Provisional text

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 14 May 2020 (1)

Case C?42/19

Sonaecom SGPS SA

v

Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal))

(Request for a preliminary ruling — Common system of value added tax (VAT) — Directive 77/388/EEC — Concept of taxable person — Holding company — Mixed holding company — Deduction of input tax — Expenditure for consultancy services and for the issue of corporate bonds with a view to acquiring another company — Change in planned output transactions)

I. Introduction

1. The Court has already considered the right to deduct of holding companies several times. (2) Nevertheless, this continues to present problems in practice, in particular where a holding company merely manages shares in certain companies, but supplies taxable services to other companies owned by it (‘mixed holding company’).

2. In the present case, Sonaecom SGPS, SA (‘Sonaecom’) wished to acquire shares in an undertaking and then to supply taxable services to it. In preparation for the transaction, it used consultancy services and services relating to the issue of corporate bonds. Sonaecom claimed a deduction on that basis. However, this was refused by the Portuguese tax authority on the ground that, in particular, Sonaecom was not able to make the investments and instead made the capital raised available to the parent company of the group as an exempt loan.

3. In these proceedings the Court will, in particular, have to clarify what effects the change from the planned activity to the actual activity has on the deduction of input tax.

II. Legal framework

A. **EU law**

4. The framework of the request for a preliminary ruling in EU law is provided by Directive 77/388/EEC ('the Sixth Directive'), (3) which has now been repealed by Directive 2006/112/EC ('the VAT Directive'). (4) The relevant provisions of the two directives are substantively identical to a large extent.

5. Under point 1 of the first subparagraph of Article 2 of the Sixth Directive (now Article 2(1)(a) to (c) of the VAT Directive), the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is to be subject to value added tax.

6. Article 4(1) of the Sixth Directive (now the first subparagraph of Article 9(1) of the VAT Directive) defines 'taxable person' as follows:

'"Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.'

7. Article 13(B)(d)(1) of the Sixth Directive (now Article 135(1)(b) of the VAT Directive) provides for exemptions within the territory of the country:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

(d) the following transactions:

1. the granting and the negotiation of credit and the management of credit by the person granting it'.

8. Article 17(1) and (2)(a) of the Sixth Directive (now Articles 167 and 168(a) of the VAT Directive) governs the origin and scope of the right to deduct:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

B. **Portuguese law**

9. In the period at issue, Article 9(28)(a) of the Código do Imposto sobre o Valor Acrescentado (Portuguese Code on Value Added Tax) provided:

'The following shall be exempt from tax:

28.

(a) the granting and negotiation of credit, in any form, including discount and rediscount transactions, and the administration and management of credit by the person who granted it'.

III. **Facts and main proceedings**

10. Sonaecom is a holding company which acquires, holds and manages shares with full rights to the resulting income. In addition, it manages and provides strategic coordination to companies operating in the telecommunications, media, software and systems integration markets. Sonaecom asserts that it received due consideration for the management and strategic coordination services, which were taxed at the full rate of VAT.

11. In 2005, Sonaecom wished to invest in the new business segment 'Triple Play', which combines audiovisual entertainment, telephony and internet. To that end, Sonaecom used consultancy services provided by two undertakings which studied the market with a view to Sonaecom's possible acquisition of shares in the telecommunications provider CabovisãosEUR 212 627.56 in VAT was incurred in respect of those services.

12. In addition, Sonaecom paid a taxable commission to an investment bank to organise, put together and guarantee the placement of a private issue of bonds known as 'Sonaecom-SGPS-2005-bonds' with a value of EUR 150 000 000. EUR 769 500.00 in VAT was incurred. Sonaecom asserts that it planned to use the capital thus obtained to acquire shares in Cabovisão and then to provide taxable technical support and management services to that company.

13. However, the acquisition of the shares in Cabovisão did not materialise. Sonaecom thereupon made available the capital obtained through the issue of the bonds to the parent company of the group, Sonae SGPS SA, as a loan.

14. Sonaecom made a deduction of a total sum of EUR 982 127.56 for 2005 in respect of the VAT arising for the consultancy services (in the return for December 2005) and the commission (in the return for June 2005).

