OPINION OF ADVOCATE GENERAL

Jääskinen

delivered on 25 June 2015 (1)

Case C?174/14

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

v

Fazenda Pública

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal))

(Reference for a preliminary ruling — VAT — Directive 2006/112/EC — Article 13(1) — Treatment as a non-taxable person — Concept of ‘other bodies governed by public law’– Autonomous Region of the Azores — Entity created by the region in the form of a wholly-owned limited company which is responsible for providing the region with services of general economic interest relating to the management of the region’s health service — Determination of the detailed arrangements for those services, including their remuneration, in programme agreements concluded between the entity and the region)

I – Introduction

1. The present case concerns the interpretation of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2) and, more specifically, the interpretation of the concept of ‘other bodies governed by public law’. That article provides that certain transactions engaged in by bodies governed by public law are exempt from VAT.

2. The applicant in the main proceedings, Saudaçor — Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores SA (‘Saudaçor’), is a limited company with exclusively public capital, being 100% owned by the Autonomous Region of the Azores (RAA). Its specific regime, which has both public and private characteristics, has led the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) to have doubts as to its classification as a body governed by public law within the meaning of Article 13(1) of Directive 2006/112.

3. The Court's case-law concerning that provision (previously Article 4(5) of 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 (3)) is plentiful, but it mainly relates to the second cumulative criterion set out by that article, in particular the condition concerning activities and transactions engaged in by bodies governed by public law 'as public authorities'. By contrast, the concept of 'other bodies governed by public law' as such has been examined less often.

II – **Legislative framework**

A – *Union law*

1. Directive 2004/18

4. Under Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (4)

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

A "body governed by public law" means any body:

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

(b) having legal personality; and

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

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

2. Directive 2006/112

5. Directive 2006/112 repealed and replaced, with effect from 1 January 2007, the existing Community VAT legislation, in particular the Sixth Directive. (5)

6. Article 2(1)(c) of Directive 2006/112 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 that directive:

'"Taxable person" shall mean any person who, independently, carries out in any place any

economic activity, whatever the purpose or results of that activity.

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

8. Article 13(1) of that 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.’

B – *Portuguese law*

1. VAT legislation

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

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

2. The legal regime for Saudaçor

11. Saudaçor was created by Regional Legislative Decree No 41/2003/A of the RAA of 17 October 2003 (6) as a limited company with exclusively public capital, being wholly owned by the RAA. Saudaçor was created to transform the Instituto de Gestão Financeira da Saúde da Região Autonoma dos Açores (Institute of Financial Management of the Health Service of the RAA) into a limited company.

12. Under Article 2(1) of Legislative Decree No 41/2003/A, Saudaçor has the task of providing services of general economic interest in the field of health. The object of that task is the planning and management of the regional health system and associated information systems, infrastructure and facilities and the completion of construction, conservation, rehabilitation and reconstruction work on health establishments and services, in particular in regions affected by natural disasters and in areas regarded as risk areas.

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

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

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

(b) providing goods and services to member entities of the regional health system [SRS];

(c) granting financing to health establishments in accordance with the health-care objectives to which each establishment has committed under the agreements signed by them;

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

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

(f) encouraging the development of information systems for institutions under the aegis of the SRS;

(g) carrying out works on the SRS which are desirable in the public interest;

(h) providing support to SRS services and establishments in areas where this proves necessary.’

14. Article 4(1) of Regional Legislative Decree No 41/2003/A provides that Saudaçor is governed ‘by the provisions of the present instrument, by the articles of association annexed hereto, by the legal regime for the State-owned undertakings sector as enshrined in Decree-Law No 558/99 of 17 December 1999, (7) and by private law’. Under paragraph 2 of that article, in its activities Saudaçor must respect the rules governing the organisation and operation of the regional health service of the RAA.

15. Article 10 of Regional Legislative Decree No 41/2003/A provides that in the performance of its functions Saudaçor holds the same public-authority powers as the RAA and then specifies, by way of example, some of those powers, including expropriation.

16. Under Article 4(1) of Regional Legislative Decree No 41/2003/A, which concerns the creation of Saudaçor, that entity is governed by the legal regime for State-owned undertakings as provided for by Decree-Law No 558/99. Under Article 3 of Decree-Law No 558/99, (8) public undertakings are companies incorporated in accordance with the Commercial Code in which the State or other State-owned public entities individually or jointly exert a controlling influence, directly or indirectly, and entities in the form of undertakings provided for in Chapter III of the regime, known as public business entities.

17. Under Article 7 of Decree-Law No 558/99, without prejudice to the provisions of the legislation applicable to regional, (9) intercommunal and municipal public undertakings, public undertakings are governed by private law, except as provided in the present Decree-Law and in the legislation adopting the articles of association of those undertakings. Public undertakings are taxed, directly and indirectly, in accordance with the common regime. (10)

18. Saudaçor performs its activities within the framework of programme agreements concluded with the RAA, in accordance with Article 20(1) of its articles of association, which define, inter alia, the services to be provided by Saudaçor for the planning and management of the regional health

service and the compensation, called the ‘financial contribution’, to be paid by that region ‘in consideration for the services covered by the agreement’ and ‘considered sufficient to cover the operating costs of Saudaçor’.

