OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 7 September 2016 (1)

Case C?453/15

A,

B

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 56 — Place where services are supplied — ‘Similar rights’ — Transfer of greenhouse gas emission allowances)

1. In this case, which concerns the sale of a ‘right to pollute’, I cannot resist the temptation to quote a remark by Mr Le Bars: (2) ‘[w]ith … international and Community legislation, the air and its “pathology”, namely pollution, lie at the frontiers of commerce. Such action may seem immoral when the concept of a “right” is traditionally associated with positive content, which is not the case with pollution. Furthermore, the idea that private agents can earn money from pollution by acting as financial intermediaries for emission allowances seems unacceptable’.

2. This is clearly not the subject-matter of the present reference for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany), received by the Court on 24 August 2015, which asks the Court about the interpretation of Article 56(1)(a) of Directive 2006/112/EC (3) with respect to greenhouse gas emission allowances. The reference was made in criminal proceedings brought in Germany against A and B for being accessories to tax evasion.

3. In short, the question arises whether a *greenhouse gas emission allowance* under Article 3(a) of Directive 2003/87/EC (4) — which confers a right to emit one tonne of carbon dioxide equivalent during a specified period — *is a ‘similar right’* within the meaning of Article 56(1)(a) of the VAT Directive.

I – **Legislative framework**

A – *EU law*

4. Article 56(1) of the VAT Directive provides:

‘1. The place of supply of the following services to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place

where he has his permanent address or usually resides:

(a) transfers and assignments of copyrights, patents, licences, trade marks and similar rights;

…’

5. Article 3(a) of Directive 2003/87 states:

‘For the purposes of this Directive the following definitions shall apply:

(a) “allowance” means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive;

…’

B – *German law*

6. Under Paragraph 3a of the Umsatzsteuergesetz (Law on turnover tax, UStG), entitled ‘Place of other supplies’, in the version applicable to the dispute in the main proceedings:

‘(1) Subject to Paragraphs 3b and 3f, the other supplies are effected in the place from which the trader carries on his business. If the supply is effected from a fixed establishment, the location of the establishment shall constitute the place of supply.

…

(3) Where the customer to whom one of the other supplies mentioned in subparagraph 4 is made is a trader, by way of derogation from subparagraph 1, the other supply shall be deemed to be made in the place where the customer carries on his business. If, however, the other supply is made at the fixed establishment of a trader, the location of the fixed establishment shall be decisive. Where the customer to whom one of the other supplies mentioned in subparagraph 4 is made is not a trader and is resident or established in the territory of a third country, the other supply shall be deemed to be made at his place of residence or establishment.

(4) For the purposes of subparagraph 3, “other supplies” shall mean:

1. the assignment, transfer and administration of patents, copyrights, trade mark rights and similar rights;

…’

II – **The dispute in the main proceedings and the question referred for a preliminary ruling**

7. A and B, who work for a large tax advice business, were ordered by the Landgericht Hamburg (Regional Court, Hamburg) to pay fines for being accessories to tax evasion in a case concerning a value added tax (VAT) evasion scheme run by another co-defendant, G, from April 2009 to March 2010, which was aimed at evading VAT in greenhouse gas emission allowance trading.

8. Several companies were involved in the tax evasion scheme. Company E, which was resident in Germany and controlled in practice by G, acquired greenhouse gas emission allowances abroad, exempt from VAT, and transferred them to company I, which was resident in Luxembourg and also controlled by G. I issued invoices in the form of credit notes to E which included the VAT applicable in Germany and sold the allowances to company C, which was

resident in Germany; the credit notes issued for that transaction also included the VAT applicable in Germany.

9. In its provisional VAT returns for the second, third and fourth quarters of 2009, E declared the turnover from the sale of the allowances to I, claiming an input VAT deduction on the basis of false invoices from fictitious domestic suppliers. For January and March 2010 it did not submit provisional returns. It thus evaded payment of a total of EUR 11 484 179.12. I declared the supplies to C for the periods April to July 2009, September 2009 to January 2010 and March 2010 as taxable turnover and incorrectly claimed as input tax the VAT shown in the credit notes issued to E, thus evading payment of a sum of EUR 10 667 491.10.

10. From the end of May 2009, A and B provided tax advice to I and were instructed by G to provide a summary report on that company's VAT position. In that report they stated that I could invoice VAT applicable in Germany and claim it as input tax only if it had a place of business in Germany and carried out the relevant transactions from there and that the invoices issued before the establishment of a place of business in Germany had to be corrected.

11. On the basis of a backdated contract for the lease of offices in Germany from 1 April 2009, A and B, who had no knowledge of I's role in the tax evasion scheme, completed corrected provisional VAT returns for I for April and May 2009, which they sent to the tax office on 12 August 2009. In those returns they claimed the VAT shown in the credit notes issued to E as input tax, amounting to EUR 147 519.80 for April 2009 and EUR 1 146 788.70 for May 2009, even though they believed it to be 'highly probable' that I did not have any place of business in Germany.

