

JUDGMENT OF THE COURT (Sixth Chamber)

19 January 2017 (*)

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Article 13(1), second subparagraph — Activity of managing road infrastructure and making it available on payment of a toll — Activities engaged in by a body governed by public law acting as a public authority — Presence of private operators — Significant distortions of competition — Existence of actual or potential competition)

In Case C-344/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Appeal Commissioners (Ireland), made by decision of 11 June 2015, received at the Court on 6 July 2015, in the proceedings

National Roads Authority

v

The Revenue Commissioners,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot, acting as President of the Sixth Chamber, A. Arabadjiev and C.G. Fernlund (Rapporteur), Judges,

Advocate General : M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 May 2016,

after considering the observations submitted on behalf of:

- the National Roads Authority, by E. O’Hanrahan, Solicitor, and M. Collins, Senior Counsel,
- the Revenue Commissioners, by M.-C. Maney, Solicitor, and E. Barrington, Senior Counsel,
- the German Government, by T. Henze, acting as Agent,
- the Polish Government, by B. Majczyna, B. Majerczyk-Graczykowska and K. Małkowska, acting as Agents,
- the European Commission, by M. Owsiany-Hornung and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’).

2 The request has been made in proceedings between the National Roads Authority (Ireland) (‘the NRA’) and the Revenue Commissioners (Ireland) concerning the treatment of the NRA as a taxable person for value added tax (VAT) in connection with its activity of making road infrastructure available on payment of a toll.

Legal context

EU law

3 The VAT Directive repealed and replaced as from 1 January 2007 the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, ‘the Sixth Directive’). According to recitals 1 and 3 of the VAT Directive, the Sixth Directive had to be recast in order to present all the applicable provisions in a clear and rational manner, with a new structure and drafting, in principle without making any substantive changes.

4 As the content of the first to third subparagraphs of Article 13(1) of the VAT Directive corresponds to that of the first to third subparagraphs of Article 4(5) of the Sixth Directive, the Court’s interpretation of the latter provisions should be extended to the former provisions.

5 Article 2(1) of the VAT Directive provides:

‘The following transactions shall be subject to VAT:

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

...

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

...’

6 Article 9 of the VAT Directive provides:

‘1. “Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

...’

7 Article 13(1) of the VAT Directive provides:

‘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.'

Irish law

The Value Added Tax Act, 1972

8 Section 8(2A) of the Value Added Tax Act, 1972, in the version applicable to the facts of the main proceedings, provides:

'Notwithstanding section 2, the State or any public body shall not be treated as a taxable person acting in that capacity in respect of any activity or transaction that is carried out by it in, or is closely linked to, the exercise by the State or such public body of particular rights or powers conferred on it by any enactment, except where—

- (a) that activity is listed in Annex I (which is set out in Schedule 7) of [the VAT Directive], and is carried out by the State or that public body on a more than negligible scale, or
- (b) not treating the State or that public body as a taxable person in respect of that activity or transaction creates or would likely create a significant distortion of competition.'

The Roads Act, 1993

9 According to the order for reference, the NRA is an Irish body governed by public law set up by the Roads Act, 1993 ('the Roads Act') to manage the national public road network.

10 In accordance with section 17(1) of the Roads Act, the primary function of the NRA is to secure the provision of a safe and efficient network of national roads. It has overall responsibility for the planning and supervision of works for the construction and maintenance of national roads.

11 On that basis, under section 57 of the Roads Act, the NRA may prepare a scheme for the establishment of a system of tolls in respect of the use of a national road.

12 Section 58 of the Roads Act provides in substance that the NRA may, for the use of toll roads, charge and collect tolls whose amounts are fixed in the bye-laws it makes.

13 Under section 61 of the Roads Act, the NRA has the responsibility for introducing the bye-laws it considers expedient for the operation and maintenance of toll roads.

14 Under section 63 of the Roads Act, the NRA also has the legal power to enter into agreements with third parties authorising them to collect tolls on a toll road. The maximum amount of the tolls which may be levied for the use of a toll road, whether operated by the NRA or by a third party, is to be specified in a bye-law made by the NRA to that end.

15 In addition, any agreement concluded between the NRA and a third party under section 63

of the Roads Act must satisfy various requirements set out in that section. The third party must thus agree to comply with one or more or all of the following obligations: (i) to pay some or all of the cost of construction and/or maintenance of the road, (ii) to construct and/or maintain (or join or assist in the construction and/or maintenance of) the road, and (iii) to operate and manage the road for the NRA (including to provide, supervise and operate a system of tolls for the use of the road and their collection).