19. Thus, a first programme agreement was concluded on 23 July 2004, covering the period 2004–2008, which provided for total compensation of EUR 15 905 000, with a sum of EUR 3 990 000 for 2007 and a sum of EUR 4 050 000 for 2008. A second programme agreement was concluded with effect from 1 January 2009, (11) covering the period 2009–2012, which provided for annual compensation of EUR 8 500 000, reduced by Joint Order of 8 March 2010 (12) to EUR 6 599 147 for 2009. Under Clause 5 of these two programme agreements, those amounts may be revised where, on account of a change of circumstances, that amount is manifestly insufficient to allow performance of the programme agreement.

20. The programme agreements set out Saudaçor’s contractual obligations in Clause 3 and the services of general interest provided by Saudaçor in Annex III. Those services of general interest include three kinds of services, namely support for the Regional Health Service Plan, assistance and funding for the regional health service and implementation, management and maintenance of the information and computer system supporting the health sector of the RAA.

III – **The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court**

21. On 2 March 2011, the Portuguese tax authority drew up a draft inspection report proposing corrections concerning the VAT payable by Saudaçor in respect of its activities for the period from 2007 to 2010 in a total amount of EUR 4 750 586.24.

22. On 6 April 2011, that inspection report was adopted, after Saudaçor had been heard.

23. According to the report, cited in the decision referring the case, in the tax years examined, Saudaçor recorded the consideration received from the RAA as grants exempt from VAT. However, during the proceedings, Saudaçor abandoned the ‘grant’ classification and wished to be designated as a ‘legal person governed by public law’ within the meaning of Article 2(2) of the VAT Code, a provision which seeks to transpose the first subparagraph of Article 4(5) of the Sixth Directive, the content of which is the same as that of the first subparagraph of Article 13(1) of Directive 2006/112.

24. In that inspection report, the tax authority stated, among other things, that in view of its legal regime Saudaçor came under the normal VAT regime and could not rely on the rule laid down in Article 2(2) of the VAT Code under which bodies governed by public law are not regarded as taxable persons. Furthermore, Saudaçor had accepted that it was subject to VAT because it claimed a total sum of EUR 2 300 273.17 as VAT deductions on purchases of goods and services without, however, paying VAT on the amounts received from the RAA.

25. The tax authority referred to Binding Opinion No 1271 of 21 March 2006, (13) according to which Article 2(2) of the VAT Code limits exclusion from VAT, subject to the conditions laid down therein, to the State and to legal persons governed by public law. Other entities may not benefit from exclusion even if they are public undertakings for the purposes of the legal regime for the State-owned undertakings sector, as is the case here with a limited company with exclusively public capital, and even though it has been entrusted with certain operations falling within the exercise of delegated public-authority powers which do not create a distortion of competition.

26. In addition, according to the tax authority, the services provided by Saudaçor in respect of planning and management of the regional health service under the programme agreements

concern areas of activity involving private initiative, which also means that treatment as a non-taxable person might lead to distortions of competition. That would be the case, for example, with the implementation, management and maintenance of the computer system for a region's health sector.

27. Saudaçor was then served recovery notices. On 27 July 2011, it was called to appear in the tax execution procedure for the recovery of VAT and compensatory interest.

28. Saudaçor brought an action at the Tribunal Administrativo e Fiscal de Ponta Delgada (Administrative and Tax Court, Ponta Delgada) against the recovery notices for VAT and compensatory interest concerning the tax years 2007 to 2010, which claimed that it should pay a total amount of EUR 5 157 249.72.

29. That court dismissed the action at first instance on the ground, inter alia, that the rule laid down in the first subparagraph of Article 13(1) of Directive 2006/112, under which bodies governed by public law are not regarded as taxable persons, does not cover an entity like Saudaçor which, although created by the RAA, is a limited company which is distinct from the region and subject to the rules of private law and which pursues its functions and objectives independently.

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

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

32. Since it has doubts as to the interpretation of Article 13(1) of Directive 2006/112, by decision of 12 March 2014, the Supremo Tribunal Administrativo decided to stay the main proceedings and to refer the following questions to the Court for a preliminary ruling:

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

2. Is an entity established as a limited company, with exclusively public capital and 100% owned by the Autonomous Region of the Azores, and whose object is the exercise of consultancy and management activities in matters relating to the regional health service, with the purpose of developing and reorganising it through the performance of programme agreements concluded with the Autonomous Region of the Azores, which holds by delegation the public-authority powers conferred in those matters on the Autonomous Region which was originally responsible for providing the public health service, covered by the concept of a "body governed by public law" acting as a public authority for the purpose of the first subparagraph of Article 13(1) of [Directive 2006/112]?

3. In the light of the provisions of that directive, may the consideration received by that

company, which consists in the making available of the financial resources necessary for the performance of those programme agreements, be regarded as payment for the services provided, for the purposes of liability to VAT?

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

33. Written observations were submitted by Saudaçor, the Portuguese and United Kingdom Governments and the European Commission, which were all represented at the hearing held on 19 March 2015.

IV – **Analysis**

A – *Preliminary remarks*

34. Before beginning to examine the questions referred, I will consider the order in which they should be dealt with. Saudaçor has suggested first examining the third question, which asks whether the consideration paid by the RAA is payment for the services provided. According to Saudaçor, this is a question concerning the nature of its activities, which are not 'economic' within the meaning of Article 9(1) of Directive 2006/112.