12. Hearing appeals on a point of law brought against the judgment of the Landgericht Hamburg (Regional Court, Hamburg) by A and B and by the Staatsanwaltschaft (State Prosecutor's Office), the Bundesgerichtshof (Federal Court of Justice) states that the question whether the defendants have committed the offence of being an accessory to tax evasion under German criminal law depends on whether they intentionally submitted incorrect provisional VAT returns to the tax office in which claims were wrongly made to deduct input tax on the basis of credit notes for supplies by E. Since A and B did not have any knowledge of the involvement of E and I in the VAT evasion scheme run by G, this could only be the case, continues the referring court, if the reason the credit notes issued to E did not give any right to claim input tax was that they were not allowed to contain any reference to VAT. It states, however, that as regards invoices issued to I, which was resident in Luxembourg, this was the case only if the place of supply for the transfer of the emission allowances was not in Germany. It was inadmissible for E to give I an invoice which showed VAT only if, pursuant to Article 56(1)(a) of the VAT Directive, the place of supply was not at the supplier's, E, but at the recipient's, I, so that the supply was not taxable in Germany.

13. The Bundesgerichtshof (Federal Court of Justice) notes that for this latter condition to be met, it is necessary that in 2009 the place of supply of transfers of greenhouse gas emission allowances within the meaning of Paragraph 3a(4) of the UStG, in the version applicable to the main proceedings, based on Article 56(1)(a) of the VAT Directive, was the place where the recipient had established his business or had a fixed establishment, and it is therefore necessary to determine whether trading in such allowances is a 'similar right' within the meaning of those provisions.

14. The referring court considers in this regard that the interpretation of 'similar rights' within the meaning of Article 56(1)(a) of the VAT Directive is not so obvious that there is no reasonable doubt about it. Nonetheless, it tends to the view that those allowances are 'similar' within the meaning of that provision, the term 'similar' meaning 'corresponding in certain characteristics' or 'comparable to the thing specified', in so far as the rights mentioned in that provision are characterised by the

fact that the holder is granted an absolute right by the legislature such that he has the exclusive authority to use and exploit it, and to exclude others from doing so. In this sense, emission allowances are comparable to intellectual property rights.

15. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 56(1)(a) of [the VAT Directive] to be interpreted as meaning that an allowance under Article 3(a) of [Directive 2003/87] which confers a right to emit one tonne of carbon dioxide equivalent during a specified period is a “similar right” within the meaning of [Article 56(1)(a)]?’

III – **Procedure before the Court**

16. Observations were submitted by A, B, the Generalbundesanwalt beim Bundesgerichtshof (Federal Public Prosecutor General at the Federal Court of Justice), the German and Greek Governments and the European Commission. All the parties except the Greek Government presented oral argument at the hearing on 13 July 2016.

IV – **Assessment**

A – *Summary of the observations of the parties*

17. A and B maintain that the question asked should be answered to the effect that an emission allowance under Article 3(a) of Directive 2003/87 is not a ‘similar right’ within the meaning of Article 56(1)(a) of the VAT Directive.

18. A asserts that Article 56 mentions five rights in the field of intellectual property and supplements that list with the ‘catch-all’ term ‘similar rights’. While, according to the Bundesgerichtshof (Federal Court of Justice), the term used in the German version (*ähnlich*) means that the rights must be rights corresponding in certain characteristics or ‘which are comparable’ to the rights expressly mentioned, A submits that it is nevertheless clear from other language versions of the VAT Directive that, rather than mere comparability, there must be a close link between the rights expressly mentioned in Article 56(1)(a) of the VAT Directive and rights covered by the term ‘similar rights’. It is therefore first necessary to examine the main characteristics of the rights expressly mentioned. An emission allowance should also have those characteristics in order to be covered by the term ‘similar rights’.

19. It is doubtful, according to A, whether the notion ‘absolute right’ in German law mentioned by the referring court is relevant. Furthermore, an allowance is not an absolute right, but merely gives its holder a ‘right of tolerance’ (*Duldungsanspruch*) which may be invoked against the State. This right of tolerance is actually comparable to a private-law claim, even if it is recorded in a public registry.

20. The terms ‘*cession*’ (‘transfer’) and ‘*concession*’ (‘assignment’) used in the French version and their equivalents in other language versions are a crucial element, showing that it is a matter of assigning a right with a view to its use, all the rights expressly mentioned being based on a specific intellectual work. An emission allowance is therefore an ‘outsider’ in relation to intellectual property rights, which are characterised by the fact that the holder may freely assign to another person an idea which is legally his own with a view to its exercise, without forfeiting his original right and without having to transfer it to the person who is able to use it.

21. This interpretation is confirmed by the history of Article 56(1)(a) of the VAT Directive, which has its origin in the wording of Article 9(2)(e) of the Sixth Directive 77/388/EEC, (5) which

mentioned transfers of patents, trade marks and similar rights and assignments of licences concerning such rights. It follows that ‘similar rights’ must also be capable of being the subject of a grant of a licence, which is not the case with a CO2 allowance.

22. In addition, there is no need for an interpretation of the VAT directive going beyond its wording. It amounts to a general application of the country of destination principle to trade in services between undertakings when this did not become the general rule until after the material time in the main proceedings, following the amendment of that directive by Directive 2008/8/EC. (6)

23. B adds that the result of the interpretation of the VAT Directive requested in the present case must be seen in the context of the consequences in terms of criminal liability, which means that account must be taken of the applicable principles in this field, in particular the principles of legal certainty, *nullum crimen, nulla poena sine lege*, *nulla poena sine lege certa* and *nulla poena sine lege stricta* and the requirement of homogeneity. Having regard to the principle of *nulla poena sine lege certa*, it is problematic that criminal liability depends on the very broad notion of ‘similar right’. Consequently, the only possible interpretation of that notion is to require an intrinsic link between the ‘similar right’ and the other rights mentioned in the provision, going beyond any mere comparability.