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

16 According to the documents before the Court, most toll roads in Ireland have been constructed and are operated by private operators under public-private partnerships agreements concluded with the NRA.

17 The referring tribunal observes that there are currently eight toll roads in Ireland operated by private operators, on whose tolls VAT is charged. For each of those toll roads the NRA has adopted a toll scheme and made bye-laws fixing the maximum amount to be charged for the use of those roads. The NRA operates two toll roads itself, the Westlink motorway and the Dublin tunnel.

18 With respect more particularly to the Westlink motorway, the order for reference states that that motorway was previously operated by a private operator under a contract between the operator and the NRA. When additional investment was needed to modernise it in order to ensure traffic flows, but the private operator did not wish to undertake that investment without additional commitments from the NRA, the NRA negotiated a termination of the contract in question, took over operation of the road, and installed an electronic toll system.

19 From July 2010 the revenue authorities treated the NRA as a taxable person for VAT in respect of its activity of making available the two toll roads it operates, on the ground that its treatment as a non-taxable person would lead to significant distortions of competition within the meaning of the second subparagraph of Article 13(1) of the VAT Directive.

20 The NRA paid the VAT it had thus been assessed to, and for that purpose treated the amount received as tolls as inclusive of VAT. However, since it contested the correctness of its treatment as a taxable person and considered that, by virtue of the first subparagraph of Article 13(1) of the VAT Directive, it should be exempted from VAT, the NRA brought proceedings before the Appeal Commissioners (Ireland).

21 Before that tribunal, the revenue authorities argue that, in the light of the judgment of 16 September 2008, *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505), the second subparagraph of Article 13(1) of the VAT Directive must be interpreted as meaning that a distortion of competition is presumed to exist even where the activities concerned do not compete with each other. The revenue authorities submit that, once two activities are of the same nature, there is in effect an irrebuttable presumption that treating one of them as taxable and the other as non-taxable would breach the principle of fiscal neutrality and lead to significant distortions of competition.

22 The referring tribunal observes that, as it is common ground that the NRA is a body governed by public law acting as a public authority as regards the activity of making road infrastructure available on payment of a toll, *prima facie* it is not to be regarded as a taxable person. The NRA should not therefore be required to apply VAT to that activity.

23 The tribunal further states, first, that, in so far as the various toll roads in Ireland are sufficiently far apart from each other, they serve different needs from the point of view of

consumers and are not therefore in competition with each other. It follows that the level of the toll charged by an operator, whether the NRA or a private operator, has no influence on the average consumer's choice to use one toll road rather than another.

24 Secondly, there is no realistic possibility of a private operator entering the market with a view to providing services of access to toll roads by constructing a toll road which would compete with the Westlink motorway or the Dublin tunnel.

25 A private operator could only enter that market if the NRA were to adopt a toll scheme in connection with a public road in order to make it a toll road, make bye-laws for that road, and then enter into an agreement with the private operator authorising him to collect the tolls.

26 In addition, the evidence shows that in practice a private operator wishing to construct a private toll road would encounter almost insuperable difficulties. First, while such construction would require very extensive tracts of land, a private operator who, unlike the NRA, does not have the power of compulsory purchase would be unable to force landowners to sell him private land for the purpose of constructing such a road. Secondly, in view of the investment such construction could entail, there is no evidence that a private operator would be prepared to make such an investment in order to compete with an already existing toll road.

27 The referring tribunal states, finally, that the revenue authorities have also failed to show that there is a realistic possibility of a private operator entering that market.

28 However, because of the revenue authorities' submissions mentioned in paragraph 21 above, the referring tribunal is uncertain whether the activity of collecting tolls engaged in by the NRA and that engaged in by private operators must be regarded as activities of the same nature, and hence in competition with each other, so that treating the NRA as a non-taxable person should be regarded as leading to significant distortions of competition within the meaning of the second subparagraph of Article 13(1) of the VAT Directive.

29 In those circumstances the Appeal Commissioners decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) If a body governed by public law carries on an activity such as providing access to a road on payment of a toll and if in the Member State there are private bodies who collect tolls on different toll roads pursuant to an agreement with the public body concerned under national statutory provisions, is [the second subparagraph of Article 13(1) of the VAT Directive] to be interpreted as meaning that the public body concerned must be deemed to be in competition with the private operators concerned such that to treat the public body as a non-taxable person is deemed to lead to a significant distortion of competition notwithstanding the facts that (a) there is not and cannot be any actual competition between the public body and the private operators concerned and (b) there is no evidence that there is any realistic possibility that any private operator could enter the market to build and operate a toll road which would compete with the toll road operated by the public body?

