OPINION OF ADVOCATE GENERAL

JÄÄSKINEN

delivered on 30 June 2015 (1)

Case C?276/14

Gmina Wroc?aw

v

Minister Finansów

(Request for a preliminary ruling from the Naczelny S?d Administracyjny (Poland))

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Articles 9 and 13 — Articles 5(3) and 4(2) TEU — Economic activities carried out by an organisational entity of a municipality other than as a public authority — Organisational entity of a municipality whose economic activities do not fulfil the criterion of independence — Whether such an entity may be regarded as a taxable person for the purposes of value added tax within the meaning of the provisions of Directive 2006/112)

I – **Introduction**

1. This request for a preliminary ruling, submitted by the Naczelny S?d Administracyjny (Supreme Administrative Court), questions whether an organisational entity of a municipality, whose economic activities do not fulfil the criterion of independence as provided for in Article 9(1) of Directive 2006/112/EC, (2) may be regarded as a taxable person for the purposes of value added tax ('VAT'), distinct from the municipality of which it forms part, for economic transactions carried out by that entity on behalf of the municipality.

2. In particular, the national court asks the Court of Justice whether that notion of independence, as provided for in Article 9(1) of Directive 2006/112, must be taken into account in order for bodies governed by public law, such as the municipal budgetary entities referred to in the request for a preliminary ruling, to be treated as taxable persons for the purposes of VAT, having regard to Article 13(1) of that directive as well as Articles 4(2) and 5(3) TEU on the principles of subsidiarity and institutional autonomy.

3. In the Polish Republic's view, the crux of the matter is that, in Poland, municipalities perform their public service tasks independently, by means of organisational entities created to that end, in particular municipal budgetary entities, (3) which have, until now, been treated as taxable persons for the purposes of VAT, distinct from the municipality. This case therefore raises a question as to the interpretation of Articles 9 and 13 of Directive 2006/112, concerning how to assess the way in which these organisational entities, particularly municipal budgetary entities, carry out their economic activities.

4. The question concerning the principles of subsidiarity and institutional autonomy laid down in Articles 5(3) and 4(2) TEU was raised by the national court as it takes the view that the impossibility of registering municipal budgetary entities, such as those referred to in the main proceedings, as taxable persons for the purposes of VAT, distinct from the municipality, may have an impact on the operating model of local and regional bodies in Poland. It is therefore necessary to examine whether those provisions of primary law have an effect on the interpretation of the relevant provisions of Directive 2006/112.

5. As noted by the parties who submitted observations in this case, the case-law of the Court on the criterion of independence concerns the application of that criterion to the activities of natural persons performing public functions and the activities of private entities. Consequently, the national court asks the Court of Justice to examine whether that case-law should be applied in the same way to bodies governed by public law.

II – **Legal framework**

A – *Directive 2006/112*

6. Directive 2006/112 repealed and replaced, as from 1 January 2007, the existing Community legislation on VAT, including the Sixth Directive. (4)

7. Article 9(1) of Directive 2006/112 provides:

'"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. As set out in Article 10 of Directive 2006/112:

'The condition in Article 9(1) that the economic activity be conducted "independently" shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.'

9. Article 13(1) of Directive 2006/112 is worded as follows: (5)

'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 – *Polish law*

10. Article 15(1) of the Law of 11 March 2004 on goods and services tax (6) transposes Article 9(1) of Directive 2006/112 into Polish law, as follows:

'"Taxable persons" shall mean legal persons, organisational entities without legal personality and natural persons who carry out, independently, one of the economic activities referred to in paragraph 2, whatever the purpose or results of that activity.'

11. Article 15(6) of the national law on VAT provides that taxable persons shall not include public authorities and the offices of such authorities as regards tasks established by specific provisions for the accomplishment of which they have been appointed, with the exception of activities carried out under private law contracts.'

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

12. In the Polish administrative system, municipalities carry out the tasks entrusted to them under the Law of 8 March 1990 on municipalities (7) with the assistance of local and regional budgetary establishments and municipal budgetary entities. (8) The latter, which do not have legal personality, essentially serve to carry out tasks for which the municipality is responsible. Their purpose is not to engage in economic activities, which may, at most, occur in the context of other activities of a fundamental nature. The income and expenditure of municipal budgetary entities, including that associated with their economic activities subject to VAT, form part of the municipality's budget. These entities include schools and cultural centres.

13. The dispute in the main proceedings between the Gmina Wroc?aw (Municipality of Wroc?aw) and the Minister Finansów (Polish Minister of Finance, 'the Minister of Finance') has its origin in the municipality's requests for written interpretations of tax law.