24. On the other hand, the Federal Public Prosecutor General at the Federal Court of Justice, the German and Greek Governments and the Commission assert that Article 56(1)(a) of the VAT Directive must be interpreted as meaning that the allowance under Article 3(a) of Directive 2003/87 is a ‘similar right’.

25. The Federal Public Prosecutor General at the Federal Court of Justice maintains that the list of rights mentioned in Article 56(1)(a) of the VAT Directive is not homogenous and that those rights are subject to different rules.

26. As regards the determination of the place of supply, the crucial element is the fact that those rights offer a possibility for economic use by the recipient going beyond mere exploitation of the right as such. The place of supply should therefore be the place of establishment of the customer where the cost of the services supplied between taxable persons is included in the price of the goods. In order to determine the place of supply, the defining characteristics of the rights mentioned in that article are therefore that they confer positive rights of use on their holder, which benefit him economically in continuing to create added value either because he uses them himself or because he sells them and transfers them to third parties. A greenhouse gas emission allowance has these predominant characteristics.

27. The German Government submits, first of all, that the transfer of greenhouse gas emission allowances constitutes a supply of services within the meaning of Article 24(1) of the VAT Directive and that the object of the transfer is the emission right provided by the allowance. It asserts, second, that the rights mentioned in Article 56(1)(a) of the VAT Directive are taxed, by derogation from the ‘country of origin principle’ (stemming from Article 43 of the VAT Directive in force until 31 December 2009), in the State of the recipient if he is established in a third country or a taxable person established in a Member State other than that of the supplier.

28. Lastly, according to the German Government, for a right to be ‘similar’, it must be known whether it is comparable to the rights mentioned in Article 56(1)(a) of the VAT Directive and whether it has the same characteristics as those rights. It is not necessary for the right to be identical to those rights and, consequently, a ‘similar right’ does not only exist in the field of intellectual property. Observing that the list in that article only includes protected rights, where the legislature grants the holder an absolute right such that he has the exclusive authority to use and

exploit it, it asserts that greenhouse gas emission allowances may be considered similar.

29. Only the holder of the allowance has the right to emit one tonne of carbon dioxide equivalent during a specified period. The exclusivity of the right of exploitation stems from an allocation in the emissions trading register and the account holder is able to dispose of the allowance either by using it to comply with his surrender obligations or by selling it and transferring it to another account holder.

30. It adds that the purpose of Article 56(1)(a) of the VAT Directive militates in favour of its application to greenhouse gas emission allowances since emission rights conferred by allowances are normally used where the purchaser carries on his business.

31. The Hellenic Republic asserts that it is clear from the wording of Article 56(1)(a) of the VAT Directive that the list contained therein is non-exhaustive. The main characteristic of the rights to intangible assets mentioned therein is that they grant their holder the exclusive power to use and exploit those rights and to exclude others from doing so. Therefore, ‘similar rights’ may be regarded as rights which confer on their holder such an absolute power, or as rights whose exclusive use is guaranteed by claims or other rights.

32. The allowance conferring a right to emit one tonne of carbon dioxide equivalent during a specified period falls in that category on account of its nature and its characteristics. As each holder of the right mentioned in Article 3(a) of Directive 2003/87 appears in the emissions trading register provided for Article 19 of that directive, the position of the holder and his right of exclusive use are fully guaranteed. It is also crucial that any person who infringes the national legislation adopted pursuant to that directive is subject to penalties. The power granted to the holder of such a right is therefore akin to the corresponding power conferred on the holder of one of the intangible rights expressly mentioned in Article 56(1)(a) of the VAT Directive.

33. In the Commission’s view, greenhouse gas emission allowance trading constitutes a supply of services within the meaning of Article 24(1) of the VAT Directive.

34. At first sight, notes the Commission, it is not clear that the term ‘similar rights’ includes emission allowances, as the legal situations expressly mentioned in Article 56(1)(a) of the VAT Directive concern protection of intellectual property, while the allowances are a permit from the State or the authorities to emit greenhouse gases. It is nevertheless possible to identify significant similarities between intellectual property and those allowances.

35. The question whether a right has a similarity with the rights mentioned in Article 56(1)(a) of the VAT Directive must be answered above all having regard to the spirit and purpose of that provision.

B – *Analysis*

1. Preliminary remarks

36. First and foremost, I should make clear that the Court’s answer must concern only the interpretation of the VAT Directive and not the criminal law consequences that it may have in the main proceedings, since they fall within the exclusive jurisdiction of the referring court, which does not ask the Court about this. This Opinion will have due regard to this consideration.

37. The Bundesgerichtshof (Federal Court of Justice) asks whether Article 56(1)(a) of the VAT Directive is to be interpreted as meaning that an allowance under Article 3(a) of Directive 2003/87 which confers a right to emit one tonne of carbon dioxide equivalent during a specified period is a

‘similar right’ within the meaning of Article 56(1)(a) of the VAT Directive.

38. First of all, the Court has not yet been required to interpret that term within the meaning of Article 56(1)(a) of the VAT Directive.

39. Next, since 1 January 2010 the general rule has been that the place where services are supplied is the place where the recipient is established, whereas the rules in force which are applicable in the present case provided for the country of origin principle.