35. Articles 9 and 13 of Directive 2006/112 are part of Title III of that directive, entitled 'Taxable persons'. Title III contains rules concerning treatment as a taxable person in general and specific cases, such as the VAT grouping and rules concerning the public authorities.

36. I note in this regard that Article 9 of Directive 2006/112 lays down the general rule, while Article 13 is an exemption. (14) According to the Court's case-law, the application of Article 13(1) of Directive 2006/112 implies a prior finding that the activity considered is of an economic nature. (15)

37. The notion of economic activity in Article 9(1) of Directive 2006/112 is linked to Article 2 of that directive as, for an activity to be classified as economic, it must be effected for consideration. Where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT. The economic activities of taxable persons are necessarily activities which are carried on with the object of obtaining payment of consideration or which are likely to be rewarded by the payment of consideration. (16)

38. Consequently, in my view, the Court has to resolve just two legal questions in order to be able to give helpful answers to the national court.

39. The outcome of the dispute in the main proceedings hinges, first, on the question whether an entity like Saudaçor should be regarded as a taxable person, and the answer to that question hinges in turn on whether or not its activities are economic within the meaning of Article 9(1) of Directive 2006/112. In order to answer that question, it must be examined whether the remuneration paid by the RAA constitutes the consideration received for the services provided by Saudaçor.

40. Second, if Saudaçor must be regarded as a taxable person, it must be examined whether it was nevertheless exempt from VAT pursuant to Article 13(1) of Directive 2006/112 as a body governed by public law engaging in the transactions in question as a public authority.

41. That is the order in which I therefore propose that the questions asked by the Supremo

Tribunal Administrativo be dealt with.

42. Furthermore, I note that the Portuguese Government supported its claim that Article 13(1) of Directive 2006/112 is not relevant to the main proceedings by arguing that because Saudaçor performed transactions which, by its own admission, allowed it to deduct VAT in respect of its acquisitions, it can no longer rely on the right not to make those same transactions subject to VAT. In this regard, the Portuguese Government made reference to *Cantor Fitzgerald International* (17) and *MDDP*. (18) However, it seems to me that the information contained in those judgments cannot be applied directly to the present case and is not even relevant to the outcome of the dispute in the main proceedings.

43. In my view, the notion of economic activities within the meaning of Article 9(1) of Directive 2006/112 and the concept of other bodies governed by public law within the meaning of Article 13(1) of that directive are concepts based on objective elements. The conduct of a person, whether a taxable person or not, cannot alter the meaning and scope of those articles. (19)

B – *The economic nature of Saudaçor's activities and its treatment as a taxable person for the purposes of VAT*

44. The referring court's doubts over the nature of the services provided by Saudaçor, as expressed in its third question, stem from Saudaçor's claim that the remuneration paid to it by the RAA corresponds to a budget appropriation of revenue between two legal persons governed by public law which is intended to permit Saudaçor to provide non-market services relating to the implementation and management of the regional health service.

45. On the other hand, according to the other parties which submitted observations, the amounts paid by the RAA to Saudaçor have a direct link with the services that Saudaçor is required to provide to the RAA.

46. It should be recalled that Saudaçor has the task of providing services of general economic interest in the field of health, the object of which is the planning and management of the regional health system and associated information systems, infrastructure and facilities and the completion of construction, conservation, rehabilitation and reconstruction work on health establishments and services. (20)

47. The Portuguese Government has pointed out that the case in the main proceedings concerns only the payments referred to in Clauses 2(a) and 5(1) and Annex I of the programme agreements for the 2004–2008 and 2009–2012 periods in relation to the services which Saudaçor undertook to provide to the RAA, because the VAT recovery notices contested in the main proceedings relate only to those payments. (21) In addition, according to the Portuguese Government, the services in question are only technical and administrative support services, often known as 'back office' services.

48. With regard to the reduction of the financial contribution for 2009 by order of 8 March 2010, the Portuguese Government explained that this was a correction of a material error vitiating the programme agreement for 2009–2012 (22) and not the unilateral fixing by the RAA of the remuneration to be paid to Saudaçor, which has its own autonomous board of directors and full powers of negotiation and contractual powers.

49. It should be noted, first of all, that under the second subparagraph of Article 9(1) of Directive 2006/112, any activity of producers, traders or persons supplying services is to be regarded as 'economic activity' and, in particular, the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis. According to case-law, an

analysis of those definitions shows that the scope of the term ‘economic activities’ is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity. (23)

50. According to settled case-law, the possibility of classifying a transaction as a transaction for consideration requires only that there be a *direct link* between the supply of goods or the provision of services and the consideration actually received by the taxable person. Consequently, a supply of services is effected for consideration, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient. (24)

51. The fact that the activity of an operator consists in the performance of duties which are conferred and regulated by law in the public interest is irrelevant. (25) Thus, a payment made by a public authority in the general interest can constitute consideration for a supply of services for the purposes of Directive 2006/112. The concept of a supply of services does not depend on the use made of a service by the person who pays for it. Only the nature of the undertaking given is to be taken into consideration, with the result that for such an undertaking to be covered by the common system of VAT it must imply consumption. (26)

52. In addition, it is not even a requirement that, for a supply of services to be effected for consideration within the meaning of Directive 2006/112, the consideration for that supply must be obtained directly from the person to whom those services are supplied, since it may be obtained from a third party. (27) However, that is not the case in the main proceedings because the person to whom the services are provided by Saudaçor is the RAA, the public entity responsible for the Azores’ regional health system, which makes the payment and is the recipient of those services.

