

Provisional text

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 22 February 2018(1)

Case C-665/16

Minister Finansów

v

Gmina Wrocław

(Request for a preliminary ruling from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Taxable transactions — Article 2(1)(a) — Supply of goods for consideration — Article 14(2)(b) — Transfer of the ownership of property for compensation by order of a public authority — Expropriation of municipal immovable property)

I. Introduction

1. In Roman mythology, Janus was the God of beginnings and endings, of doorways, passages, gates, but in the pre-classical period apparently also of creation, war, water sources, and the sun. (2) Beyond the (for an EU lawyer quite familiar) difficulties of competence attribution, which was always tricky for Roman gods whose powers kept changing over the centuries, there is one element about Janus that people still remember today: that he used to be depicted as having two faces.

2. In contrast to a god with one head and two faces, the present case concerns one face, but on two different heads. That is, in a nutshell, the source of the value added tax (VAT) controversy arising in this case: under Polish law, the Mayor of Wrocław has two distinct roles. On the one hand, he is the executive authority of the (self-administrative) Gmina Wrocław (Municipality of Wrocław, Poland). On the other hand, in the matters of (top-down) state administration, he also acts as the representative of the Public Treasury.

3. The dual function of some bodies of regional administration that are, depending on their specific tasks, acting either as self-administration or state administration, is nothing new, certainly in central Europe. What is, however, new in the context of the present case is how to evaluate that practice for VAT purposes in cases in which the same body, *in casu* the Mayor of Wrocław,

appears in the specific scenario of expropriation of immovable property at both ends of the transaction, but acting in two different roles. Furthermore, following the formal transfer of the title of ownership from the Municipality of Wrocław to the Public Treasury, the property at issue in fact continues to be managed by the same authority: the Mayor of Wrocław.

4. It is in this context that the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) seeks to ascertain whether the transfer from the Municipality of Wrocław to the Public Treasury of the ownership of the immovable property at issue constitutes a taxable transaction within the meaning of Article 14(2)(a) of the VAT Directive. (3) This question raises two specific issues: First, in order to constitute a taxable transaction, does *the transfer of the ownership of property* under Article 14(2)(a) of the VAT Directive also need to amount to a transfer of the *right to dispose of property as an owner* in the sense of Article 14(1) of that directive? Second, what is the relationship between the notion of *compensation* to which Article 14(2)(a) refers and the notion of *consideration* of Article 2(1)(a) of the directive?

II. Legal framework

A. EU law

5. In its list of transactions which shall be subject to VAT, Article 2(1)(a) of the VAT Directive includes:

‘the supply of goods for consideration within the territory of a Member State by a taxable person acting as such; ...’

6. According to Article 14 of the VAT Directive:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

(a) the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;

(b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.’

B. Polish law

7. Article 7(1)(1) of the Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the tax on goods and services (‘the Law on VAT’)) (4) provides that: ‘The supply of goods referred to in Article 5(1)(1) shall mean the transfer of the right to dispose of goods as owner, including the transfer, by order of a public authority or a body acting in the name of the public authority, or the transfer, pursuant to the law, of the ownership of goods in return for payment of compensation.’

III. Facts, proceedings and the question referred

8. Following a decision of the Wojewoda Dolnośląski (Regional Governor of Lower Silesia, Poland), the ownership of immovable property previously belonging to the Municipality of Wrocław was transferred to the Public Treasury for the purpose of building a road. By a separate decision, the Regional Governor of Lower Silesia set the compensation for the property to which the Municipality of Wrocław ('the Municipality') was entitled and ordered the Mayor of Wrocław ('the Mayor') to pay that sum.

9. Entertaining doubts as to its tax obligations with regard to that transaction, the Municipality of Wrocław submitted an application to the Minister Finansów (Minister for Finance) asking for an interpretation of the tax law in relation to its specific circumstances. It asked whether the transfer of the ownership, pursuant to the law, of immovable property in return for payment of compensation constitutes a supply of goods for consideration subject to VAT. If it did, it asked which body should appear on the VAT invoice as the purchaser of the goods.

10. The Minister for Finance answered that the transaction at issue in the present case was subject to VAT, adding the following clarifications.

11. First, the taxable person could not be the Mayor, because he is not a body independently carrying out an economic activity and does not operate on his own behalf. As a result, the taxable person is the Municipality.

12. Second, even though it was the Mayor who was ordered to pay the compensation, this does not alter the fact that the ownership of the immovable property had been transferred from the Municipality to the Public Treasury, which was represented by the Mayor. As a result, for VAT purposes the supplier and the recipient are the same taxable person.

13. Third, as the ownership of the immovable property had been transferred from the Municipality to the Public Treasury in return for compensation, there had been a supply of goods for consideration subject to VAT.

14. The Minister for Finance thus found that the Municipality had an obligation to account for the supply of the expropriated immovable property in the form of a VAT invoice on which the Municipality was listed as acting both in its own name as the supplier and as the representative of the Public Treasury as the recipient.