14. The Municipality of Wroc?aw asked the Minister of Finance whether a municipal budgetary entity may be registered as a taxable person for the purposes of VAT separately from the municipality for transactions falling within the scope of VAT, or whether the municipality itself must be registered as a taxable person for transactions carried out by its budgetary entity. The Municipality of Wroc?aw argues that such municipal budgetary entities do not satisfy the criterion of independence in order to be treated as taxable persons for the purposes of VAT, provided for in Article 15(1) and (2) of the national law on VAT, and, therefore, cannot be registered separately. Furthermore, the registration of municipal budgetary entities separately from the municipality leads to a number of practical difficulties. (9)

15. In his individual written interpretations, the Minister of Finance took the view that since municipal budgetary entities which are separate from the municipality's organisational structure engage independently in economic activities, as determined by objective criteria, and in doing so carry out activities that are subject to VAT, they should be regarded for the purposes of VAT as

being taxable persons distinct from the municipality.

16. The Municipality of Wroc?aw brought actions before the Wojewódzki S?d Administracyjny we Wroc?awiu (Regional Administrative Court, Wroc?aw) challenging the individual written interpretations of the Minister of Finance. That court dismissed the actions and the municipality lodged an appeal on a point of law before the referring court.

17. By order of 30 January 2013, the ordinary chamber of the Naczelny S?d Administracyjny referred to an extended chamber the question whether municipal budgetary entities were taxable persons for the purposes of VAT. By decision of 24 June 2013 replying to the ordinary chamber, the extended chamber found that the municipal budgetary entities mentioned in the case were not taxable persons for the purposes of VAT since, despite being organisationally separate from the municipality, they did not engage in economic activities autonomously or independently of the municipality.

18. On the other hand, according to the reference for a preliminary ruling, it is unclear to what extent the criterion of independence set out in Article 9(1) of Directive 2006/112 should be applied, under EU law, to bodies governed by public law. In addition, the national court is uncertain whether the criterion of independence is consistent with the principles of subsidiarity and institutional autonomy laid down in Articles 5(3) and 4(2) TEU, according to which the structure of local government bodies and the division of their powers falls within the competence of the Member States.

19. Harbouring doubts as to the interpretation of Articles 9(1) and 13(1) of Directive 2006/112, by decision of 10 December 2013, the ordinary chamber of the Naczelny S?d Administracyjny decided to stay the main proceedings and refer the following question to the Court for a preliminary ruling:

‘In the light of Article 4(2), in conjunction with Article 5(3) [TEU], may an organisational entity of a municipality (a local government body in Poland) be regarded as a taxable person for purposes of VAT when it engages in activities other than as a public authority within the meaning of Article 13 of … Directive [2006/112]…, notwithstanding the fact that it does not satisfy the criterion of autonomy (independence) set out in Article 9(1) of that directive?’

20. Written observations were submitted by the Municipality of Wroc?aw, the Minister of Finance, the Polish and Greek Governments as well as the European Commission, all of whom — except for the Greek Government — were represented at the hearing held on 5 May 2015.

IV – **Analysis**

A – *Preliminary observations*

21. The question referred for a preliminary ruling by the national court starts from the premiss that the municipal organisational entities at issue in the main proceedings, particularly municipal budgetary entities, do not satisfy the criterion of independence laid down in Article 9(1) of Directive 2006/112. The extended chamber of the national court noted that fact in its reply to the ordinary chamber. (10)

22. It is necessary to point out, first of all, that the main proceedings relate only to the municipal *budgetary* entities of the Municipality of Wroc?aw, even though the question referred for a preliminary ruling concerns, more generally, municipal *organisational* entities which do not satisfy the criterion of independence. Municipal organisational entities cover several types of entities whose level of independence in the pursuit of their activities may vary. Nevertheless, this opinion

concerns only the municipal budgetary entities at issue in the main proceedings.

23. The question referred for a preliminary ruling thus seeks to ascertain whether the municipal budgetary entities at issue in the main proceedings may be treated as taxable persons despite lacking independence in the pursuit of their activities. In this connection, the Minister of Finance argues that the criterion of independence cannot be applied to bodies governed by public law, because fulfilment of this condition might result in a disproportionate interference with the institutional autonomy which Member States are recognised as having. In his view, Article 13 of Directive 2006/112 should be treated as a special provision with respect to Article 9(1) thereof. Accordingly, a review of the question of independence is neither necessary nor appropriate as regards bodies governed by public law.