53. Finally, it is clear from the Court’s case-law that where the supply of services in question is characterised, in particular, by the permanent availability of the service provider to supply, at the appropriate time, the services required, it is not necessary, in order to recognise that there is a direct link between that service and the consideration received, to establish that a payment relates to a particular supply of services at a specific time. (28)

54. In my view, it is readily apparent from the programme agreements, which expressly provide for compensation ‘in consideration for the services covered by the agreement’, that there is a direct link between the payments made by the RAA and the services of general interest provided by Saudaçor. I note that the fact that a payment is made by a public authority in the general interest does not mean that it cannot constitute consideration for a supply of services for the purposes of Directive 2006/112. (29)

55. In addition, according to the Court’s case-law, consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT. In order to satisfy the requirements of legal certainty, since the contractual position reflects, in principle, the economic and commercial reality of the transactions, the relevant contractual terms normally constitute a factor to be taken into consideration unless it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions. (30) This does not appear to be the case in the main proceedings. The contractual terms are therefore a factor to be taken into consideration.

56. There is also nothing in the present case to indicate that the contribution received by Saudaçor does not manifestly correspond to the actual value of the service provided. (31) On the

other hand, under the programme agreements, the amount of the contribution may be revised where it is insufficient to allow performance of the programme agreement. It appears that such revisions increasing the amount were not made in the period from 2007 to 2010. However, the revision of the financial contribution for 2009, in the form of a reduction of that contribution, was made in circumstances where the amounts already charged by Saudaçor, when the programme agreement for the year in question was signed, were almost EUR 2 million less than the amount stipulated in the programme agreement signed in 2010.

57. Saudaçor's activities, consisting in planning, management and consultancy services, are permanent and Saudaçor receives remuneration in consideration for its services. Consequently, Saudaçor's contested activities are of an economic nature and constitute the supply of services for consideration. In addition, it should be stressed that Saudaçor does not provide any public health services for the residents of the Azores. Such services are provided by the member entities of the regional health system.

58. As the services at issue in the main proceedings supplied by Saudaçor must be considered to be of an economic nature, Saudaçor must be regarded as a taxable person for VAT purposes under Article 9(1) of Directive 2006/112. Accordingly, the concept of body governed by public law in the first subparagraph of Article 13(1) of Directive 2006/112 must be interpreted in order to be able to examine whether Saudaçor may nevertheless be exempt from VAT as a body governed by public law acting as a public authority.

C – *The possibility of applying the exemption provided for in Article 13(1) of Directive 2006/112 to Saudaçor's economic activities*

1. The irrelevance of the concept of 'body governed by public law' within the meaning of Directive 2004/18 for the interpretation of the first subparagraph of Article 13(1) of Directive 2006/112

59. In the main proceedings, Saudaçor proposed, for reasons relating to the internal coherence of the system, that the concept of 'other bodies governed by public law' within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 be interpreted by reference to the concept of 'body governed by public law' within the meaning of Article 1(9) of Directive 2004/18. According to Saudaçor, the concept of body governed by public law is a concept that applies across EU law. By its first question, the referring court is seeking to ascertain whether such an interpretation is conceivable.

60. Like the Portuguese and United Kingdom Governments and the Commission, I take the view that such an interpretation cannot be accepted for the reasons set out below.

61. Articles 9 and 13 of Directive 2006/112 give a very wide scope to VAT. The Court has ruled on several occasions that it is clear from the scheme and purpose of Directive 2006/112, as well as from the place of Article 13 thereof in the common system of VAT established by the Sixth Directive, that any activity of an economic nature is, in principle, to be taxable. (32)

62. The Union legislature intended to limit the scope of the treatment of bodies governed by public law as non-taxable persons, so that the general rule is observed. (33) The objective of Article 13(1) of Directive 2006/112 is thus to exempt from VAT only the exercise of economic activities engaged in by bodies governed by public law as public authorities, to the exclusion of situations where exemption would cause 'significant distortions of competition'. (34)

63. Article 13 has been regarded in the Court's case-law as an exemption which should be placed in the general context of the common system of VAT. (35) Thus, as a derogation from the

principle that any activity of an economic nature must be subjected to VAT, the first subparagraph of Article 13(1) of Directive 2006/112 must be *interpreted strictly*. (36) Obviously, this also holds for the interpretation of the concept of ‘other bodies governed by public law’ in the first subparagraph of Article 13(1).