15. The Municipality of Wrocław disagreed with that interpretation. It therefore brought an action against the Minister for Finance before the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland).

16. That court held that the criterion for a supply of goods to exist for the purposes of tax law – the transfer of economic control over the immovable property from the supplier to the recipient – was not fulfilled in the present case. This was because both the supplier and the recipient were one and the same body: the Municipality of Wrocław. As a result, that court concluded that there had not been a transfer of economic and de facto control over the immovable property, which is a prerequisite for a transaction to be regarded as a taxable event for the purposes of VAT according to EU and national law.

17. The Minister for Finance lodged an appeal before the referring court, the Naczelny Sąd Administracyjny (Supreme Administrative Court).

18. That court found that the situation in question raised serious doubts about whether the transfer by a municipality of ownership of immovable property by order of a public authority in

return for payment of compensation could be regarded as a taxable transaction for the purposes of Article 7(1)(1) of the national Law on VAT. By order of 12 February 2015, (5) a three-judge chamber referred the case to an enlarged panel of seven judges at the Naczelny Sąd Administracyjny (Supreme Administrative Court) with the question:

‘Can the transfer of ownership of immovable property by order of a public authority in return for payment of compensation the economic burden of which (including the payment of tax) will be borne by the subject of the expropriation, be regarded as a taxable transaction for the purposes of Article 7(1)(1) [of the Law on VAT]?’

19. The seven-judge panel at the Naczelny Sąd Administracyjny (Supreme Administrative Court) answered by resolution of 12 October 2015 in the affirmative: (6) the transfer by a municipality of the ownership of immovable property by order of a public authority in return for payment of compensation constitutes a supply of goods within the meaning of Article 7(1)(1) of the Law on VAT. It explained that such a transfer of the ownership of property, in civil law, was a supply of goods for the purposes of the VAT. It therefore considered that it was not relevant to address the issue of whether that transaction also involved the transfer of economic control over the property. Moreover, the panel did not agree with the opinion that the payment of compensation to the Municipality for the immovable property expropriated by the Public Treasury was not an actual payment. It considered that the Municipality does in fact receive funds from the Public Treasury’s budget as part of allocations made so that it can carry out public tasks in the field of state administration.

20. The parties in the main proceedings do not agree with the resolution of the Naczelny Sąd Administracyjny (Supreme Administrative Court). They have requested that a question be referred to this Court for a preliminary ruling. A three-judge chamber of the Naczelny Sąd Administracyjny (Supreme Administrative Court) has agreed to do so, has stayed the proceedings and poses the following question for a preliminary ruling:

‘Does the transfer, pursuant to the law, of the ownership of immovable property owned by a municipality to the Public Treasury in return for payment of compensation, in the case where, under the rules of national law, that immovable property continues to be managed by the mayor of the municipality, who is simultaneously the representative of the Public Treasury and the executive body of the municipality, constitute a taxable transaction within the meaning of Article 14(2)(a) of [the VAT Directive]?’

In answering that question, is it significant whether the compensation paid to the municipality consists of an actual payment or is a mere internal accounting transfer within the municipal budget?’

21. Written submissions were made by the Municipality of Wrocław, the Polish Government and the European Commission. Those interested parties, and in addition the Minister for Finance, presented oral argument at the hearing held on 13 December 2017.

IV. Assessment

22. The present Opinion is structured as follows. First, I will make some preliminary remarks about the specific context of the case and the exact scope of the questions posed by the referring court (A). Second, I will address, at a general level, the interpretation of the concept of ‘supply of goods’ in Article 14(1) and Article 14(2)(a) of the VAT Directive, and the relationship between the concepts of ‘compensation’ (Article 14(2)(a) of the VAT Directive) and ‘consideration’ (Article 2(1)(a) of the VAT Directive) (B). Third, I will examine the specific question posed in the present case in the light of the interpretation given to the abovementioned provisions (C).

A. Preliminary remarks

1. The dual nature of local authorities in Poland

23. The present case concerns a rather specific context. The dual nature and functions of local authorities is a source of complexity when assessing the taxable nature of a transaction such as the one at issue. As helpfully outlined by the referring court and further elaborated upon by the interested parties, I understand the national rules on the matter to be the following:

24. First, at the level of management, Wrocław is a city-district. A city-district performs both its own tasks for which it is responsible (self-administration or autonomous administration) and tasks that have been delegated to it by the State (state administration). The tasks connected with the management of the immovable property in question in this case are included in the city-district’s own tasks. This means that after expropriation, the immovable property previously held by the Municipality of Wrocław will continue to be managed by the same body, represented by the Mayor of Wrocław.

25. Second, as far as the municipal budget is concerned, the referring court explains that a city-district funds its own tasks through its own resources. By contrast, delegated tasks of state administration are financed by allocations from the State budget or the budget of other levels of government. According to the order for reference, the Municipality (the city-district) is responsible for the management tasks of the immovable property at issue. As those are its *own* tasks, the costs associated with them are not necessarily fully covered by allocations from the State budget.