40. This new rule establishing the country of destination principle now appears in Article 44 of the VAT Directive as amended by Directive 2008/8. In addition, by Directive 2010/23/EU, which entered into force on 9 April 2010, (7) the EU legislature indicated that it proceeded from the principle that the transfer of emission allowances under Directive 2003/87 was to be taxed in the Member State where the recipient is established (country of destination). By that directive, in order to restrict the possibility of VAT carousel fraud, it introduced into the VAT Directive a new Article 199a, which *expressly* states that Member States may provide that the person liable for payment of VAT is the taxable person to whom a transfer of greenhouse gas emission allowance is made. That provision, which limited that possibility to a period ending on 30 June 2015, was extended until 31 December 2018 by Directive 2013/43/EU. (8)

41. The question therefore arises whether, prior to those amendments and aside from the wording of Article 56(1)(a) of the VAT Directive, it was already clear from the *ratio legis* of that article or other provisions, or even from other elements, that in view of their characteristics greenhouse gas emission allowances should be considered to fall in the category of ‘similar rights’ within the meaning of that provision.

2. The legal nature of greenhouse gas emission allowances

42. Under Article 3(a) of Directive 2003/87, a greenhouse gas emission allowance is an allowance to emit one tonne of carbon dioxide equivalent during a specified period.

43. It should be noted that third parties who do not hold such an allowance do not have that right. Its economic value is therefore considerable, as only those who hold permits based on allowances may carry on the activities mentioned in Annex I to Directive 2003/87. The allowance is thus a condition for the undertaking to be able to continue to create added value. In addition, the ensuing right to emit carbon dioxide equivalent can be freely transferred and traded in the procedure laid down for that purpose.

44. The transfer of greenhouse gas emission allowances constitutes a supply of services within the meaning of Article 24(1) of the VAT Directive (the transaction at issue in this case consists in ‘the assignment of intangible property’, (9) namely the authority to emit a certain quantity of CO2 during a specified period, an authority which is the subject of a document establishing title).

45. As the German Government has stated, the object of the transfer is therefore the emission right provided by the allowance.

46. However, Directive 2003/87 does not offer any indications as to the legal nature of such allowances. (10) Furthermore, as I noted above, the Court has not yet been required to rule on this subject.

47. As regards Directive 2003/87, ‘[m]uch debate on emissions trading concerns the legal basis of the scheme and its implementation into existing legal systems. The legal nature of allowances is a very controversial issue, as [Directive 2003/87] does not contain any mention of it. Nevertheless

allowances have aspects of both administrative grants or licences and of private property and it is understood that different conclusions as to their legal nature have already been reached in certain Member States', and 'it is also discussed if emission allowances may be defined as intangible goods instead of concessions'. (11)

48. Furthermore, '[t]he treatment of the allowances under tax law, accounting standards and financial services regulation is particularly relevant, as if it differs among countries, it may seriously affect the development of the emissions trading market', and '[w]ith regard to the tax regime applicable to emission allowances, currently there are no authoritative accounting pronouncements in either International Financial Reporting Standards (IFRS) or United States Generally Accepted Accounting Principles (US GAAP) that specifically address accounting for emissions trading schemes. Both the International Financial Reporting Interpretations Committee (IFRIC) and the Emerging Issues Task Force (EITF) have considered accounting for emissions trading schemes, but in practice no guidance has been implemented'. (12)

49. Legal writers have given differing interpretations to the legal nature of greenhouse gas emission allowances. (13) For example, according to the French legislature, emission allowances are movable property which is embodied solely by being registered to the holder. (14) In Belgium there is no statutory definition of the legal nature of allowances, but they are considered to be intangible movable property. (15) Some Belgian legal writers have regarded (16) allowances as financial instruments, as there is a secondary market based on allowances for financial derivatives.

50. In my view, greenhouse gas emission allowances must be considered as intangible personal property to which a regulated property right is attached.

51. This property right has the following characteristics: (i) it is a right which can be assessed in monetary terms (the price of transferable allowances may fluctuate in line with market supply and demand); (ii) the 'usus' (it is a right which may be used as it enables the holder to carry on an industrial activity); (iii) the 'abusus' (it is a right which can be contractually transferred to another holder). It is also a right that must be recorded in a public register (Directive 2003/87 imposes that obligation on Member States and right holders in order to ensure effectiveness vis-à-vis third parties and coherence of the allowance scheme). Lastly, it is a right limited in time (17) (as all allowances will disappear either by offsetting with real emissions or by a request for destruction made by its holder).

3. Comparability of emission allowances with intellectual property rights

52. For the place where services are supplied, priority should be given to the specific provisions of Article 44 et seq. (Title V, Chapter 3, Section 2) of the VAT Directive. It is only if those provisions do not apply that, under Article 43 of the VAT Directive, the place where the supplier has established his business must be regarded as the place of supply of services (in this case that would be the place where E is established in Germany).

53. As the Bundesgerichtshof (Federal Court of Justice) states, with regard to the transfer of rights, the application of Article 56(1)(a) of the VAT Directive must be taken into consideration. Under that article, the place of supply of services in this case would, as a rule, be where the customer has established his business, in the present case I in Luxembourg.

54. I think (like the Commission) that the first condition under that provision, that the services must be supplied to taxable persons established in a different Member State from the supplier, is undoubtedly met, as the supplier is in Germany and the recipient in Luxembourg. The same holds for the second condition, namely that the supply of services consists in 'transfers and assignments'

of certain rights. In this regard, the argument put forward by A at the hearing that the rights mentioned as ‘similar rights’ in Article 56(1)(a) of the VAT Directive should be liable to both transfers and assignments, which is not the case with emission allowances, as they can only be transferred, must be rejected. Article 56(1)(a) of the VAT Directive envisages two situations which are not cumulative. Furthermore, as was noted by the Federal Public Prosecutor General at the Federal Court of Justice, in Germany and Austria copyright cannot be transferred (as only a licence is possible).