64. By contrast, in the light of the objectives pursued by the provisions of Union law on the coordination of the procedures for the award of public contracts, and in particular the dual objective of opening up competition and transparency, the concept of ‘body governed by public law’ within the meaning of Article 1(9) of Directive 2004/18 should be given a broad and functional interpretation. (37)

65. It should be stated that the meanings of, on the one hand, ‘body governed by public law’ for the purposes of Directive 2004/18 and, on the other, ‘other bodies governed by public law’ for the purposes of Directive 2006/112 cannot be the same, as those two directives have very different objectives. As the Portuguese Government has stressed, the objectives of the common system of VAT would be undermined if, for the purposes of VAT, it were possible to adopt a broad interpretation of the concept of ‘other bodies governed by public law’ like that which has been adopted for ‘body governed by public law’ in Directive 2004/18 for functional reasons relating to observance of the rules on the award of public contracts. Such a parallel would effectively lead to an unjustified exemption from VAT of economic activities engaged in by the public and private persons mentioned in Article 1(9) of Directive 2004/18.

66. It should be added that, as was rightly pointed out by the United Kingdom Government, the Union legislature made the deliberate choice not to make reference in Directive 2006/112 to the concept of ‘body governed by public law’ which appears in Directive 2004/18. In other contexts, where it considered that a link should be made between two instruments of EU law, the Union legislature chose to adopt the definition used in Directive 2004/18 by means of a cross-reference. (38)

67. Consequently, the concept of ‘other bodies governed by public law’ in the first subparagraph of Article 13(1) of Directive 2006/112 should be interpreted solely by reference to the scheme and purpose of that directive, as well as the place of that provision in the common system of VAT established by the Sixth Directive. (39)

2. The interpretation of the concept of ‘other bodies governed by public law’ and the legal classification of Saudaçor in this regard

68. With regard to the second and fourth questions, the main issue for the purposes of the interpretation of the concept of ‘other bodies governed by public law’ within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 is whether it is an autonomous concept of EU law, as the United Kingdom Government claims, or an implicit reference to the domestic laws of the Member States.

69. I would point out, first of all, that the Union legislature opted not to define that concept in Directive 2006/112 and not to make a reference to the concept of body governed by public law which appears, inter alia, in Directive 2004/18, as I have already explained in point 66 of this Opinion.

70. The concept of ‘other bodies governed by public law’ already appeared in the first subparagraph of Article 4(5) of the Sixth Directive, which has the same wording as the first subparagraph of Article 13(1) of Directive 2006/112. That previous article, in its French version, mentioned ‘les États, les régions, les départements, les communes et les autres organismes de droit public’.

71. Article 13(1) of Directive 2006/112 and the first subparagraph of Article 4(5) of the Sixth Directive also retained the same wording in this regard in the German and English versions. In German, the list is as follows: ‘Staaten, Länder, Gemeinden und sonstige Einrichtungen des öffentlichen Rechts’, whilst the English version reads as follows: ‘states, regional and local government authorities and other bodies governed by public law’.

72. It should be noted, however, that the various language versions are not completely the same, as the French version lists, in addition to ‘autres organismes de droit public’, four levels of bodies governed by public law, whereas the German and English versions list only three. As far as the other original language versions of the article are concerned, the Danish and Italian versions list four categories of bodies, like the French version, whilst the Dutch version lists five: ‘de Staat, de regio’s, de gewesten, de provincies, de gemeenten en de andere publiekrechtelijke lichamen’.

73. The approach taken in drawing up that list was not clarified in the explanatory memorandum for the proposal for the Sixth Directive (40) but several language versions (41) of the initial proposal for the Sixth Directive were amended prior to the adoption of that directive to add the word ‘other’. (42)

74. In view of the linguistic differences and the presence of the word ‘other’ in the list, it seems clear that the purpose of that list is to set out non-exhaustively the bodies which may be exempt from VAT under the first subparagraph of Article 13(1) of Directive 2006/112. Accordingly, states and regional and local government authorities are merely examples of bodies which are capable of being exempt.

75. I therefore consider that the only function of the concept of ‘other bodies governed by public law’ in the provision in question is to demonstrate the illustrative nature of that provision. The existence of linguistic differences regarding the number and the designation of the bodies or entities capable of being exempt confirms that view.

76. Consequently, it seems that the list in the first subparagraph of Article 13(1) of Directive 2006/112 implicitly makes reference to the laws of the Member States as regards the concept of ‘other bodies governed by public law’.

77. During the hearing the United Kingdom Government argued that the concept of body governed by public law is an autonomous concept of EU law. According to the United Kingdom Government, if that concept depended solely on the laws of the Member States, this could give it too broad a scope. The classification of an entity as a body governed by public law under national legislation is not irrelevant, but it is not crucial.

78. It is true that, at first sight, the Court’s case-law would seem to support this view taken by the United Kingdom Government. According to the Court, although the designation of a body by the administrative law of a Member State as a body governed by public law is certainly relevant in determining its treatment for VAT purposes, it cannot be considered to be crucial where the actual nature and the substance of the activity engaged in by that body show that the strict conditions for the application of that rule on treatment as a non-taxable person are not met. (43)

79. However, *Commission* v *Spain* concerned a situation where the designation of a body by national legislation as a body governed by public law did not correspond to its nature or the activities actually engaged in by that body, as the operators in question were not part of the public administration and carried on their activities in the exercise of a profession comparable to a liberal profession. Thus, the interpretation adopted in that specific case was necessary to ensure a strict interpretation of any exemption, like that in Article 13(1) of Directive 2006/112. (44)

80. By contrast, it seems hard to imagine that a body governed by private law in accordance with national legislation could be classified as a body governed by public law for the purposes of EU law. As there is no definition of 'public law' in EU law, reference has to be made to the rules of public law of each Member State.