26. Third, regarding the formal representation of the parties to the transaction, even though the ownership of immovable property has been transferred from the Municipality of Wrocław to the Public Treasury, both public entities were represented in that transaction by the same authority acting in different roles: the Mayor of Wrocław.

2. The scope of the question asked

27. The present preliminary reference has been framed by the national court in quite specific terms. The question posed relies on a number of factual and legal assumptions.

28. In particular, according to Article 9(1) of the VAT Directive, a ‘taxable person’ is any person who independently carries out in any place any economic activity, whatever the purpose or results of that activity. The exploitation of tangible or intangible property for the purposes of obtaining income from it on a continuous basis is to be regarded as an ‘economic activity’. (7) A derogation from the general definition of ‘taxable persons’ in Article 9(1) of the VAT Directive is found in Article 13(1) of that directive. It excludes states, regional and local government authorities, as well as other bodies governed by public law, in respect of activities or economic transactions in which they engage as a public authority — unless their treatment as non-taxable persons leads to significant distortions of competition. (8)

29. Although repeatedly contested by the Municipality of Wrocław, the referring court has explicitly stated that the capacity of that Municipality as a *taxable person* is not in question. The question posed by the referring court therefore concerns exclusively the *taxable character* of the transfer of ownership of the immovable property at issue.

30. It is for the national court to classify the activities at issue in the light of the criteria adopted by the Court. (9) In this context, it must be recalled that it is the responsibility of the national court to define the factual and legislative context of the dispute before it. (10) In particular, the determination of the questions to be put to the Court falls to the national court and not to the parties to the main proceedings. This is so not only having regard to the function given to the Court by Article 267 TFEU, but also because of the duty to ensure that all the interested parties are given the opportunity to submit observations, as stated in Article 23 of the Statute of the Court of Justice of the European Union. (11)

31. It is thus not the role of this Court to reopen factual assessments or interpretation of national law already carried out by the referring court which are not the subject matter of the questions referred. This is also true (or particularly true) in cases where the proper assessment requires the application of EU law to rather complex national legislation.

32. This Opinion will therefore proceed on the basis of the assessment carried out by the national court — namely that for the purposes of the transaction at issue, the Municipality of Wrocław is a ‘taxable person’ — without, however, taking any position on that specific issue.

B. ‘Supply of goods’ under Article 14(2)(a) of the VAT Directive

33. By its question, the referring court seeks to establish whether the transaction at issue in the main proceedings constitutes a taxable ‘supply of goods’ in the sense of Article 14(2)(a) of the VAT Directive. The referring court asks, additionally, whether the fact that the compensation paid consists of a mere internal accounting transfer within the municipal budget bears any significance for that assessment.

34. In order to give a useful answer to the question raised, I will first examine the origin and purpose of Article 14(2)(a) of the VAT Directive (1). Second, I will analyse the relationship between Article 14(2)(a) and Article 14(1) of the VAT Directive (2). Third, I will address whether the ‘compensation’ provided for in Article 14(2)(a) fulfils the ‘consideration’ requirement in Article 2(1)(a) of that directive (3).

1. Origin and purpose of Article 14(2)(a) of the VAT Directive

35. Article 14(2)(a) of the VAT Directive covers a specific transaction fulfilling three elements. First, there has to be a ‘transfer of ownership of property’. Second, the transfer of ownership has to occur ‘by order made by or in the name of a public authority or in pursuance of the law’. Third, the transfer of property must be for ‘payment of compensation’.

36. Article 14(2)(a) of the VAT Directive covers a specific set of transactions. In contrast to the transactions aimed at in Article 14(1) of the VAT Directive, involving the free will of the parties inherent in a reciprocal transaction made for consideration, Article 14(2)(a) of that directive foresees a different scenario: a transfer of property brought about as the result of a unilateral decision by a public authority against the payment of compensation.

37. Even though the preparatory works do not shed much light on the purpose of Article 14(2)(a) of the VAT Directive, (12) the wording and the logic of this provision nonetheless allow for

some inferences to be drawn.

38. As several authors have pointed out, it is reasonable to assume that the legislature, by explicitly making expropriation for compensation a taxable supply of goods and thus subjecting forcible transfers of ownership for compensation to the same rules as other supplies of goods, may have sought to prevent public authorities from choosing expropriation over a transaction fulfilling the general criteria of a supply of goods. (13)

39. I agree. It appears indeed to be a sensible approach not to encourage the public administration to expropriate by providing it with tax incentives to do so, instead of searching for an agreement with the party concerned. Thus, whether brought about by contract or by expropriation, the supply of goods in the form of immovable property should remain tax neutral. What is to be underlined, however, is the different logic and hence different terminology of Article 14(2)(a) of the VAT Directive, which could be captured by the following contrast: *private law — reciprocity — consideration*, on the one hand, and *public law — unilateral decision — compensation*, on the other.