15. Following an audit, the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) adjusted the tax in 2008 and demanded payment of the tax declared plus EUR 106 548.20 in compensatory interest, making a total of EUR 1 088 675.77. As grounds, it stated that, first, the acquisition of shares fell outside the scope of VAT and, second, the granting of credit was exempt under Article 13(B)(d)(1) of the Sixth Directive.

16. The action brought against those assessment notices in October 2008 was dismissed by the Tribunal Administrativo e Fiscal do Porto (Porto Administrative and Tax Court, Portugal) in 2016. The VAT for the consultancy services was not deductible because the intended acquisition and management of shares were not economic activities. The VAT in respect of the commission for the issue of bonds was not deductible because the capital had been transferred in full to the parent company of the group and Sonaecom had not demonstrated that that capital benefited the affiliated companies or that it had been employed in an output transaction that gives rise to the right to deduct VAT.

17. Sonaecom lodged an appeal against that judgment. Sonaecom claims that, by their nature, the acquisitions at issue must at least be regarded as forming part of the costs which it had to incur in order to be able properly to supply the services which it regularly provides for its affiliates. Its interventions in the management of those companies are repeated and significant, in particular through cooperation in the development of their strategy and in the provision of services for remuneration and, in turn, it therefore frequently needs to procure a huge variety of supplies and services.

IV. **Request for a preliminary ruling and procedure before the Court**

18. By order of 5 December 2018, which was received at the Court on 24 January 2019, the

Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) referred the following questions to the Court for a preliminary ruling pursuant to Article 267 TFEU:

(1) Is it compatible with the deductibility rules laid down in the Sixth VAT Directive, specifically Articles 4(1) and (2) and 17(1), (2) and (5), to deduct tax borne by the appellant, Sonaecom SGPS, in respect of consultancy services connected with a market study commissioned with a view to acquiring shares, where that acquisition did not materialise?

(2) Is it compatible with the deductibility rules laid down in the Sixth VAT Directive, specifically Articles 4(1) and (2) and 17(1), (2) and (5), to deduct tax borne by the appellant, Sonaecom SGPS, in respect of the payment to BCP of a commission for organising and putting together a bond loan, allegedly taken out with a view to integrating the financial structure of its affiliated companies, and which, since those investments failed to materialise, was ultimately transferred to Sonae, SGPS, the parent company of the group?

19. Sonaecom, the Portuguese Republic and the European Commission submitted written observations on the request for a preliminary ruling and presented oral argument at the hearing on 12 February 2020.

V. **Legal assessment**

A. **Deduction in respect of expenditure for the consultancy services (first question)**

20. By its first question, the referring court wishes to know whether the deduction made by Sonaecom is compatible with the Sixth Directive. It is thus ultimately asking whether the deduction declared by Sonaecom is consistent with EU law. It is nevertheless apparent from the request for a preliminary ruling that the referring court actually wishes to know whether Articles 17 and 4 of the Sixth Directive are to be interpreted as meaning that a holding company in a situation like Sonaecom’s is entitled to deduct VAT paid in respect of certain services.

21. Furthermore, the referring court fails to recognise that, according to the Court’s settled case-law, the mere acquisition of shares by a holding company is not an economic activity within the meaning of VAT law. (5) It is otherwise only where a holding company is involved in the management of the acquired company. (6) The referring court did not find, however, that Sonaecom planned to supply taxable services to Cabovisão, in which it intended to acquire shares.

22. Sonaecom has nevertheless submitted that it intended to supply taxable services to Cabovisão after the acquisition of the shares. The referring court can ascertain, subsequent to these proceedings, whether there is objective evidence of that intention.

23. The first question referred must therefore be reformulated as asking whether a mixed holding company has the right to deduct under Articles 17 and 4 of the Sixth Directive in respect of consultancy services connected with the market survey with a view to the acquisition of shares. This question arises in particular because the holding company intended to supply taxable services to the company to be acquired, but this did not materialise in the absence of acquisition.

24. The answer to this question can be inferred from the Court's case-law. Alongside the question whether mixed holding companies can be taxable persons (1), the Court has reaffirmed in particular, most recently in *Ryanair*, (7) the deductibility of expenditure arising in preparation for activities not subsequently carried out by the taxable person (2). The Court has also considered the direct and immediate link between input and output transactions (3). A disproportion between the amount of the deduction and the amount of a holding company's tax liability on the basis of its planned management services, which regularly occurs in these cases, is immaterial (4).