81. As I have already stated in point 63 of this Opinion, as a derogation from the principle that any activity of an economic nature must be subjected to VAT, the first subparagraph of Article 13(1) of Directive 2006/112 must be interpreted strictly. Thus, that provision, together with the cumulative criterion of engaging in activities as a public authority, may limit but not extend classification as a body governed by public law in national law, where this would lead to exemption from VAT which is not in keeping with the spirit of Directive 2006/112 or the objectives of Article 13 thereof.

82. Accordingly, in my view, the first subparagraph of Article 13(1) of Directive 2006/112 cannot be interpreted as meaning that a private body for the purposes of national legislation could be classified as a body governed by public law under EU law. The Member States must be entitled to define 'other bodies governed by public law' strictly, without EU law being able to extend that definition to other bodies which are private under the applicable provisions of national law. I consider that the position taken by the Court in *Commission* v *Spain* (45) does not call that conclusion into question.

83. Furthermore, in the light of all the foregoing considerations, it seems that a national definition of a body governed by public law which did not reflect the actual nature and the substance of the activities of such a body could also be limited by way of the second cumulative condition required to apply the rule of treatment as a non-taxable person, namely the condition that the body in question must be acting 'as a public authority'. Engagement in activities 'as public authorities' within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 is an autonomous concept of EU law. According to *Commission* v *Spain*, for that rule of treatment as a non-taxable person to apply to a body, account should be taken of, in addition to the designation of that body in national law, 'the actual nature and the substance of the activity engaged in by that body'. (46) In my view, the 'substance of the activity' may be understood as a direct reference to the condition concerning engagement in activities 'as a public authority'.

84. With regard to the cumulative criterion of engagement in activities as a public authority, it is clear from settled case-law that activities pursued as public authorities within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders. It is for the national court to classify the activity at issue in the main proceedings in the light of that criterion. (47)

85. In this regard, according to case-law, it is the manner in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as the first subparagraph of Article 13(1) of Directive 2006/112 makes such treatment of bodies governed by public law conditional upon their acting 'as public authorities', it excludes therefrom

activities engaged in by them as bodies governed not by public law but by private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law. (48) Thus, the classification of a transaction as an ‘activity as a public authority’ also depends, to a certain extent, on the applicable national law.

86. It should be borne in mind that case-law clearly lays down the principle that *traders governed by private law* cannot be exempt from VAT under the first subparagraph of Article 13(1) of Directive 2006/112 even if their activities consist in the performance of acts falling within the powers of the public authority. (49) Thus, if a certain trader is not part of the public administration, its activity is pursued not as a body governed by public law, but in the form of an activity carried out in the exercise of a profession comparable to a liberal profession. (50) Article 13(1) of Directive 2006/112 cannot therefore be applied to a private company even if its shares are being held 100% by a body governed by public law. (51)

87. I would observe that under Article 4(1) of Regional Legislative Decree No 41/2003/A Saudaçor is governed, inter alia, by the legal regime for the State-owned undertakings sector and *by private law*. In addition, under Article 7 of Decree-Law No 558/99, which regulates the legal regime for State-owned undertakings, public undertakings are governed *by private law*.

88. Thus, in so far as Saudaçor, as a limited company with exclusively public capital which is not part of the public administration, is governed by private law under the applicable domestic legislation, which must in any event be determined by the referring court, and is taxed in accordance with the common regime, it is clearly a trader governed by private law.

89. Consequently, such a limited company cannot be classified as a body governed by public law within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 and, accordingly, its activities at issue cannot be exempt from VAT under that article. The fact that Saudaçor holds the same public-authority powers as the RAA in performing some of its tasks has no bearing on that finding.

90. I note that, in order for the first subparagraph of Article 13(1) of Directive 2006/112 to apply, two conditions must both be fulfilled, namely the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. (52) As the first condition is not fulfilled in the present case, it is not necessary to examine Saudaçor’s activities in relation to the second condition.

V – **Conclusion**

91. In the light of the foregoing considerations, I suggest that the Court answer the questions referred for a preliminary ruling by the Supremo Tribunal Administrativo as follows:

With regard to the third question, in a situation like that at issue in the dispute in the main proceedings, ‘financial contributions’ paid under a programme agreement ‘in consideration for the services covered by the agreement’ by a public entity to a limited company governed by private law 100% of whose shares it holds constitute consideration for the services provided by that limited company to that public entity.

With regard to the first question, the concept of ‘other bodies governed by public law’ within the meaning of the first subparagraph of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax may not be interpreted by reference to the concept of ‘body governed by public law’ as defined in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures

for the award of public works contracts, public supply contracts and public service contracts.

With regard to the second and fourth questions, pursuant to Directive 2006/112, a limited company with exclusively public capital which is not part of the public administration and which is governed by private law and taxed in accordance with the common regime under the applicable domestic legislation cannot be classified as a body governed by public law within the meaning of the first subparagraph of Article 13(1) of that directive.

1 – Original language: French.

2 – OJ 2006 L 347, p. 1.

3 – OJ 1977 L 145, p. 1, ‘the Sixth Directive’.

4 – OJ 2004 L 134, p. 114.