2. Relationship between Article 14(2)(a) and Article 14(1) of the VAT Directive

40. The question posed by the referring court and the arguments presented by the interested parties revolve around whether or not the transactions covered by Article 14(2)(a) of the VAT Directive need to comply with the requirements of Article 14(1) of that directive, in particular with the condition that there is to be a ‘transfer of the right to dispose of tangible property as owner’.

41. The referring court and the interested parties have referred extensively to case-law of the Court on Article 14(1) of the VAT Directive that emphasises the relevance of the de facto transfer of property, the legal form of that transfer notwithstanding. (14) The Court has declared that, for a transaction to be classified as a supply of goods in the sense of Article 14(1), it is necessary that it has the effect of authorising that person actually to dispose of the goods, as if he was its owner. (15) The right to dispose of goods as an owner has been described as the right to decide in what way the goods are used or to what end. (16)

42. The argument put forward by the Municipality of Wrocław suggests that for a transaction to fall under Article 14(2)(a), it would also need to fulfil the criteria of Article 14(1), namely, entail the right to dispose of goods as an owner.

43. Conversely, the Polish Government and the Commission submit that Article 14(2)(a) of the VAT Directive is autonomous with regard to Article 14(1) of that directive. Therefore, it is irrelevant for the purposes of Article 14(2)(a) whether there is transfer of the right to dispose of the goods in the economic sense.

44. I agree with the latter approach.

45. Article 14 of the VAT Directive, found under the heading ‘taxable transactions’, is devoted to the determination of what constitutes a ‘supply of goods’.

46. Its first paragraph defines the *general rule* of what constitutes a ‘supply of goods’: the ‘transfer of the right to dispose of tangible property as owner’. The second paragraph of that provision refers to *other transactions* which ‘shall be regarded as a supply of goods’ ... ‘in addition to the transactions referred to in paragraph 1’.

47. It is therefore apparent from the wording and structure of Article 14 of the VAT Directive that the second paragraph of this provision effectively constitutes *lex specialis* to the general definition

of supply of goods contained in its first paragraph.

48. Article 14(1) and Article 14(2) of the VAT Directive are separate instances of a 'supply of goods' which must receive an independent interpretation. Article 14(1) contains the general criteria for the determination of a supply of goods. Article 14(2) contains a list of transactions which 'in addition' to those falling within the general definition of Article 14(1) shall also be regarded as a 'supply of goods'. The structure of Article 14 is therefore decisive: Article 14(1) establishes the general requirements for a supply of goods to be given. Conversely, Article 14(2) refers to specific transactions which are assimilated to a supply of goods.

49. Article 14(2)(a) of the VAT Directive employs different terms when compared with Article 14(1). Article 14(2)(a) does not refer to the 'right to dispose of tangible property as owner', but clearly chooses a different formulation: 'the transfer, by order ... of the ownership of the property'.

50. As a result, in the specific context of mandatory transfers of ownership as opposed to freely assumed contractual relations, Article 14(2)(a) effectively supplants all the relevant elements of Article 14(1). The different logic and purpose outlined above (17) thus entails different notions.

51. The focus on the formal element of the transfer of the title of ownership of the property as opposed to the effective right to dispose of the property as the owner in the economic sense is understandable in the specific context of expropriation of property. In such cases, it is likely that the public authority which carried out the expropriation has done so for a specific purpose. The realisation of that specific purpose (like building a road on the expropriated land) effectively binds that public authority in the way in which it disposes of the property. Thus, it might in fact happen that although a public authority has acquired the formal title to the land, the way in which it disposes of the property would be considerably circumscribed. If, in such specific circumstances, the logic of effective disposal as an owner were to be applied, that could effectively lead to quite peculiar situations in cases of expropriation in the public interest, as there would be no owner for VAT purposes.

52. Moreover, it might be added by internal analogy that Article 14(2)(b), which constitutes another of the 'additional' transactions assimilated to a supply of goods, refers to the 'actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment'. As the Court has held, the wording of that provision makes it clear that, *unlike* the transactions covered by Article 14(1), those covered by Article 14(2)(b) do not refer to the transfer of the power to dispose of property as an owner. (18)

53. In short, Article 14(2)(a) of the VAT Directive does not require the transfer of the power to dispose of property as an owner, whereas it does in paragraph 1 of that article. For the purposes of Article 14(2)(a) of the directive, and if the other requirements of that provision are fulfilled, it is the transfer of the ownership of property in the sense of the formal legal title to the property in question that suffices for such a transaction to be considered a taxable 'supply of goods'.

3. Relationship between Article 14(2)(a) and Article 2(1)(a) of the VAT Directive

54. Article 2 of the VAT Directive constitutes the framework provision setting out the transactions that shall be subject to VAT. According to Article 2(1)(a) of that directive, one of those transactions is 'the supply of goods for consideration within the territory of a Member State by a taxable person acting as such'.

55. For a transaction to be taxable according to that provision, four elements are therefore required. First, there must be a 'supply of goods'. Second, the supply of goods must be 'for

consideration'. Third, the supply must occur in the territory of a Member State. Fourth, it must be carried out by a 'taxable person acting as such'.

