agent, curator and guardian provided for under Luxembourg law could be viewed as a 'body recognised as being devoted to social wellbeing' because of the peculiar social dimension of that figure identified by law. In such a case, the recognition of the social nature of the function of agent, curator and guardian would derive directly from national law, while the judicial appointment decision would merely identify the person to whom the function is assigned.

97. Lastly, I am not entirely convinced by the assertions made by the Luxembourg Government and the Commission, that the fact that profit making is typical of the profession of lawyer is a fact precluding recognition.

98. The term 'body' is, in principle, sufficiently broad to include private bodies that operate for profit (on a limited basis). The fact that EQ performs some of his activities on a profit-making basis does not at all exclude the possibility that he might be classified as 'other bodies recognised by the Member State concerned as being devoted to social wellbeing', in accordance with Article 132(1)(g) of the VAT Directive. [31]

99. In my view, the above is subject to the proviso that the profit-making activities are limited, for the following reasons.

100. First of all, we should note that the remuneration for the services rendered by the lawyer may be paid by the State, if the adult lacking legal capacity does not have sufficient financial means.

101. This allowance, set on the basis of a Grand-Ducal regulation, as noted above, is never determined in advance, is not automatic – because it is subject to assessment by the court – and makes no distinction between the costs and services of the lawyer, and thus may in some cases not fully cover the costs. [32]

30 See judgment of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 49).

31 See judgments of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 39), and of 12 March 2015, *'go fair' Zeitarbeit* (C-594/13, EU:C:2015:164, paragraph 27 and the case-law cited).

32 See the responses from EQ to the questions from the Court, and in particular the response to question 1.

102. According to case-law referred to previously,[33] this circumstance can be included among the elements to be taken into consideration in establishing whether the body in question is devoted to social wellbeing and demonstrates that its social activities are carried out on a non-market basis, despite being in exchange for a fee.

103. The Court has already held that, when considering whether to recognise as bodies devoted to social wellbeing bodies other than those governed by public law, it is for the national authorities, in accordance with EU law and subject to review by the national courts, to take various factors into account. They include the existence of specific provisions; the public interest nature of the activities of the taxable person concerned; the fact that other taxable persons carrying out the same activities already enjoy similar recognition; and the fact that the costs of the services in question may be largely met by the State.[34]

104. In the present case, it seems to me that some of the indicative elements identified by the Court to recognise that a given body is devoted to social wellbeing can also be found in the following, albeit in part: the public interest nature of at least some of the activities carried out by the taxable person; the fact that other taxable persons carrying out the same activities already enjoy the exemption;[35] and the fact that at least some of the costs of those welfare and social services are borne by the State or, in any event, as in the present case, are always set by order and following assessment by the judicial authorities. It will naturally be a matter for the national court to determine whether those requirements are actually met in the main proceedings, but we should note that they are indicative elements and we should not consider that they all need to be present for the purposes of recognition.

105. Specifically because the situation in the present case cannot be considered as a matter of course to be one of those typical cases that entitles the recipient to the exemption, in my opinion and as can be seen indirectly from the case-law cited above, the real element that characterises the position of the person, for the purposes of whether that person can be considered a 'body devoted to social wellbeing', is the continuing nature of that person's engagement in social work.

106. This circumstance can be easy to identify when the corporate object or sole purpose of the person's activities is providing social and welfare services, but it is more difficult to determine (but cannot be excluded) when the person carries out a more structured activity such as that of a professional, inter alia, that of a lawyer.

107. I believe that in this case, because, as already stated, it is not possible to exclude a priori the possibility of recognition solely because of membership of a specific professional association, the criterion that could guide the national authorities in terms of recognition should be related to the preponderance of activities of a social nature over other activities that are also legitimately carried out.

108. Just like any other professional, a lawyer who primarily undertakes activities that can be described as 'services closely linked to welfare and social security work' can in my view be recognised as a 'body devoted to social wellbeing' including where that person also carries out activities of a strictly legal nature, even where those activities are not linked to social services.

33 See judgment of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 31 and the case-law cited).

34 See judgments of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 44); of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 35); and of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 31 and the case-law cited).

35 This requirement is the subject of divergent assertions from the applicant in the main proceedings and from the Luxembourg Government in the responses to the Court's written questions. It will therefore be a matter for the referring court to determine whether or not they exist.

109. In such a case, the professional must ensure that he or she keeps separate accounts that make it possible to differentiate, for VAT purposes, the (main) activities closely linked to welfare work from the different (residual) activities subject to VAT. [36]

110. In the light of the above, it will be a matter for the referring court to establish, taking into consideration all of the relevant elements, and in particular those mentioned, whether the national authorities, by not recognising EQ as a body devoted to social wellbeing, have observed the limits of the discretionary power afforded to them by Article 132 of the VAT Directive.