(2) If there is no presumption, what exercise should be conducted to determine whether there is a significant distortion of competition within the meaning of [the second subparagraph of Article 13(1) of the VAT Directive]?'

Consideration of the questions referred

Preliminary observations

30 The European Commission submits that, despite the referring tribunal's findings in that respect, it is far from clear whether, in operating the two toll roads at issue in the main proceedings and collecting tolls, the NRA is to be regarded as acting as a public authority.

31 It must be recalled, first, that it is the responsibility of the national court to define the legislative and factual context of the dispute before it (see, to that effect, judgment of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraphs 27 and 32 and the case-law cited).

32 Secondly, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties to the main proceedings may not change their tenor (judgment of 16 October 2014, *Welmory*, C-605/12, EU:C:2014:2298, paragraph 33 and the case-law cited).

33 In the present case, it is apparent from the order for reference that the referring tribunal considers unequivocally that, in the dispute in the main proceedings, the NRA is acting as a public authority when it engages in the activity of making road infrastructure available on payment of a toll.

34 In those circumstances, the Court must proceed on the basis that the NRA, a body governed by public law, acts as a public authority in its activity of making the road infrastructure concerned available on payment of a toll, and therefore that that activity must be regarded as falling within the scope of Article 13(1) of the VAT Directive.

The questions referred

35 By its two questions, which should be considered together, the referring tribunal seeks essentially to know whether the second subparagraph of Article 13(1) of the VAT Directive must be interpreted as meaning that, in a situation such as that in the main proceedings, a body governed by public law which carries on an activity consisting in providing access to a road on payment of a toll must be regarded as competing with private operators who collect tolls on other toll roads pursuant to an agreement with the public law body concerned under national statutory provisions.

36 It should be recalled that the second subparagraph of Article 13(1) of the VAT Directive provides for a limitation of the rule stated in the first subparagraph of that provision that bodies governed by public law are to be treated as non-taxable persons for VAT purposes in respect of the activities or transactions in which they engage as public authorities. That second subparagraph thus aims to restore the general rule set out in Article 2(1) and Article 9 of the VAT Directive, according to which any activity of an economic nature is in principle to be subject to VAT, and cannot therefore be construed narrowly (see, by analogy, judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft*, C-102/08, EU:C:2009:345, paragraphs 67 and 68).

37 However, that cannot mean that the second subparagraph of Article 13(1) of the VAT Directive should be interpreted in such a way that the derogation from treatment as a taxable person for VAT laid down in the first subparagraph of Article 13(1) of the directive for bodies governed by public law acting as public authorities is deprived of effectiveness (see, to that effect, judgment of 20 November 2003, *Taksatorringen*, C-8/01, EU:C:2003:621, paragraphs 61 and 62, and of 25 March 2010, *Commission v Netherlands*, C-79/09, not published, EU:C:2010:171,

paragraph 49).

38 Under the second subparagraph of Article 13(1) of the VAT Directive, those bodies are to be regarded as taxable persons in respect of the activities or operations in which they engage as public authorities, where their treatment as non-taxable persons would lead to significant distortions of competition.

39 According to the Court's case-law on that provision, first, what is envisaged here is the situation in which bodies governed by public law engage in activities which may also be engaged in, in competition with them, by private economic operators. The aim is to ensure that those private operators are not placed at a disadvantage because they are taxed while those bodies are not (see, to that effect, judgment of 25 March 2010, *Commission v Netherlands*, C-79/09, not published, EU:C:2010:171, paragraph 90 and the case-law cited).

40 Secondly, that limitation of the rule that bodies governed by public law acting as public authorities are treated as non-taxable persons for VAT purposes is only a conditional limitation. Its application involves an assessment of economic circumstances (see, to that effect, judgment of 17 October 1989, *Comune di Carpaneto Piacentino and Others*, 231/87 and 129/88, EU:C:1989:381, paragraph 32).

41 Thirdly, the significant distortions of competition which treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead to must be evaluated by reference to the activity in question, as such, without that evaluation relating to any particular market, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical (judgments of 25 March 2010, *Commission v Netherlands*, C-79/09, not published, EU:C:2010:171, paragraph 91 and the case-law cited, and of 29 October 2015, *Saadaçor*, C-174/14, EU:C:2015:733, paragraph 74).