56. Article 14 of the VAT Directive covers only the first of those criteria laid down by Article 2(1)(a) of the VAT Directive. It only defines 'supply of goods'. However, that provision remains silent as to the other elements of Article 2(1)(a) of the directive (consideration, territorial element and quality of taxable person acting as such). Indeed, in contrast to Articles 16 to 18 of the VAT Directive, which refer to transactions that shall or may be treated as 'a supply of goods for consideration', Article 14 only provides for transactions that shall be regarded as a 'supply of goods'.

57. It thus logically follows that Article 14 of the VAT Directive leaves the remaining three criteria of Article 2(1)(a) of that directive untouched. Therefore, the element of *consideration* cannot be presumed to exist in every situation where a 'supply of goods' in the sense of Article 14 of the VAT Directive is given.

58. This finding opens up the second issue raised by the question referred by the national court: what is the relationship between the notion of 'compensation' referred to in Article 14(2)(a) of the VAT Directive and the notion of 'consideration' of Article 2(1)(a) of that directive? Are these two notions separate? Or is compensation to be considered as a type (that is, a logical subset) of the notion of consideration?

59. The interpretation of the notion of 'consideration' in the case-law is that a supply of goods is made 'for consideration' if there is a *direct link* between the goods or the services provided and the consideration received. (19) Such a direct link exists 'only if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied'. (20) The Court has held that 'consideration is the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria'. (21)

60. The Court has also held that 'the consideration must be capable of being expressed in monetary terms' and that 'where that value is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of the services constituting the consideration for the supply of goods attributes to the services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose'. (22) The fact that the price paid for a transaction is higher or lower than the open market value has been deemed irrelevant by the Court for the purpose of establishing whether a transaction has been carried out for consideration. (23)

61. The discussion on whether the notion of 'compensation' in Article 14(2)(a) complies with all the elements constituting 'consideration' defined in the case-law mentioned above is, in my view, of limited significance. Indeed, as correctly submitted by the Commission, the criteria developed by the case-law of the Court with regard to the concept of 'consideration', extensively discussed by the interested parties in the present case, have been developed specifically in the context of the interpretation of Article 2(1)(a) with regard to the transactions generally covered by Article 14(1) of the VAT Directive, or with regard to the supply of services for consideration in the sense of Article 2(1)(c) of that directive.

62. In my view, 'compensation' as referred to in Article 14(2)(a) is a specific type of consideration in the sense of Article 2(1)(a) of that directive. Compensation can be seen as a standardised type of consideration provided for in the specific circumstances of expropriation.

63. For this reason, whether or not such an objectively different notion of compensation meets

exactly all the individual criteria that the case-law of this Court has developed over the years to cover the notion of consideration is of limited importance. The different logic and purpose of both notions may justify necessary adaptations or distinctions.

64. However, for what it is worth, in the closing part of this section, I shall turn to two potential objections with regard to the difference between the two notions and, on that basis, demonstrate how the notion of compensation understood in such a way can easily fit the overarching notion of consideration. First, it is case-law according to which compensation for harm does not generally entail 'consideration', and, second, the case-law concerning the need for 'reciprocal performance'.

65. Turning to the first potential objection, in the context of supply of services and the interpretation of Article 2(1)(c) of the VAT Directive, the case-law of the Court has on different occasions considered that compensation paid for harm does not fulfil the requirements to be regarded as consideration. The Court has held that a sum paid as a deposit — as a fixed cancellation charge paid as compensation for the loss suffered as a result of client default in the context of a contract relating to the supply of hotel services, had no direct connection with the supply of any service for consideration and, was not subject to that tax. (24) The Court has also held that fair compensation linked to the harm resulting for rightsholders from the reproduction of their protected works without their authorisation is not direct consideration for any supply of services either. (25)

66. In my view, the compensation to which those cases refer is simply different from the compensation referred to in Article 14(2)(a) of the VAT Directive. The aforementioned rulings were handed down in the field of supply of services. In contrast to supply of goods, there is no provision that is similar to Article 14(2)(a) of the VAT Directive in the field of supply of services, that is, no specific provision covering the transfer of property against payment of compensation. Having in mind the express inclusion of the transfer of ownership of property for compensation under Article 14(2)(a) of the VAT Directive, it would be nonsensical to exclude the transactions covered by that provision from the notion of 'taxable transactions' of Article 2 of the VAT Directive by defining the notion of compensation as being outside the overall concept of 'consideration'. As the doctrine has rightly pointed out, the introduction of Article 14(2)(a) in the VAT Directive might have aimed precisely at overcoming the potential conceptual problems by listing the specific transaction contained therein as a supply of goods. (26)