55. This leads us to the third condition, which requires allowances under Article 3(a) of Directive 2003/87 to be ‘similar rights’ to ‘*copyrights, patents, licences, trade marks*’. The word ‘similar’ is important here because A’s argument effectively maintains that those rights should be ‘identical’, which is clearly not the requirement laid down in Article 56(1)(a) of the VAT Directive.

56. According to the order for reference, the Bundesgerichtshof (Federal Court of Justice) tends to the view that this condition is also met, and I note that all the parties to the proceedings before the Court (except A and B) share that view.

57. The Bundesgerichtshof (Federal Court of Justice) states that the view that the right embodying an emission allowance is a ‘similar right’ within the meaning of Paragraph 3a(4)(1) of the UStG, and thus also within the meaning of Article 56(1)(a) of the VAT Directive, has been to date the unanimous view taken in Germany by academic literature, (18) the tax administration (19) and the case-law. (20)

58. I share this view, which seems to be consistent with the scheme and purpose of Article 56(1)(a) of the VAT Directive, even though the legal transactions expressly mentioned in Article 56(1)(a) of the VAT Directive concern protection of intellectual and industrial property, (21) while the allowances mentioned in Directive 2003/87 constitute a permit from the State or public authorities to emit greenhouse gases; (22) this is for the following reasons.

59. First, it is clear from the wording of that provision that the list contained therein is illustrative and non-exhaustive. The Union legislature manifestly opted not to limit the rights mentioned in that provision only to industrial property rights or to intellectual property in general.

60. Secondly, I consider (like the Federal Public Prosecutor General at the Federal Court of Justice) that the list is manifestly not homogenous, as it understands by ‘licences’ a group of various rights of exploitation which may be different from the intellectual property rights expressly mentioned. However, there may be licences relating to rights other than copyright or rights conferred by a patent or a trade mark.

61. Thirdly, the fact that the rules applicable to greenhouse gas emission allowances are different from those applicable to the rights expressly mentioned in Article 56(1)(a) of the VAT Directive is immaterial. Moreover, the same holds for them: trade marks and patents must be registered whilst copyright exists from the creation of the protected work. In addition, their respective terms are variable. In fact the crucial element is not the comparability of the rights as such, but the comparability of their transfer or assignment. This is the common criterion allowing harmonised taxation of turnover; there can be a taxable supply of services under the directive only if there is a transfer and in that case the place of supply must be determined. (23)

62. Furthermore, on closer inspection, there are considerable similarities between industrial property and emission allowances:

– (a) both are protected rights which are the subject of a document establishing title which the holder can transfer to third parties (only the holder of an allowance having the right to emit one

tonne of carbon dioxide equivalent during a specified period (24));

– (b) as the Bundesgerichtshof (Federal Court of Justice) stated in its request for a preliminary ruling, (25) both are characterised by the fact that the holder is granted an absolute right by the legislature such that he has the exclusive authority to use and exploit it and to exclude others from doing so, even though the intellectual property right has all the characteristics of a property right, namely *usus*, *fructus* and *abusus*, whereas the property right of emission allowances is not capable of producing civil fruits (*fructus*, by way of licence);

– (c) both categories contain rights which can be assessed in monetary terms, as the value of copyrights, patents and trade marks, like the value of emission allowances, is determined by market supply and demand;

– (d) certain intellectual property rights, like emission allowances, must be recorded in a public register. The exclusivity of the right of exploitation stems from the clear allocation in the emissions trading register. Greenhouse gas emission allowances have a clear electronic identification and may be placed on the account of just one account holder. Consequently, only the account holder is able to dispose of the emission allowance, either by using it to comply with his surrender obligations (under emission allowance trading legislation) or by selling it and transferring it to another account holder;

– (e) both categories of rights are subject to a time limit, even though the ‘life’ of the intellectual property right is longer;

– (f) furthermore, in both cases, the right holder is no longer authorised to use the right in question after transfer. Consequently, the transfer of greenhouse gas emission allowances benefits its holder economically and may be compared, for VAT purposes, to the transfer of patents, trade marks, licences or copyrights.

63. Fourthly, as the Commission asserts, the question whether a right has a similarity with the rights mentioned in Article 56(1)(a) of the VAT Directive must be answered above all having regard to the spirit and purpose of that provision. It is clear from an overview of recitals 4, 10, 17, 19, 20, 22 and 23 and Articles 45, 52, 53, 55 and 56 of the VAT Directive that, in order to prevent distortion of competition on the internal market for intra-Community supplies of goods or services to taxable persons, the country of destination principle should be applied as far as possible, that is to say, taxation must take place in the Member State of the person to whom the supply is made. This practice is also consistent with the basic principle of VAT as a general tax on consumption (26) which is levied as a rule in the place of consumption.

64. It is apparent from the *ratio legis* of Article 56(1)(a) of the VAT Directive that, in order to determine whether a legal status is ‘similar’, it must thus be ascertained whether or not applying the country of destination principle at the time of transfer raises a problem. In the case of rights recorded in a public register, the person acquiring the right, his place of business and therefore also the country of destination can be determined easily and with great legal certainty. That is the case with greenhouse gas emission allowances. They may therefore be accorded the same treatment for the purposes of VAT.