24. The Polish Government suggests reformulating the question referred for a preliminary ruling in order to examine, first of all, whether the municipal budgetary entities at issue in the main proceedings satisfy the criterion of independence which applies to them. It argues that these entities satisfy that criterion. Only in the alternative — if the Court finds that the criterion of independence is not satisfied as regards municipal budgetary entities — is it necessary to examine whether such entities may nevertheless be treated as taxable persons under Article 13(1) of Directive 2006/112.

25. For my part, I consider that in order to provide a helpful answer to the national court, it is necessary not to reformulate the question referred for a preliminary ruling, but rather to examine specifically whether — and if so, how — the definition of the notion of ‘taxable person’ set out in Article 9(1) of Directive 2006/112, which includes the criterion of independence of economic activities, should be applied to bodies governed by public law as referred to in Article 13(1) of Directive 2006/112. I am of the view that the answer lies in the case-law of the Court which I shall examine below. I will begin my analysis with an assessment of, first, the ties between Articles 9 and 13 of Directive 2006/112 and, second, the notion of ‘taxable person’ appearing in Article 9(1) of Directive 2006/112.

B – *The relationship between Articles 9 and 13 of Directive 2006/112 and the broad definition of the notion of ‘taxable person’*

26. In the common system of VAT, Articles 9 and 13 of Directive 2006/112 form part of Title III thereof, entitled ‘Taxable persons’. Title III sets out the rules on the treatment of persons as taxable persons in general and also provides for specific cases, such as VAT groupings and the rules on public authorities. In this connection, Article 9 is the general rule on taxable persons for the purposes of VAT, whilst Article 13 sets out an exemption. (11)

27. According to the case-law, it is important that, for the uniform application of Directive 2006/112, the notion of ‘taxable person’ is given an autonomous and uniform interpretation. (12)

28. The general definition of this notion, laid down in Article 9(1) of Directive 2006/112, states that taxable person shall mean ‘*any person who*, independently, carries out in any place any economic activity’. (13) This very broad expression encompasses all natural persons and legal persons, both public and private.

29. Furthermore, this broad definition of the notion of ‘taxable person’ can also apply to an entity devoid of legal personality. (14) Therefore, the fact that the municipal budgetary entities at issue in the main proceedings do not have legal personality is irrelevant to the possibility of registering them as taxable persons distinct from the municipality.

30. On the other hand, according to the case-law of the Court, the application of Article 13(1) of

Directive 2006/112 implies a prior finding that the activity considered is of an economic nature. (15) If an economic activity within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112 is found to exist, then it is necessary to examine the applicability of the exception concerning bodies governed by public law laid down in the first subparagraph of Article 13(1) of that directive. (16)

31. In its judgment in *Commission* v *Spain*, (17) the Court stated — in the context of the assessment of a possible infringement by a Member State — that it was necessary to examine, first, whether the activities in question amount to economic activities, *second*, whether those activities are carried out *independently* and, third, whether, in any event, the rule on treatment as non-taxable persons for the purposes of VAT (18) as regards activities carried out by a body governed by public law as a public authority may be applied. (19)

32. Consequently, the Court has already expressly held that the assessment of whether the economic activity is independent precedes the assessment conducted under Article 13(1) of Directive 2006/112.

33. None the less, the national court asks whether this case-law is relevant as regards bodies governed by public law, as the criterion of independence of the activity has, thus far, only been reviewed by the Court as regards natural persons performing public functions. (20) According to the national court, the question whether the activity is independent need not be assessed when legal persons governed by public law are concerned. I do not share the national court's view.

34. It is apparent from the broad logic of the common system of VAT, from the wording of Article 9(1) of Directive 2006/112, which does not contain any limitations, (21) and from the case-law cited above, that the full definition of taxable person set out in Article 9 must be applied to everyone in a uniform and consistent manner. (22)

35. As regards the broad logic of the common system of VAT, it should be recalled that Articles 9 and 13 of Directive 2006/112 confer a very wide scope on VAT. The EU legislature intended to limit the scope of the treatment of bodies governed by public law as non-taxable persons, so that this general rule is observed. (23)

36. Therefore, if a natural or legal person does not fulfil the criteria set out in Article 9(1) of Directive 2006/112 in order to be treated as a taxable person, particularly the condition that the economic activity must be carried out 'independently', it is not necessary to determine whether that person might be exempt from VAT under Article 13(1) of Directive 2006/112.

37. Consequently, it cannot be held, as the Minister of Finance argues, that it is not necessary to examine whether bodies governed by public law carry out an economic activity independently within the meaning of Article 9(1) of Directive 2006/112, because the State is entitled to confer on entities the status of body governed by public law. In my opinion, the status of an entity as a body governed by public law is irrelevant if that entity does not, in any event, carry out an economic activity independently.