67. The second potential objection is raised by case-law interpreting the combination of Article 2(1)(a) and Article 14(1) of the VAT Directive, emphasising the element of 'reciprocal performance'. Thus, for example in *Posnania Investment*, where the transaction at issue consisted in the transfer of ownership of immovable property to a public entity in payment of tax arrears, the Court found that even though there was a legal relationship between the supplier and the beneficiary, the *obligation* of the taxpayer (supplier) was *unilateral*, the payment of the tax resulting only in the statutory discharge of its tax debt, the tax being a compulsory charge. The Court concluded on this basis that there was no legal relationship entailing reciprocal performance. (27)

68. Again, as far as that category is in fact relevant in view of the different nature of the transaction contemplated in Article 14(2)(a) of the VAT Directive, there still remains an element of 'reciprocity' in the sense of a 'direct link', even with regard to the transfer of ownership of property and the compensation. One is the cause for the other – the compensation was paid because the property was expropriated. Indeed, that element relates to the logical relationship between consideration and supply: the supply of goods concerned and the consideration (in the form of compensation) must be regarded as being directly linked. If the supply is not made, no consideration is paid, and vice versa. (28)

4. Interim conclusion

69. The application of Article 14(2)(a) of the VAT Directive is subject to three cumulative conditions. First, there has to be a transfer of ownership. Second, that transfer has to be by order made by, or in the name of, a public authority or in pursuance of the law. Third, there has to be payment of compensation.

70. With regard to the first of those conditions, the VAT Directive does not require the transfer of the power to dispose of property as an owner, as is the case in paragraph 1 of that article. For the purposes of Article 14(2)(a) of that directive, and if the requirements related to the compensation and the way the transaction should be carried out are fulfilled, the transfer of the ownership of property in the sense of the formal legal title to the property in question suffices for such a transaction to be considered a 'supply of goods' under Article 14 of that directive.

71. For a supply under Article 14(2)(a) to be taxable, the requirements of Article 2(1)(a) of the VAT Directive must also be fulfilled, subject to the specific elements contained in the former provision. Those specific elements of Article 14(2)(a) also bear an influence on the interpretation of the general notion of 'consideration' of Article 2(1)(a). The compensation effectively paid pursuant to Article 14(2)(a) is to be regarded as a specific type of 'consideration' in the sense of Article 2(1)(a) of the VAT Directive.

C. The present case

1. Was there a supply of goods in the sense of Article 14(2)(a)?

72. In the present case, the referring court has expressed doubts about the existence of a transfer of property in the 'economic' sense. It explains that the Mayor of Wrocław acts on both sides of the transaction, as a body of the local government (the Municipality) and as a representative of the Public Treasury. The applicable provisions of Polish law only concern the transfer of 'legal ownership' and do not relate to the transfer of 'economic ownership'. It is therefore doubtful as to whether there has been a *de facto* transfer of economic ownership. The referring court also points out that the disputed transaction concerns the transfer of the ownership not as a result of the freely expressed will of the parties to that transaction, but pursuant to the law, and in return for payment of compensation.

73. The concept of 'economic ownership' does not appear in the directive as such. However, from the indications of the referring court and the discussion between the interested parties, it appears that the preliminary question concerns the issue of whether it is possible to apply the concept of 'transfer of the right to dispose of tangible property as an owner' of Article 14(1) of the VAT Directive, as interpreted by the Court.

74. According to the general criteria outlined in points 40 to 53 of this Opinion, a requirement that there is a transfer of the right to dispose of the goods as an owner is not one of the conditions under Article 14(2)(a) of the VAT Directive.

75. As a result, and subject to verification by the national court, it would seem that all three requirements of Article 14(2)(a) for a supply of goods to be given are present in the case at issue.

76. First, as confirmed by the national court, it is not disputed that the ownership of the immovable property was transferred from the Municipality of Wrocław to the Public Treasury. For that purpose, it is immaterial that it was in fact the same Mayor of Wrocław who was acting in two different roles in the same transaction, as the executive authority in the name of the Municipality

and as a representative of the Public Treasury. What matters for the purposes of the provision concerned is the change in the formal legal title of ownership between two clearly distinct legal persons.

77. Second, that transfer of ownership occurred following the decision taken by the Regional Governor of Lower Silesia and according to national law. (29) In this regard, the circumstance, pointed out by the referring court, that the transfer of the ownership of goods is not a result of the free will of the parties is also immaterial. Indeed, the second requirement under Article 14(2)(a) of the VAT Directive is precisely that the transfer of ownership occurs either pursuant to the law, or by order of or in the name of a public authority. This element entails a difference with the transactions covered by Article 14(1) of that directive, and as such, means that there is no free will or mutual agreement.

78. Third, it would appear that there was a payment of compensation made by the Mayor of Wrocław, as mandated by a separate decision issued by the Regional Governor of Lower Silesia setting the level of compensation to which the Municipality of Wrocław was entitled. However, since the existence of ‘actual’ compensation has been extensively debated by the interested parties in these proceedings, I will examine this specific question separately.

2. ‘Actual’ compensation or consideration

79. The general analysis carried out in points 54 to 68 of the present Opinion already suggests that the notion of compensation in Article 14(2)(a) of the VAT Directive should be construed as a specific type of consideration in the sense of Article 2(1)(a) of the directive.