(c) The possibility for the national court to grant recognition

111. Certain final considerations in relation to the recognition procedure: the Luxembourg Government and, as I understand it, also the Commission assert that, in the Luxembourg system, the recognition of a taxable person as a body devoted to social wellbeing cannot be granted by a court, even where it is established that the Luxembourg State, by not making provision in its national law for the possibility of recognition for a specific taxable person, has exceeded the bounds of its discretion in that regard.

112. While it is true that Article 131 of the VAT Directive being examined leaves the Member States broad discretion in terms of recognising the bodies in question, the Court has explicitly held, specifically in relation to the interpretation of that directive, that 'the general nature of the directive in question or the discretion which … it leaves to the Member States may not be relied upon in order to deny any effect to those provisions which in view of their subject matter may be relied upon to good purpose before a court even though the directive as a whole has not been implemented'. [37]

113. It is first and foremost for the State to define that condition, but the Court has clarified that a Member State that has failed to adopt the implementing measures provided for in the directive 'may not plead its own omission in order to refuse to grant to a taxpayer an exemption which the taxpayer may legitimately claim under the Sixth Directive'. [38] Hence, if it is possible to reconstruct by other means the conditions for the recognition in question, the principles of EU law, and that of the effectiveness of the directives above all, require that the persons concerned not be prevented from exercising a right sanctioned by the directive in question.

114. We should note that, according to settled case-law, [39] wherever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State.

115. In the judgment in *Kügler*, the Court clarified that Article 132(1)(g) of the VAT Directive indicates in a sufficiently precise and unconditional manner the activities to which the exemption applies and is therefore a directly applicable provision. [40]

36 For the partial exemption only of certain activities and not others, see most recently (to the effect that the existence of services of a different kind does not alter the nature of the exemption) judgments of 20 November 2019, *Infohos* (C-400/18, EU:C:2019:992, paragraphs 42 and 43), and of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 54).

37 See judgment of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 30).

38 See judgments of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 60), and of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 32).

39 See judgment of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 51 and the case-law cited).

40 See judgment of 10 September 2002 (C-141/00, EU:C:2002:473, paragraph 53).

116. The lack of appropriate legislative recognition of the bodies in question cannot be considered in itself such as to prejudice the direct applicability of the provision, but it must be ascertained whether the law of the Member State involved does not also make it possible to reconstruct, by other means, some form of recognition, albeit only de facto, of the body as being devoted to social wellbeing.

117. To the extent that the Member States observe the limits of the discretion that is accorded to them by Article 132(1)(g) of the VAT Directive, individuals cannot rely on that provision in order to acquire the status of body devoted to social wellbeing in respect of the Member State concerned.

118. However, the direct effect recognised by the Court for the exemption in question [41] leads me to believe that, if the State of Luxembourg has exceeded the bounds of its discretion by not making provision for the possibility of recognition in this specific case, the referring court could, if necessary, award that recognition itself.

119. In that spirit, when an individual requests classification as a body devoted to social wellbeing, it is a matter for the national courts to establish whether the competent authorities have observed those limits by applying the principles laid down by EU law and to 'establish, in the light of all relevant factors, whether the taxable person is [a body] recognised as "[being devoted to social wellbeing]" for the purposes of that provision'. [42]

120. The solution proposed here does not extend the scope of the exemption beyond that laid down in the directive but merely makes it possible to grant the exemption to individuals who would be entitled to it within the meaning of the directive.

IV. Conclusion

121. In the light of the above considerations, I propose that the Court of Justice respond to the questions referred for a preliminary ruling by the tribunal d'arrondissement, Luxembourg (District Court, Luxembourg), numbered 5, 6 and 7 and comprising group (B), as follows:

(1) Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that services closely linked to welfare work may include those services rendered in the context of a scheme for the protection of adults lacking legal capacity established by law and subject to the control of an independent judicial authority; classification as a body recognised as being devoted to social wellbeing may be awarded to a lawyer in the context of a scheme for the protection of adults lacking legal capacity on condition that the individual concerned is engaged in social work on a continuing basis, in the sense that the activities of a social nature take precedence to a significant degree over other activities; for the purposes of that recognition, there is no need for a recognition process based upon a pre-defined procedure and pre-determined criteria, but such recognition may be awarded on a case-by-case basis, where necessary by a judicial authority where non-recognition by the national legislature or the administrative authorities exceeds the bounds of the discretion left to the Member States by the directive.

(2) For that purpose, it will be a matter for the national court to establish whether the activities of agent, curator and guardian carried out by EQ are closely linked to welfare work and, in the light of the nature of the services offered, whether EQ can be recognised as a body devoted to social wellbeing in the exercise of the services rendered as agent, curator and guardian for adults, and whether non-recognition by the national legislature and the administrative authorities exceeds the bounds of the discretion left to the Member States by the directive.

41 See judgment of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraphs 52 to 61).

42 See judgment of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 45 and the case-law cited).