38. However, the parties who submitted observations expressed doubts as to whether this criterion of independence of the activities should be applied to bodies governed by public law *in the same way* as to private operators. It is therefore necessary to examine the case-law of the Court concerning this criterion as well as its application to bodies governed by public law.

C – *Case-law of the Court concerning the criterion of independence of the economic activities as provided for in Article 9(1) of Directive 2006/112 and its application to the economic activities of bodies governed by public law*

39. The condition that the economic activity be carried out independently, set out in Article 9(1) of Directive 2006/112, is defined in negative terms in Article 10 thereof. Under Article 10, the activity is not carried out independently and does not result in VAT being levied where there is an employer-employee relationship. That provision sets out three criteria for determining whether such a relationship exists, pertaining to working conditions, remuneration and liability. (24)

40. By applying those criteria, the Court has identified factors which should be taken into account when assessing whether an economic activity is independent in accordance with Article 9(1) of Directive 2006/112. The factors to be taken into account — which are listed in, among other decisions, the judgment in *van der Steen* (25) — thus include the performance of the activities by a person in his own name, on his own behalf and under his own responsibility, and the fact that he bears the economic risk associated with carrying out the activities. (26)

41. In order to find that an activity is independent, the Court has taken into account the complete absence of any employer-employee relationship between public authorities and operators who were not integrated into the public administration, as well as the fact that such operators acted on their own account and under their own responsibility, were free to arrange how they performed their work and themselves received the emoluments which made up their income. (27)

42. According to the Court, the independent nature of the economic activity is also evidenced by the fact that operators procure and organise independently, within the limits laid down by the law, the staff and the equipment and materials necessary for them to carry out their activities, as well as the fact that they bear the liability arising from the contractual relationships entered into by them in the course of their activity and the liability for any damage caused to third parties when they are not acting as representatives of the public authority. (28)

43. The condition relating to economic risk was addressed in the judgment in *FCE Bank*, (29) in which the Court held that a bank branch was not an independent bank because, having no endowment capital, it did not itself bear the economic risks associated with carrying on its activities. Therefore, it could not be regarded as a taxable person for the purposes of VAT. (30)

44. I recall that the application of the notion of taxable person must be uniform and consistent. (31) Ultimately, the condition of independence concerns the *way in which the economic activities are carried out*, nothing more. It is true that the case-law cited above laying down assessment criteria relating to the independence of the economic activity concerns only natural persons performing public functions and legal persons governed by private law. However, in my opinion, there is nothing to suggest that those same assessment criteria do not also apply to economic activities carried out by bodies governed by public law mentioned in Article 13(1) of Directive 2006/112. If the above criteria can be applied to, inter alia, private entities, whose internal structures and commercial practices may also be more diverse and complex than those of bodies governed by public law, I think that they should be applied to bodies governed by public law in the same way. In this connection, the specific nature of bodies governed by public law relates instead to their activities carried out as public authorities, which are taken into account separately under the exemption provided for in Article 13 of Directive 2006/112.

45. The Polish Government contends that the criterion concerning economic risk cannot be held to apply to bodies governed by public law, because neither the municipality nor its budgetary

entities can be subject to insolvency procedures. Thus, according to the Polish Government, bodies governed by public law are not exposed to economic risks which are comparable to those taken by private bodies carrying out economic activities. (32) In its view, if the criterion of independence were applied to bodies governed by public law in the same way as to private entities, neither budgetary entities nor municipalities themselves would fulfil the conditions for treatment as ‘taxable persons’ within the meaning of Article 9(1) of Directive 2006/112.

46. In my view, the existence of an economic risk must be given a broader interpretation than that sought by the Polish Government. The materialisation of the economic risk may take different forms, but I think that the person who bears the risk must have assets of some kind he risks losing. For example, the economic risk for a credit institution may be a customer defaulting on the repayment of a loan. (33) A finding that an operator bears the economic risk of his activity may also derive from the fact that his earnings depend not only on the amounts directly associated with his activity, but also on expenditure incurred on staff and equipment in connection with the activity, among others. (34)

47. Furthermore, Directive 2006/112 is based on the idea that bodies governed by public law as referred to in Article 13(1) thereof, such as the State and municipalities, may be taxable persons for the purposes of VAT as regards the activities they engage in other than as public authorities. They may be taxable persons for the purposes of VAT even for the activities they engage in as public authorities ‘where their treatment as non-taxable persons would lead to significant distortions of competition’. (35) Thus, the fact that an entity may be subject to insolvency procedures is not determinative of its status as taxable person under Article 9(1) of Directive 2006/112.