42 The purely theoretical possibility of a private operator entering the relevant market, which is not borne out by any matter of fact, any objective evidence or any analysis of the market, cannot be assimilated to the existence of potential competition (judgment of 16 September 2008, *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 64).

43 As follows from the wording of the second subparagraph of Article 13(1) of the VAT Directive and from the case-law on that provision, its application presupposes, first, that the activity in question is carried on in competition, actual or potential, with that carried on by private operators and, secondly, that the different treatment of those activities for VAT purposes leads to significant distortions of competition, which must be assessed having regard to economic circumstances.

44 It follows that the mere presence of private operators on a market, without account being taken of matters of fact, objective evidence or an analysis of the market, cannot demonstrate the existence either of actual or potential competition or of a significant distortion of competition.

45 In the present case, according to the documents submitted to the Court, the primary function of the NRA is to ensure the availability of a safe and efficient network of national roads. For that purpose, it has overall responsibility for the planning and construction of all national roads and for the supervision of works for the construction and maintenance of those roads. On that basis, only it can prepare a plan for establishing a toll scheme for access to those roads and make the bye-laws it considers necessary for their operation and management, those bye-laws setting the maximum amount of the tolls which may be levied for access to a toll road, whether it is operated by the NRA or a private operator.

46 It also appears from those documents that private operators can enter the market of making road infrastructure available on payment of a toll only if the NRA authorises them to do so. Furthermore, the fact that the management of a national road has been entrusted to a private operator does not in any way alter the fact that the NRA always retains ultimate responsibility for national roads, so that, if the private operator is no longer willing or no longer able to fulfil his commitments, the NRA is required to ensure the proper functioning of those roads.

47 It appears in this respect that, for the Westlink motorway, the agreement between the NRA and the private operator provided for the operator to collect the tolls by means of a conventional toll barrier system. However, moving from toll booths with barriers to an electronic barrier-free toll system, which was necessary to ensure a better traffic flow on that motorway, required substantial investment and involved assuming the risk inherent in operating a barrier-free toll system. As the private operator was unwilling to make that investment without additional commitments on the part of the NRA, the NRA negotiated the termination of the agreement, took over operation of the Westlink motorway in August 2008, and installed an electronic toll system in the public interest of ensuring the flow of traffic.

48 It is clear that in such circumstances the activity of making road infrastructure available on payment of a toll, which is thus not limited to the collection of tolls, is carried out exclusively by the NRA under conditions that are such as to ensure in all circumstances that a safe and efficient network of national roads is available. In doing so, the NRA assumes, on its own account or where a private operator withdraws, in compliance with specific statutory obligations that apply only to it, the function of operating and maintaining that network.

49 It is, moreover, common ground that there is no real possibility of a private operator entering the market in question by constructing a road that could compete with already existing national roads.

50 In those circumstances, it is apparent that the NRA engages in its activity of making road infrastructure available on payment of a toll within the legal scheme peculiar to it. Consequently, as the referring tribunal also found, that activity cannot be regarded as being carried on in competition with that, carried on by private operators, consisting in collecting tolls on other toll roads pursuant to an agreement with the NRA in accordance with national legislative provisions. Furthermore, in line with the case-law referred to in paragraph 42 above, there is no potential competition either, in so far as the possibility of private operators carrying on the activity in question on the same conditions as the NRA is purely theoretical. Accordingly, the second subparagraph of Article 13(1) of the VAT Directive is not applicable to a situation in which, as in the dispute in the main proceedings, there is no real competition, actual or potential, between the public law body in question and private operators.

51 In the light of all the foregoing, the answer to the questions referred is that the second subparagraph of Article 13(1) of the VAT Directive must be interpreted as meaning that, in a situation such that in the main proceedings, a body governed by public law which carries on an activity consisting in providing access to a road on payment of a toll may not be regarded as competing with private operators who collect tolls on other toll roads pursuant to an agreement with the public law body concerned under national statutory provisions.

Costs

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

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

The second subparagraph of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in a situation such that in the main proceedings, a body governed by public law which carries on an activity consisting in providing access to a road on payment of a toll may not be regarded as competing with private operators who collect tolls on other toll roads pursuant to an agreement with the public law body concerned under national statutory provisions.

Bonichot

Arabadjiev

Fernlund

Delivered in open court in Luxembourg on 19 January 2017.

A. Calot Escobar

J.-C. Bonichot

Registrar

Acting as President of the Sixth Chamber

**** Language of the case: English.**