80. However, from the order for reference and also the submissions of the interested parties in the main proceedings, it appears that the doubts of the referring court relate not so much to the logical relationship between the concepts of ‘consideration’ and ‘compensation’, but rather to the fact that it is uncertain whether the compensation has *effectively* been paid.

81. Both parties to the main proceedings hold the view that no *actual* consideration has been paid.

82. According to the Municipality of Wrocław the funds for the payment of the compensation determined by the decision of the Regional Governor of Lower Silesia were taken from the municipal budget linked to the city-district’s tasks. At the same time, the income from the compensation has been reflected in that same budget as revenue of the municipality. This has been done through an internal accounting transfer, which has not compensated the loss of immovable property suffered by the Municipality of Wrocław.

83. The Polish Government submits that it cannot be considered that the condition regarding the *direct link* between the transfer of ownership and the compensation is fulfilled. The Mayor of Wrocław, who was ordered to pay the compensation, does not have his own budget. The funding for the tasks he carries out is drawn from the budget of the Municipality. As a result, the implementation of the decision to pay the compensation is only effected through a transfer of funding that has already been allocated for the tasks of a city-district to the Municipality of Wrocław. The Minister for Finance expressed a similar point of view at the hearing.

84. It is exclusively for the referring court to determine whether, in the specific circumstances of the case at issue the compensation has effectively been paid. It is indeed not for this Court to adjudicate on the intricacies of Polish administrative law, given that the factual and legal context in this case remains distinctly nebulous, in spite of the invitation from the Court to the interested parties at the hearing to explain how the accounting system of a municipal administration with dual

tasks in fact operates. In particular, it remains unclear whether there was any actual transfer of funds from the Public Treasury, and if so, to which of the budgetary lines of the Municipality, or even to what extent the Municipality indeed has separate and distinct budgetary lines for the different tasks it is entrusted with.

85. There are nonetheless at least some general points that could perhaps be provided as guidance to the referring court.

86. First, the fact that compensation was carried out through an accounting operation does not preclude its effective character, as neither the VAT Directive nor the case-law impose any specific requirement as to the method of payment or accounting procedure whereby compensation shall be effected.

87. Second, however, in the sense of the direct link or the basic ‘quid pro quo’ logic inherent in any transaction, (30) there must be consideration given in return for the transfer of the formal title to the property. In a way, consideration must ensue in the reverse direction to that of the transfer of the title. Thus, there must be some accrual of the *own resources* of the Municipality, taking into account that the property was previously owned by the Municipality in its capacity as an independent unit of self-administration.

88. Third, the compensation of Article 14(2)(a) of the VAT Directive being a specific expression of the consideration required by Article 2(1)(a) of that directive, it is imperative that that compensation has *effectively* been paid. This is confirmed by Article 14(2)(a), which explicitly requires *payment* of compensation. One of the fundamental principles of the VAT Directive is that the taxable amount is the consideration *actually* received, the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received. (31) Indeed, if there is a supply with no consideration, there is no basis of assessment. (32) To put it bluntly: if no payment was received, there is nothing to tax.

V. Conclusion

89. As a result of the foregoing, I propose the following answer to the question posed by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland):

A transfer, pursuant to the law, of the ownership of immovable property owned by a municipality to the Public Treasury in return for effective payment of compensation, in the case where, under the rules of national law, that immovable property continues to be managed by the mayor of a municipality, who is simultaneously the representative of the Public Treasury and the executive body of the municipality, constitutes a taxable transaction within the meaning of Article 14(2)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

1 Original language: English.

2 See, for example, Roscher, W.H. (ed.), *Ausführliches Lexikon der Griechischen und Römischen Mythologie*. 2nd volume. Leipzig, Verlag von B.G. Teubner, 1890-1897, pp. 29 to 41 or William Smith (ed.), *Dictionary of Greek and Roman Biography and Mythology*, Vol. II, London, Taylor and Walton, 1846, pp. 550 to 552.

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

4 Dz. U 2004, No 54, item 535. Consolidated text, Dz. U. 2011, No 177, item 1054, as amended.

5 I FSK 1857/13.

6 I FPS 1/15.

7 Judgment of 11 May 2017, Posnania Investment (C-36/16, EU:C:2017:361, paragraph 27).

8 See judgment of 29 September 2015, Gmina Wrocław (C-276/14, EU:C:2015:635, paragraph 29 and the case-law cited).

9 See judgment of 14 December 2000, Fazenda Pública (C-446/98, EU:C:2000:691, paragraph 23 and the case-law cited). See also order of 20 March 2014, Gmina Wrocław (C-72/13, EU:C:2014:197, paragraphs 18 to 22 and the case-law cited).

10 See, for example, judgment of 19 January 2017, *National Roads Authority* (C-344/15, EU:C:2017:28, paragraph 31 and the case-law cited).

11 See, for example, judgment of 6 October 2015, T-Mobile Czech Republic and Vodafone Czech Republic (C-508/14, EU:C:2015:657, paragraphs 28 and 29 and the case-law cited).