48. My view is that the independent nature of the economic activities of an entity, from the standpoint of risk, depends less on whether that entity bears an economic risk deriving from its activities, and more on whether there is, in actual fact, another entity which — out of its own assets and in the former’s stead — bears the risk associated with those economic activities. (36)

49. To conclude, the fact that an entity bears the economic risk is one of the factors to be taken into account when assessing how the entity carries out its economic activities. The other factors that may be taken into account include the carrying out of an activity by an entity in its own name and on its own behalf, the ownership of assets, the freedom to arrange how to organise the performance of work, staff and equipment, and the fact that the entity bears contractual liability and liability for damage caused to third parties. The question whether an economic activity is independent, as provided for in Article 9(1) of Directive 2006/112, must be assessed on a case-by-case basis, having regard to all the circumstances.

D – *The principles of subsidiarity and institutional autonomy provided for in Articles 5(3) and 4(2) TEU*

50. Lastly, it should be noted that the independence referred to in Article 9 of Directive 2006/112 is assessed by reference to the *carrying out of economic activities*. The question is not whether a body governed by public law is independent or autonomous within the structure of the local and regional bodies of a Member State, or what its status is under domestic administrative law. Consequently, the institutional autonomy of Member States in terms of Article 4(2) TEU is in no way affected by the above findings.

51. The Greek Government considered that the confusion in that regard in the present case is the result of linguistic differences in Article 9(1) of Directive 2006/112, to which the national court refers. According to the national court, the French and English language versions use the expression ‘d’une façon *indépendante*’ (in English, ‘independently’), whilst the Polish language

version uses the expression ‘autonomously’ (‘samodzielnie’in Polish (37)). I note that the expression ‘d’une façon indépendante’ is also used in several other language versions. (38)

52. As regards linguistic differences, it is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (39)

53. Accordingly, the wording used in the Polish language version cannot be used alone to interpret Article 9(1) of Directive 2006/112. In that regard, I have already considered the case-law interpretation of Article 9(1) of Directive 2006/112 in points 40 to 43 of this opinion. In any event, I find it difficult to grasp the difference between an activity carried out ‘independently’ and one carried out ‘autonomously’, in view of the case-law of the Court on this criterion. However, the dispute relates not to the independent or autonomous nature of the entity concerned, but to the way in which its economic activity is carried out.

54. I also note that the criteria relating to the treatment of persons as taxable persons for the purposes of VAT, which flow from Article 9(1) of Directive 2006/112, are objective criteria that must be fulfilled. A Member State cannot alter the scope of Directive 2006/112 by means of national provisions relating to the organisation of municipalities.

55. As the Commission, too, has found, Member States are free to organise the structure and the activities of their bodies governed by public law, including by optimising their internal structure with respect to the rules on VAT. A Member State’s choice as to the organisational structure of its bodies governed by public law may have different consequences in terms of VAT, without, however, curtailing the freedom of choice it enjoys. None the less, although Member States enjoy the freedom of choice mentioned in Article 4(2) TEU, the consequences of some choices are predetermined by EU law. (40)

56. It should also be recalled, as the Polish Republic itself has pointed out, that the purpose of bodies governed by public law is not, in principle, to engage in economic activities other than as a public authority. Any economic activities carried out by bodies governed by public law are ancillary to, and often connected with, the performance of public service tasks. The treatment of bodies governed by public law as taxable persons for the purposes of VAT, for economic activities carried out by them other than as a public authority, is just one of the factors that Member States may take into account when establishing the organisational structure of their administration.

57. As regards the principle of subsidiarity, it is clearly apparent from the wording of recital 65 in the preamble to Directive 2006/112 (41) that this principle was taken into account by the EU legislature when the directive was drafted.

58. I recall that, in the main proceedings, the extended chamber of the Naczelny S?d Administracyjny already appears to have found that the activities of the municipal budgetary entities referred to in the request for a preliminary ruling are independent. In view of the analysis to be conducted and the need to be acquainted with the specific features of the Polish local government system, it is in fact the national court that is best placed to assess, in the light of the criteria identified by the Court, (42) whether municipal budgetary entities such as those referred to in the main proceedings carry out their activities independently. Since the Court does not have all of the required information on local government in Poland to be able to conduct that assessment, it is for the national court to do so.

E – *Request to limit the temporal effect of the judgment*

59. The Polish Government has requested that, if the Court finds that budgetary entities cannot be treated as taxable persons for the purposes of VAT, the temporal effect of the Court's judgment should be limited. To that end, it claims that there is a danger of serious economic repercussions. In its view, a decision to that effect would have a significant impact on the current operating model of local government in Poland, which might have adverse consequences for the country's entire public finance sector. Furthermore, the Republic of Poland, acting in good faith, considered and continues to consider that budgetary entities may be treated as taxable persons for the purposes of VAT.