5 – Despite a number of changes in drafting, the relevant provisions of Directive 2006/112 are essentially identical to the corresponding provisions of the Sixth Directive. See, to this effect, judgment in *Le Rayon d’Or* (C?151/13, EU:C:2014:185, paragraph 6).

6 – *Diário da República* 1, Series A, No 257, 6 November 2003, p. 7430.

7 – *Diário da República* 1, Series A, No 292, 17 December 1999, p. 9012.

8 – As amended. That Decree-Law was repealed with effect from 2 December 2013 by Decree-Law No 133/2013 of 3 October 2013 (*Diário da República* 1, Series A, No 191, of 3 October 2013, p. 5988), but the former legislation was in force at the material time of the facts of the main proceedings, namely from 2007 to 2010.

9 – According to the observations submitted by the Portuguese Government, this reservation does not apply to undertakings created on the initiative of autonomous regions, but to undertakings formed at the initiative of administrative regions, which, at the time of the main proceedings, were not created.

10 – In addition to this regime for State-owned undertakings, which is applicable to Saudaçor under Article 4(1) of Regional Legislative Decree No 41/2003/A, the European Commission made reference to the legal regime for public undertakings of the RAA, established by Regional Legislative Decree No 7/2008/A (*Diário da República* 1, Series A, No 58, 24 March 2008, p. 1649). Article 9 of that Regional Legislative Decree contains provisions which are, in essence, identical to those of Article 7 of Decree-Law No 558/99.

11 – However, this second programme agreement was not approved and signed until March 2010.

12 – Order of the Vice-President of the Regional Government of the Azores and the Regional Health Secretariat.

13 – The information in this regard contained in the decision referring the case is not very clear, but it seems that this is a binding opinion drawn up by the tax authority in proceedings A200 2005045 on whether the exercise of Saudaçor’s activity was considered to fall within the scope of the public-authority powers under Article 2(2) of the VAT Code or, if not, under what its activity and its undertaking was classified for VAT purposes. During the hearing the Portuguese Government stated that Saudaçor had itself requested this binding opinion.

14 – See, with regard to Article 4(5) of the Sixth Directive, which corresponds to the current Article 13 of Directive 2006/112, judgment in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 18).

15 – See, to this effect, judgments in *T-Mobile Austria and Others* (C?284/04, EU:C:2007:381, paragraph 48); *Götz* (C?408/06, EU:C:2007:789, paragraph 15) and *Commission* v *Finland* (C?246/08, EU:C:2009:671, paragraphs 34 and 39).

16 – Judgments in *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121, paragraphs 10 and 11) and *Tolsma* (C?16/93, EU:C:1994:80, paragraph 12).

17 – According to that judgment (C?108/99, EU:C:2001:526, paragraph 33), a taxable person who, for the purposes of achieving a particular economic goal, has a choice between exempt transactions and taxable transactions must, in his own interest, duly take his decision while bearing in mind the neutral system of VAT. The principle of the neutrality of VAT does not mean that a taxable person with a choice between two transactions may choose one of them and avail himself of the effects of the other.

18 – In that judgment (C?319/12, EU:C:2013:778, paragraph 56 and operative part), the Court ruled that a taxable person may not claim a right to deduct input value added tax where, as a result of an exemption provided for by national law in infringement of provisions of Union law, the output services supplied are not subject to value added tax.

19 – It should also be noted that it is, in any event, a matter for the national court to refuse to allow an operator’s right to deduct VAT where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends (see, to this effect, judgment in *Fini H*, C?32/03, EU:C:2005:128, paragraphs 33 and 34).

20 – See point 12 of this Opinion.

21 – According to the Portuguese Government, Saudaçor can also receive other amounts from the RAA under Clauses 2, 5 and 7 of the programme agreements, in particular the grants paid by the RAA to Saudaçor in order to pursue certain specific objectives in the public interest.

22 – As that programme agreement was not signed until 5 March 2010, the amount of the contribution in question indicated in the agreement did not correspond to the actual amount already charged monthly and paid for the services actually provided by Saudaçor in 2009.

23 – Judgments in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraphs 8, 9 and 15); *Commission* v *Greece* (C?260/98, EU:C:2000:429, paragraphs 26 and 28) and *Commission* v *Finland* (C?246/08, EU:C:2009:671, paragraph 37 and cited case-law).

24 – Judgments in *Apple and Pear Development Council* (102/86, EU:C:1988:120); *Tolsma* (C?16/93, EU:C:1994:80, paragraphs 13 and 14); *Kennemer Golf* (C?174/00, EU:C:2002:200, paragraph 39); *Commission v Finland* (C?246/08, EU:C:2009:671, paragraph 44); *GFKL Financial Services* (C?93/10, EU:C:2011:700, paragraph 18 and 19) and *Serebryannay vek* (C?283/12, EU:C:2013:599, paragraph 37 and cited case-law).

25 – Judgments in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 10); *Commission* v *Ireland* (C?358/97, EU:C:2000:425, paragraph 31) and *Commission* v *United Kingdom* (C?359/97, EU:C:2000:426, paragraph 43).

26 – Judgment in *Landboden-Agrardienste* (C?384/95, EU:C:1997:627, paragraph 20).

27 – Judgments in *Loyalty Management UK and Baxi Group* (C?53/09 and C?55/09, EU:C:2010:590, paragraph 56) and *Le Rayon d'Or* (C?151/13, EU:C:2014:185, paragraph 34).