12 A provision equivalent to Article 14(2)(a) of the VAT Directive was introduced by the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1). In the Commission Proposal (COM/1973/950/final), draft Article 5(2)(f), which became Article 5(4)(a) of the Sixth VAT Directive, referred to ‘the transfer, by order made by or in the name of a public authority, or the ownership in property against payment of compensation, *where the transfer of such property by private agreement would attract liability to the tax*’. This last (italicised) provision was not included in the final text. The Proposal also contained an Article 12(4), according to which ‘in respect of the supplies specified in Article 5(2)(f), the amount of compensation paid, excluding re-employment allowance, shall be deemed to be the taxable amount’. This provision did not make it to the final text. See Terra, B.J.M., and Kajus, J., *A Guide to the Sixth VAT Directive. Commentary to the Value Added Tax of the European Community*, Volume A, IBFD Publications, 1991, p. 209.

13 See for example, Terra, B.J.M., and Kajus, J., *Introduction to European VAT (Recast), Commentaries on European VAT Directives*, IBFD Publications, 2017, p. 246; or van Doesum, A., van Kesteren H., and van Norden, G.-J., *Fundamentals of EU VAT Law*, Kluwer Law International, 2016, p. 111.

14 See, in this sense, judgment of 18 July 2013, *Evita-K* (C-778/12, EU:C:2013:486, paragraph 35). The Court has also emphasised that that provision ‘does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner’. See, for example, judgment of 3 September 2015, *Fast Bunkering Klaipėda* (C-526/13, EU:C:2015:536, paragraph 51 and the case-law cited). The Court has explained that this is with the purpose of basing the common system of VAT on a uniform definition of taxable transactions and that that objective would be jeopardised ‘if the preconditions for a supply of goods ... varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law’. See, for example, judgment of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraph 8).

15 Judgment of 3 September 2015, *Fast Bunkering Klaipėda* (C-526/13, EU:C:2015:536, paragraph 51 and the case-law cited).

16 See, to that effect, judgment of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73, paragraph 34).

17 Above, points 35 to 39.

18 See judgment of 4 October 2017, *Mercedes-Benz Financial Services UK* (C-164/16, EU:C:2017:734, paragraph 31).

19 See, for example, judgment of 8 November 2012, *Profitube* (C-165/11, EU:C:2012:692, paragraph 51 and the case-law cited).

20 See, for example, judgment of 11 May 2017, *Posnania Investment* (C-36/16, EU:C:2017:361, paragraph 31 and the case-law cited).

21 See, for example, judgment of 7 November 2013, *Tulic and Plavojin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 33 and the case-law cited).

22 See judgment of 19 December 2012, *Orfey Bulgaria* (C-549/11, EU:C:2012:832, paragraphs 44 and 45 and the case-law cited).

23 See judgment of 2 June 2016, *Lajvér* (C-263/15, EU:C:2016:392, paragraph 45 and the case-law cited).

24 Judgment of 18 July 2007, *Société thermale d'Eugénie-Les-Bains* (C-277/05, EU:C:2007:440, paragraph 32).

25 Judgment of 18 January 2017, *SAWP* (C-37/16, EU:C:2017:22, paragraph 30).

26 See, for example, van Doesum, A., van Kesteren, H., and van Norden, G.-J., *Fundamentals of EU VAT Law*, Kluwer Law International, 2016, p. 111; Terra, B.J.M., and Kajus, J., *Introduction to European VAT (Recast), Commentaries on European VAT Directives*, IBFD Publications, 2017, p. 246; Henkow, O., *The VAT/GST Treatment of Public Bodies*, Kluwer Law International, 2013, p. 67.

27 Judgment of 11 May 2017, *Posnania Investment* (C-36/16, EU:C:2017:361, paragraphs 32 to 36). See, similarly, in the context of supply of services, judgment of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470, paragraphs 24 to 26).

28 See van Doesum, A., van Kesteren, H., and van Norden, G.-J., *Fundamentals of EU VAT Law*, Kluwer Law International, 2016, p. 129, citing the judgment of 2 June 1994, *Empire Stores* (C-33/93, EU:C:1994:225, paragraph 16). See, *a contrario*, judgment of 18 July 2007, *Société thermale d'Eugénie-Les-Bains* (C-277/05, EU:C:2007:440, paragraph 26), where the reservation of accommodation was considered not to be dependent on payment of a deposit, so there was no direct connection between the service and the consideration.

29 The invoked national provision was Article 12(4) of the Ustawa o szczególnych zasadach lokalizacji dróg publicznych (Law on specific rules on the routing of public roads).

30 In general see above, point 68 of this Opinion.

31 See, judgment of 2 July 2015, *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 35 and the case-law cited). See also judgment of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraphs 12 and 13).

32 See, to that effect, judgment of 21 November 2013, *Dixons Retail* (C-494/12, EU:C:2013:758, paragraph 31 and the case-law cited).