60. It should be noted that, at the hearing, the Polish Government conceded that the impact of such an outcome on its local government operating model would rather be a matter for the future. The retroactive effects of the judgment stem only from the need to recalculate the taxes levied during the preceding five years. (43)

61. I recall, in that regard, that VAT is a tax on consumption levied on expenditure on, or the final consumption of, goods and services by natural or legal persons. In theory, VAT should result in a single rate of duty in that the tax burden on goods or services should exactly match the VAT calculated on the selling price charged to customers, irrespective of the number of transactions that took place prior to taxation. Thus, the VAT charged on services provided to the public by municipal budgetary entities should not depend on the manner in which the municipality is registered as a taxable person for the purposes of VAT, namely whether it is registered with its budgetary entities as a single taxable person or whether the budgetary entities are registered separately.

62. However, as the Municipality of Wroc?aw pointed out at the hearing, as EU law currently stands, the VAT system contains many aspects which diminish complete tax neutrality, such as the power of Member States to exempt the economic activities of small undertakings from VAT. (44) Accordingly, the answer to the question referred for a preliminary ruling is not irrelevant at a practical level.

63. However, it is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the legal order of the European Union, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. (45)

64. More precisely, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and

where it appeared that individuals and national authorities had been led to adopt practices incompatible with EU legislation by reason of objective, significant uncertainty regarding the implications of provisions of EU law. (46)

65. In my opinion, the reasons put forward by the Polish Government do not fulfil those criteria. The Polish Government was in no way able to assess the scale of any possible economic repercussions. The present case concerns only the municipal budgetary entities referred to in the main proceedings and the possibility of determining whether their activities are carried out independently. In any event, the question of the possible consequences of the judgment to be delivered by the Court — also as regards the State budgetary entities and budgetary establishments mentioned in the discussion between the parties — is a matter of national law.

66. Based on all of the foregoing, I consider that it is not appropriate to limit the temporal effect of the judgment of the Court in this case.

V – **Conclusion**

67. In the light of the above considerations, I propose that the Court answer the question referred for a preliminary ruling by the Naczelny S?d Administracyjny (Poland) as follows:

Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that an organisational entity of a municipality may be treated as a taxable person for the purposes of value added tax only if it carries out its economic activities independently within the meaning of that article. It is for the national court to assess, in the light of the criteria identified by the Court, whether the municipal budgetary entities at issue in the main proceedings carry out their activities independently.

1 – Original language: French.

2 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – The Polish system also provides for other kinds of municipal organisational entities and State entities. For example, according to the municipality of Wroc?aw, municipal budgetary establishments have a higher degree of independence than municipal budgetary entities.

4 – 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’). In spite of numerous drafting amendments, the relevant provisions of Directive 2006/112 are essentially identical to the corresponding provisions of the Sixth Directive. See, to that effect, judgment in *Le Rayon d’Or* (C?151/13, EU:C:2014:185, paragraph 6).

5 – As regards the discrepancies between several language versions of Article 13(1) of Directive 2006/112 and the analysis of the notion of ‘other bodies governed by public law’, see my opinion in *Saudaçor* (C?174/14, EU:C:2015:430, points 68 to 82).

6 – Ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug, Dz. U No 54, item 535, as amended (‘the national law on VAT’).

7 – Ustawa z dnia 8 marca 1990 r. o samorz?dzie gminnym, Dz. U de 2001, No 142, item 1591, consolidated version. Article 9(1) of that law provides that ‘in order to carry out their tasks, the municipality may establish organisational entities and also conclude agreements with other bodies, including NGOs [non-governmental organisations]’.

8 – The establishment of budgetary entities is governed by the Law on public finances (ustawa o finansach publicznych, Dz. U de 2013, item 885, as amended).

9 – At the hearing, the Municipality of Wroc?aw explained the practical issues which, in its view, arise in this case. It submits that if the municipality was registered as the sole taxable person for the purposes of VAT with all of its budgetary entities, it would be easier for it to oversee the VAT rules as a whole, to be well informed of the activities of its budgetary entities, to apply a uniform tax policy within the municipality and to dispel doubts and uncertainties regarding the taxation of the municipality’s internal transactions. Conversely, if the municipality and its budgetary entities were split into several taxable persons for the purposes of VAT, the principle of neutrality of VAT would be affected. For instance, if a municipality delegates an investment activity to one budgetary entity in circumstances where another budgetary entity carries out the taxable economic activity based on that investment, it is unclear whether the first budgetary entity qualifies for VAT reductions even though both entities form part of the organisational structure of the same municipality.