65. Although emission allowances do not have the same purpose as an intellectual property right (which is to protect a human creative activity), it would seem clear that these two categories are comparable for the purposes of the analysis of Article 56 of the VAT Directive.

66. In this respect, the important factor for tax treatment is the potential of these rights to create added value. This condition is met in this case as, through the transfer of allowances, patents or

copyrights, the right holder exercises his right of disposal in return for a certain price.

4. The Court's case-law

67. Even though Article 56(1)(a) of the VAT Directive has not yet been interpreted in case-law, we can be guided by the fact that the Court has nevertheless had the opportunity to interpret other part of that paragraph.

68. In its judgment of 16 September 1997, *von Hoffmann* (C?145/96, EU:C:1997:406), the Court interpreted, on a reference for a preliminary ruling, the content of Article 9(2)(e) of the Sixth Directive 77/388. (27) In that judgment the Court examined whether the services of an arbitrator fell within the scope of the concept of 'other similar services' comparable to the services provided by lawyers or consultants.

69. Although Advocate General Fennelly suggested a broad interpretation of the concept to the Court, stressing that it was not necessary to apply the *eiusdem generis* principle of construction, as this would not accord with the scheme and purpose of the Sixth Directive, (28) the Court did not concur with that interpretation.

70. The Court stated in its judgment that:

– the Community legislature did not refer to professions but to services, professions being mentioned in that provision only as a means of defining the categories of services to which it refers; (29)

– the expression 'other similar services' does not refer to some common feature of the disparate activities mentioned in Article 9(2)(e), third indent, of the Sixth Directive 77/388 but to services similar to those of each of those activities, viewed separately; (30)

– a service must be regarded as similar to those of one of the activities mentioned in that provision when they both serve the same purpose. (31)

71. Eleven years later, by its judgment of 6 November 2008, *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C?291/07, EU:C:2008:609), the Court clarified that ruling.

72. The same provision had to be interpreted as in *von Hoffmann* (C?145/96, EU:C:1997:406). A Swedish foundation carried out both economic and other activities and the question arising was linked to the tax consequences of the supply of certain consultancy services which the foundation wished to obtain only for its activities which fell outside the scope of the Sixth Directive.

73. In paragraph 24 of its judgment, the Court recalled the object of the rules for determining the place where services are deemed to be supplied for VAT purposes, which is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation. It continued its reasoning, giving a teleological interpretation to the provision in question and mentioning that Article 9(2)(e) (32) did not specify whether or not it applied only if the taxable person receiving the supply of services used those services for the purposes of his economic activity. (33)

74. Furthermore, it added that such an interpretation:

– is consistent with the objective pursued by the article in question, which is to lay down a conflict of laws rule to avoid the risk of double taxation or non-taxation; (34)

– is in line with the objectives and operating rules of the Community VAT system since it

ensures that the ultimate consumer of the supply of services bears the final cost of the VAT payable; (35)

– is also consistent with the principle of legal certainty and enables the burden on traders operating across the internal market to be reduced and facilitates the free movement of services. (36)

75. This broad interpretation was confirmed by the Court in a case concerning exemption of securities-based asset management transactions. In paragraph 54 of the judgment of 19 July 2012, *Deutsche Bank* (C?44/11, EU:C:2012:484), the Court stated as follows:

‘Inasmuch as the portfolio management carried out by Deutsche Bank in the main proceedings is a service of a financial nature and *Article 56(1)(e) of [the VAT Directive] is not to be interpreted narrowly* (see, to that effect, [judgments of 26 September 1996, *Dudda*, C?327/94, EU:C:1996:355, paragraph 21, and 27 October 2005, *Levob Verzekeringen and OV Bank*, C?41/04, EU:C:2005:649], paragraph 34 and the case-law cited), that activity must be regarded, as a financial transaction, as falling within the scope of Article 56(1)(e) of [the VAT Directive]’ (my emphasis).

76. In this latter judgment in *Levob Verzekeringen and OV Bank* (C?41/04, EU:C:2005:649), the Court had to determine the place where supplies are deemed to take place for tax purposes in respect of ‘services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services’ and stated that the relevant provision of the directive did not ‘refer to professions, such as those of lawyers, consultants, accountants or engineers, but to the services supplied by those professionals and similar services’. (37)

77. This teleological interpretation of these provisions of the VAT Directive is also consistent with the general principle of interpretation of EU law set forth by the Court in *Cilfit*. (38) In this regard, every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

78. When applied to the present case, the principles stemming from the cited case-law point to the conclusion that emission allowances fall in the category of ‘similar rights’ mentioned in Article 56(1)(a) of the VAT Directive. Not only is the right conferred by them comparable to intellectual property rights from the point of view of its characteristics, but that interpretation is also compatible with the specific aim of Article 56, which is to avoid double taxation or the risk of non-taxation.

79. As emission rights conferred by allowances are normally used where their purchaser carries on his business, whether he himself operates an installation producing emissions for which allowances must be surrendered or resells the allowances, the application of Article 56(1)(a) of the VAT Directive therefore produces a rational solution from a fiscal point of view, since the services concerned are subject to the VAT system of the Member State in whose territory the persons who purchase allowances carry on their business. (39)

5. Practice in the Member States

80. This question should be examined not only because the Federal Republic of Germany has maintained in the proceedings before the Court that all the other Member States had adopted the same position as it, but also because it could confirm my analysis in the absence of another interpretation in the States which might be more consistent with the purpose of the VAT system in general and of Article 56(1)(a) of the VAT Directive in particular.

a) The position of the Advisory Committee on VAT

81. This committee, which was set up under Article 398 of the VAT Directive and consists of representatives of the Member States and of the Commission, reached the same conclusion.