28 – Judgments in *Kennemer Golf* (C?174/00, EU:C:2002:200, paragraph 40) and *Le Rayon d'Or* (C?151/13, EU:C:2014:185, paragraph 36). In the present case, under the programme agreements the contribution from the RAA is paid to Saudaçor in twelfths and, according to the Portuguese Government, the services of Saudaçor are also charged monthly.

29 – Judgment in *Landboden-Agrardienste* (C?384/95, EU:C:1997:627, paragraph 20).

30 – Judgment in *Newey* (C?653/11, EU:C:2013:409, paragraphs 42 to 45).

31 – See, in this regard, judgment in *Commission* v *Finland* (C?246/08, EU:C:2009:671, paragraphs 49 and 51), according to which the link between the legal aid services provided by public legal aid offices and the payment to be made by the recipients was not, in that case, sufficiently direct for that payment to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities, as the part payment made to the public offices by recipients depended only in part on the actual value of the services provided.

32 – Judgments in *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505, paragraphs 25 to 28 and 38); *Commission* v *Ireland* (C?554/07, EU:C:2009:464, paragraph 39) and *Commission* v *Netherlands* (C?79/09, EU:C:2010:171, paragraph 76).

33 – Judgment in *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505, paragraph 38).

34 – Second subparagraph of Article 13(1) of Directive 2006/112.

35 – Judgment in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 18).

36 – See in this regard judgments in *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505, paragraph 60); *Commission* v *Ireland* (C?554/07, EU:C:2009:464, paragraph 42) and *Commission* v *Spain* (C?154/08, EU:C:2009:695, paragraph 119), and order in *Gmina Wroc?aw* (C?72/13, EU:C:2014:197, paragraph 19).

37 – See, inter alia, judgments in *Adolf Truley* (C?373/00, EU:C:2003:110, paragraph 43) and *Commission* v *Spain* (C?214/00, EU:C:2003:276, paragraph 53 and cited case-law).

38 – See, for example, Article 2(8) of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1); Article 2(16) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320); and Article 2(i) of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1). The latter regulation was adopted before the adoption of Directive 2006/112 and the first two legal acts after it was adopted, which shows that the Union legislature's practice in this regard has not changed.

39 – Judgment in *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505, paragraph 25).

40 – Explanatory Memorandum, COM(73) 950, 20 June 1973.

41 – In particular, the French, German, Italian and Dutch versions.

42 – See the Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment, submitted to the Council by the Commission on 29 June 1973 (OJ 1973 C 80, p. 1).

43 – Judgment in *Commission* v *Spain* (C?154/08, EU:C:2009:695, paragraph 119).

44 – See point 63 of this Opinion. It should be noted, however, that a 'strict' interpretation does not necessarily mean a 'restrictive' interpretation. Exemptions from VAT should be strictly interpreted but should not be whittled away by interpretation. Limitations on VAT exemptions should not be interpreted narrowly, but nor should they be construed so as to go beyond their terms. Both the exemptions and any limitations on them must be interpreted in such a way that the exemption applies to that to which it was intended to apply and no more (see, in this regard, Opinion of Advocate General Jacobs in *Zoological Society* (C?267/00, EU:C:2001:698, point 19)).

45 – C?154/08, EU:C:2009:695.

46 – Ibid. (paragraph 119).

47 – See, inter alia, judgments in *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraph 16); *Comune di Carpaneto Piacentino and Others* (C?4/89, EU:C:1990:204, paragraph 8); *Commission* v *France* (C?276/97, EU:C:2000:424, paragraph 40); *Commission* v *Ireland* (C?358/97, EU:C:2000:425, paragraph 38); *Commission* v *United Kingdom* (C?359/97, EU:C:2000:426, paragraph 50); *Fazenda Pública* (C?446/98, EU:C:2000:691, paragraph 17) and *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505, paragraph 21).

48 – See, to this effect, judgments in *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraph 15) and *Comune di Carpaneto Piacentino and Others* (C?4/89, EU:C:1990:204, paragraph 10).

49 – Judgments in *Commission* v *France* (C?276/97, EU:C:2000:424, paragraphs 45 and 46); *Commission* v *Ireland* (C?358/97, EU:C:2000:425, paragraphs 43 and 44) and *Commission* v *United Kingdom*

(C?359/97, EU:C:2000:426, paragraphs 55 and 56).

50 – Idem, and judgment in *Commission* v *Spain* (C?154/08, EU:C:2009:695, paragraph 115). In the judgment in *CO.GE.P.* (C?174/06, EU:C:2007:634, paragraphs 24 and 25), the Court held that the situation of a public economic entity which acts not in the name of and on behalf of the State but on its own account, by making independent decisions, did not fulfil the cumulative conditions required to apply the rule of treatment as a non-taxable person under Article 4(5) of the Sixth Directive.

51 – See, in this regard, the Commission Final Report of 1 March 2011 entitled ‘VAT in the public sector and exemptions in the public interest’, Final report for TAXUD/2009/DE/316, p. 41.

52 See, inter alia, the judgments in *Commission* v *France* (C?276/97, EU:C:2000:424, paragraph 39) and *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505, paragraph 19).