10 – See point 17 of this opinion.

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

12 – Judgments in *Commission v Sweden* (C?480/10, EU:C:2013:263, paragraph 34) and *Skandia America* (USA), *filial Sverige* (C-7/13, EU:C:2014:2225, paragraph 23).

13 – Emphasis added.

14 – See judgment in *Heerma* (C?23/98, EU:C:2000:46, paragraph 8) and the opinion of Advocate General Léger in *FCE Bank* (C?210/04, EU:C:2005:582, point 36). The expression ‘any person’, used in the English language version of Article 9(1) of Directive 2006/112, should thus be read as meaning ‘anyone’, like several other language versions of this article (see, in this respect, Terra, B., and Kajus, J., *A Guide to the European VAT Directives: Introduction to European VAT*, IBFD 2015, vol. 1., p. 469).

15 – See, to that 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); *Isle of Wight Council and Others* (C?288/07, EU:C:2008:505, paragraphs 28 to 30); and *Commission* v *Finland* (C?246/08, EU:C:2009:671, paragraphs 34 and 39). This order of examination was also upheld in judgments in *Commission* v *France* (C?276/97, EU:C:2000:424); *Commission* v *Ireland* (C?358/97, EU:C:2000:425); and *Commission* v *United Kingdom* (C?359/97, EU:C:2000:426). In these judgments, the question whether the economic activity was independent was not, however, raised.

16 – Order in *Gmina Wroc?aw* (C?72/13, EU:C:2014:197, paragraph 19).

17 – C?154/08, EU:C:2009:695, paragraph 86.

18 – The relevant article in that case was Article 4(5) of the Sixth Directive, which corresponds to what is now Article 13 of Directive 2006/112.

19 – This order of examination has also previously been upheld in judgments in *Commission* v *Netherlands* (235/85, EU:C:1987:161) and *Ayuntamiento de Sevilla* (C?202/90, EU:C:1991:332). Also see, to this effect, order in *Mihal* (C?456/07, EU:C:2008:293, paragraphs 21 and 22).

20 – These cases include notaries, bailiffs, tax collectors and Spanish ‘registradores-liquidadores’. See, in that regard, points 41 and 42 of this opinion.

21 – In that regard, see point 28 of this opinion. According to the case-law concerning Article 4 of the Sixth Directive, having regard to the purpose of that directive, which is inter alia to found a common system of VAT upon a uniform definition of ‘taxable person’, that status must be assessed solely on the basis of the criteria set forth in Article 4 thereof (see, to that effect, judgments in *van Tiem*, C?186/89, EU:C:1990:429, paragraph 25; *BBL*, C?8/03, EU:C:2004:650, paragraph 37; and *HE*, C?25/03, EU:C:2005:241, paragraph 41). Article 4 of the Sixth Directive encompassed the articles to which Articles 9 and 13 of Directive 2006/112, among others, now correspond.

22 – Thus, treatment as a taxable person does not depend on the private law or public law nature of the person pursuing the economic activities (Terra, B., and Kajus, J., op.cit., p. 431).

23 – 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, paragraphs 39 to 41); and *Commission* v *Netherlands* (C?79/09, EU:C:2010:171, paragraphs 76 and 77).

24 – Opinion of Advocate General Léger in *FCE Bank* (C?210/04, EU:C:2005:582, point 39).

25 – C?355/06, EU:C:2007:615.

26 – Judgment in *van der Steen* (C?355/06, EU:C:2007:615, paragraphs 21 to 25). For the same factors, also see judgment in *Heerma* (C?23/98, EU:C:2000:46, paragraph 18).

27 – Judgment in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 14) and opinion of Advocate General Léger in *FCE Bank* (C?210/04, EU:C:2005:582, point 40). The Court upheld this interpretation as regards Slovak bailiffs in the order in *Mihal* (C?456/07, EU:C:2007:673, paragraph 21).

28 – Judgment in *Ayuntamiento de Sevilla* (C?202/90, EU:C:1991:332, paragraphs 11 to 15). Also see, to this effect, judgment in *Commission* v *Spain* (C?154/08, EU:C:2009:695, paragraphs 103 to 106) concerning Spanish ‘registradores-liquidadores’.

29 – C?210/04, EU:C:2006:196.

30 – Judgment in *FCE Bank* (C?210/04, EU:C:2006:196, paragraphs 35 to 37). In his opinion in that case, Advocate General Léger also found that the branch did not carry on business on its own account (opinion of Advocate General Léger in *FCE Bank*, C?210/04, EU:C:2005:582, point 46).