82. In line with the Commission proposal, the Advisory Committee on VAT took the view that the emission allowances governed by Directive 2003/87 fell under Article 9(2)(e) of the Sixth Directive. The content of that provision is largely the same as that of Article 56(1)(a) of the VAT Directive.

83. On 14 October 2004, it adopted the following guidelines:

‘The delegations agreed *unanimously* that the transfer of greenhouse gas emission allowances as described in Article 12 of Directive 2003/87/EC …, when made for consideration by a taxable person is a taxable supply of services falling within the scope of Article 9(2)(e) of Directive 77/388/EEC. None of the exemptions provided for in Article 13 of Directive 77/388/EEC can be applied to these transfers of allowances.’

b) Practice of the Member States

84. In the vast majority of Member States (21 of the 25 (40) legal orders examined), a national provision corresponding to Article 56(1) of the VAT Directive applies to greenhouse gas emission allowances. This finding is based on the national acts brought into line with the guidelines issued by the Advisory Committee on VAT in 2004. (41)

85. It should be noted that in two Member States (Estonia, Slovakia) express provision has been made for transfers of greenhouse gas emission allowances as a distinct point in the national law transposing Article 56(1) of the VAT Directive.

86. In a number of other Member States (Belgium, Bulgaria, Czech Republic, Ireland, France, (42) Lithuania, Hungary, Austria, Slovenia, Finland, (43) Sweden, United Kingdom), opinions, circulars or recommendations have been issued by the competent administrations stating that transfers of allowances should be considered to fall under the national provision corresponding to Article 56(1)(a) of the VAT Directive.

87. In three other Member States (Spain, Italy, (44) Poland), it is clear from administrative practices in the form of individual decisions taken by the tax authorities that transfers of greenhouse gas allowances were considered to constitute transactions for which the place of supply was the place where the transferee is established.

88. Lastly, in four other Member States, preparatory documents (Denmark, Luxembourg, Netherlands) or correspondence between ministries (Latvia) demonstrate a similar point of view.

89. It should be stated in this regard that, while in some legal orders transfers of allowances have explicitly been categorised as ‘similar rights’ (Italy, Netherlands, Slovenia, Finland, Sweden), there are others where transfers of emission allowances have simply been classified as falling under the national provision corresponding to Article 56(1)(a) of the VAT Directive, without any clarification as to the specific category to which those allowances were allocated (Belgium, Bulgaria, Czech Republic, Denmark, Germany, Ireland, Spain, France, Italy, Latvia, Luxembourg, Hungary, Austria, Poland, United Kingdom), or which specify a separate category ‘transfer of greenhouse gas emission allowances’ (Estonia, Slovakia), distinct from the categories expressly mentioned in Article 56(1)(a) of the VAT Directive.

90. It should also be noted that the case-law in those different Member States on the determination of the place of taxation of transfers of greenhouse gas emission allowances before 2010 seems fairly sparse.

91. For other legal orders (Greece, Cyprus, Malta, Romania), it has not been possible to identify if and/or how transfers of greenhouse gas emission allowances were categorised for VAT purposes and therefore what was the place of supply for those transfers.

92. In the light of the foregoing considerations, the term ‘similar rights’ in Article 56(1)(a) of the VAT Directive must be interpreted as also covering greenhouse gas emission allowances.

V – **Conclusion**

93. For these reasons, and noting that the general rule is now that the place where services are supplied is the place where the recipient is established, I propose that the Court answer the question asked by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

The term ‘similar rights’ in Article 56(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as also covering allowances as defined in Article 3(a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

1 – Original language: French.

2 – Le Bars, B., ‘La nature juridique des quotas d’émission de gaz à effet de serre après l’ordonnance du 15 avril 2004, Réflexions sur l’adaptabilité du droit des biens’, *La Semaine juridique*, Édition générale No 28, 7 July 2004, doctrine 148.

3 – Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), in the version in force in 2009 (‘the VAT Directive’).

4 – Directive of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

5 – Council Directive 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).

6 – Council Directive of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11).

7 – Council Directive of 16 March 2010 amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain services susceptible to fraud (OJ 2010 L 72, p. 1). Recital 3 of Directive 2010/23 describes the transfer of emission allowances as ‘particularly susceptible to fraud’.

8 – Council Directive of 22 July 2013 amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud (OJ 2013 L 201, p. 4).

9 – Article 25(a) of the VAT Directive.

10 – As regards tax treatment, see the report produced for the Commission (Directorate-General Taxation and Customs Union) by Copenhagen Economics, *Tax treatment of ETS allowances, Options for improving transparency and efficiency*, October 2010.

11 – See Colangelo, M., *Creating property rights, Law and Regulation of Secondary Trading in the European Union*, Martinus Nijhoff, 2012, pp. 162 and 165 (who makes reference to Jacometti, V., *Lo scambio di quote di emissione. Analisi di un nuovo strumento di tutela ambientale in prospettiva comparatistica*, Milan: Giuffrè, 2010).

12 – Colangelo, op. cit., pp. 169 and 170.