31 – See point 34 of this opinion.

32 – It should be noted that, as regards State aid, an implied and unlimited State guarantee in favour of an undertaking which cannot be subject to compulsory administration and winding-up procedures constitutes State aid (see, to that effect, judgment in *France* v *Commission*, C?559/12

P, EU:C:2014:217, paragraphs 97 and 98). However, this finding is irrelevant for the purpose of interpreting Directive 2006/112, as the objectives of the rules on VAT differ from those pursued in other areas of EU law, such as State aid or public procurement. See, to that effect, my analysis on the interpretation of Article 13(1) of Directive 2006/112 in my opinion in *Saudaçor* (C?174/14, EU:C:2015:430, paragraphs 61 to 65).

33 – Judgment in *FCE Bank* (C?210/04, EU:C:2006:196, paragraph 36).

34 – In the judgment in *Ayuntamiento de Sevilla*, tax collectors bore the economic risk entailed in their activity in so far as their profit depended not only on the amount of taxes collected, but also on the expenses incurred on staff and equipment in connection with their activity (judgment in *Ayuntamiento de Sevilla*, C?202/90, EU:C:1991:332, paragraph 13). In the judgment in *Commission* v *Spain,* the Court held that the 'registradores-liquidadores' at issue in that case bore the economic risk of their activity in so far as their profit depended on the amount of taxes collected, on the expenses incurred on staff and equipment in connection with their activity, on the effectiveness of the 'registradores-liquidadores' and even, in some cases, on the percentage of penalties and fines imposed and collected in the course of the activity of 'registrador-liquidador' (judgment in *Commission* v *Spain*, C?154/08, EU:C:2009:695, paragraph 107).

35 – Under the second subparagraph of Article 13(2) of Directive 2006/112.

36 – For example, a primary school with a swimming pool that is used by the public during the evenings and at weekends may indeed be exposed to negative financial consequences deriving from that economic activity, such as an imbalance between expenditure and revenue. However, it is ultimately the municipality that bears this economic risk, as it must cover any possible losses generated by that activity.

37 – This Polish expression may also be translated as 'alone'.

38 – Particularly the Danish, German, Spanish, Italian, Maltese, Dutch, Portuguese, Romanian, Finnish and Swedish language versions.

39 – See, inter alia, judgment in *Ivansson and Others* (C?307/13, EU:C:2014:2058, paragraph 40).

40 – Also see, to this effect, judgment in *Commission* v *Spain* (C?154/08, EU:C:2009:695, paragraphs 120 to 123). According to this judgment, there is nothing in EU law to prevent a Member State or regions of a Member State from deciding, in accordance with the applicable legislation, to use entities — such as the 'registradores-liquidadores' in question in that case — to collect and assess taxes which unquestionably fall within the competence of the Member States. However, this does not mean that a Member State is free not to make services provided by such 'registradores' subject to VAT if it becomes apparent that the services are provided in the form of an independent economic activity.

41 – According to recital 65, '[s]ince, for those reasons, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'

42 – In this connection, I agree with the analysis of the Polish Government that the national court erred if it held — as the Government asserts — that the question whether the economic

activity was carried out independently must be examined solely on the basis of Polish law.

43 – In this connection, the Municipality of Wroc?aw stated at the hearing that several municipalities in Poland have been protecting their interests for some time by applying to the Minister of Finance for written interpretations, namely definitive rulings on the interpretation of tax law. Accordingly, these municipalities may choose to correct their tax returns retroactively or avail themselves of the protection conferred by the written interpretations. The Municipality of Wroc?aw also stated that, from an organisational standpoint, it is able to file a centralised VAT return.

44 – In addition, as I pointed out in my opinion in *Commission* v *Ireland* (C?85/11, EU:C:2012:753, point 45), as regards VAT groupings, the registration of entities with close economic links as a single taxable person may entail cash flow advantages at group level, as VAT is not charged on their internal transactions.

45 – Judgments in *Schulz and Egbringhoff* (C?359/11 and C?400/11, EU:C:2014:2317, paragraph 57 and the case-law cited) and *Balazs and Casa Jude?ean? de Pensii Cluj* (C?401/13 and C?432/13, EU:C:2015:26, paragraph 50 and the case-law cited).

46 – Judgments in *Schulz and Egbringhoff* (C?359/11 and C 400/11, EU:C:2014:2317, paragraph 58 and the case-law cited) and *Balazs and Casa Jude?ean? de Pensii Cluj* (C?401/13 and C?432/13, EU:C:2015:26, paragraph 51 and the case-law cited).