13 – See Le Bars, B., 'La nature juridique des quotas d'émission de gaz à effet de serre après l'ordonnance du 15 avril 2004, Réflexions sur l'adaptabilité du droit des biens', *La Semaine juridique*, Édition générale No 28, 7 July 2004, doctrine 148; Richelle, I., 'Emission Trading: Accounting and Tax Regime in Belgium', *Bulletin for International Taxation*, August/September 2008, pp. 414 to 421 (see also Richelle, I., 'Emission trading: accounting and tax aspects', in Lang, M., and Vanistendael, F. (editors), *Accounting and Taxation & Assessment of ECJ Case Law*, EATLP International Tax Series, 2007, vol. 5).

14 – See Article L-229-18-II of the Code de l'environnement (Environment Code), introduced by the order of 15 April 2004.

15 – See Richelle, I., op. cit. p. 418.

16 – See Richelle, I., op. cit. p. 416.

17 – This is not a limitation period, but a period linked to the existence of the right as such.

18 – See Küffner/Stöcker/Zugmaier, *UStG*, 114th update, § 3a, paragraph 121; Meyer-Holiatz/Nagel/Krüger in Elspas/Salje/Stewing, *Emissionshandel*, Chapter 45, paragraph 3 et seq.; Adam/Hentschke/Kopp-Assenmacher, *Handbuch des Emissionshandelsrechts*, Chapter 8.7.

19 – See Circular of the German Federal Ministry of Finance of 2 February 2005, BStBI. I 2005, p. 494 (see Annex I to the Commission's observations).

20 – See judgment of 21 June 2013, Finanzgericht Düsseldorf (Finance Court, Düsseldorf), 1 K 2550/11 U.

21 – It is interesting to note here that under Article 7 of Council Regulation (EC) No 1777/2005 of 17 October 2005 laying down implementing measures for Directive 77/388 (OJ 2005 L 288, p. 1), where a body established in a third country assigns television broadcasting rights in respect of football matches to taxable persons established in the Community, that transaction is to be treated in the same way as the abovementioned intellectual property rights.

22 – See Article 4 et seq. and Article 13 of Directive 2003/87. Greenhouse gas emissions generated by an activity in accordance with Directive 2003/87 require a permit for which the

operator of an installation may apply under the conditions laid down in Article 6 of that directive. In the EU emission allowance trading scheme, each year operators of installations must surrender a number of greenhouse gas emission allowances corresponding to their actual emissions. If an operator lowers the emissions from his installation, he may sell the emission allowances which he no longer requires on the market. In the opposite case, he must purchase emission allowances to comply with his surrender obligation. If an operator of an installation fails to comply with that surrender obligation, he is subject to financial penalties.

23 – There is clearly no need to make this determination for exempt transfers (see for example Article 135(1)(f) and (j) to (l) of the VAT Directive).

24 – See Article 3(a) of Directive 2003/87.

25 – See paragraph 29 et seq.

26 – See Article 1(2) of the VAT Directive.

27 – Which corresponds in content to the present Article 56(1)(c) of the VAT Directive.

28 – See his Opinion in *von Hoffmann* (C?145/96, EU:C:1997:218, points 17 and 23).

29 – See judgment of 16 September 1997, *von Hoffmann* (C?145/96, EU:C:1997:406, paragraph 15).

30 – See judgment of 16 September 1997, *von Hoffmann* (C?145/96, EU:C:1997:406, paragraph 20).

31 – See judgment of 16 September 1997, *von Hoffmann* (C?145/96, EU:C:1997:406, paragraph 21).

32 – Currently Article 56(1)(c) of the VAT Directive.

33 – See judgment of 6 November 2008, *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C?291/07, EU:C:2008:609, paragraph 28).

34 – See judgment of 6 November 2008, *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C?291/07, EU:C:2008:609, paragraph 30). In accordance with well-established case-law of the Court, the object of the provisions determining the point of reference for tax purposes of supplies of services is to avoid, first, conflicts of jurisdiction which may result in double taxation and, secondly, non-taxation (judgment of 30 April 2015, *SMK*, C?97/14, EU:C:2015:290).

35 – See judgment of 6 November 2008, *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C?291/07, EU:C:2008:609, paragraph 32).

36 – See judgment of 6 November 2008, *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C?291/07, EU:C:2008:609, paragraph 33).

37 – Judgment of 27 October 2005, *Levob Verzekeringen and OV Bank* (C?41/04, EU:C:2005:649, paragraph 37).

38 – See judgment of 6 October 1982, *Cilfit and Other* (283/81, EU:C:1982:335, paragraph 20).

39 – See, to that effect, judgment of 12 May 2005, *RAL (Channel Islands) and Others* (C?452/03, EU:C:2005:289, paragraph 33).

40 – The German system was obviously not studied; information was not available to examine the Portuguese legal system, and the Republic of Croatia was not yet a member of the European Union in 2009.

41 – For a list of guidelines agreed by the Advisory Committee on VAT, see the webpage at: http://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/guidelines-vat-committee-meetings_en.pdf.

42 – In France, which made the request for guidelines from the Advisory Committee on VAT concerning greenhouse gas emission allowances from the point of view of VAT, it was decided in June 2009 temporarily to exempt transfers of those allowances from VAT as transactions relating to securities.

43 – According to Finnish legal writers, it was not clear that all the Member States adopted this view, while in Belgium a ‘consensus’ was referred to.

44 – It should be pointed out that the procedure before the Italian tax authorities concerned a purchaser of greenhouse gas emission allowances established in Switzerland.