1. ***The mixed holding company as a taxable person***

25. Under Article 17(2) of the Sixth Directive, only a taxable person within the meaning of Article 4 has the right to deduct. The question whether and to what extent a holding company is a taxable person has been the subject of rulings by the Court on a number of occasions.

26. More specifically, as regards a holding company's right of deduction, the Court has held that a holding company does not have the status of taxable person within the meaning of Article 4 of the Sixth Directive (now Article 9 of the VAT Directive) and, accordingly, does not have the right to deduct tax under Article 17 of the Sixth Directive (now Articles 167 and 168 of the VAT Directive) when it has as its sole purpose the acquisition of shares in other undertakings and does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder (8) (financial holding company).

27. The mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the meaning of the VAT Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property. (9)

28. It is otherwise, however, for management and investment holding companies. As the Court has held in settled case-law, they are taxable persons if the holding company is involved directly or indirectly in the management of the company in which the holding has been acquired. That is the case if, through such involvement, the holding company carries out transactions which are subject to VAT. (10) According to settled case-law, non-exhaustive examples (11) are the supply by a holding company to its subsidiaries of administrative, accounting, financial, commercial, information technology and technical services. (12)

29. The same applies if the holding company carries out other economic activities, such as letting properties and buildings to third parties or its subsidiaries. (13) The direct, permanent and necessary extension of the existing taxable activity of a holding company also comes within the scope of VAT. (14)

30. This also applies to a mixed holding company. A mixed holding company is a company that, in addition to its non-economic holding activity, which consists in the holding of shares in other companies and is not subject to VAT, also carries out an economic activity. (15) According to case-law, a mixed holding company which not only holds shares in companies, but also supplies remunerated, taxable services to some of those companies, is thus a taxable person, (16) albeit entitled to only a pro rata deduction.

31. Sonaecom, which intended to supply remunerated technical and management services to the company in which it wished to acquire shares, is such a mixed holding company and thus, in principle, a taxable person within the meaning of Article 4 of the Sixth Directive (now Article 9 of the VAT Directive).

2. ***The right to deduct based on the intended economic activities***

32. Sonaecom's right to deduct in respect of the consultancy services arose, in principle, even though it ultimately did not acquire any shares in Cabovisão.

33. According to the Court's case-law, a right to deduct also exists for abortive investments. In the case of costs incurred in the preparation of an economic activity, deduction of input tax can be claimed even where the economic activity is not taken up successfully and the intended taxable transactions do not take place. (17) This follows from the neutrality of the VAT system, whereby an undertaking's preparatory activities are intended to be exempt from any VAT burden.

34. The Court has thus ruled in *Ryanair* that a company which plans to acquire shares of another company and carries out preparatory acts with the intention of becoming involved in the management of that other company by providing management services subject to VAT must be considered a taxable person within the meaning of the Sixth Directive. (18)

35. In the present case, this applies in principle to Sonaecom, which intended to supply taxable services to Cabovisão, the company to be acquired.

3. ***The direct and immediate link between the consultancy services and the planned services***

36. The only question arising is thus the direct and immediate link between the expenditure incurred for the consultancy services in connection with the planned acquisition of shares and the services which Sonaecom intended to supply to Cabovisão.

37. According to the Court's settled case-law, expenditure has a direct and immediate link with certain output transactions which were a component of their cost. (19) In addition, an undertaking may claim deduction of input tax for the general costs which are components of the price of all its products. (20)

38. Therefore, a company which intends to acquire all the shares of another company in order to provide management services subject to VAT to that other company has the right to deduct, in full, input VAT paid on expenditure relating to consultancy services provided in the context of a takeover bid. (21)

39. This can be applied to mixed holding companies. It is the situation at least in so far as a holding company bears expenditure connected with the acquisition of shares in subsidiaries to which it supplies or intends to supply taxable services. On that basis, it carries out an economic activity (22) and is entitled to deduct.

40. In the present case, Sonaecom used consultancy services in order to acquire shares in Cabovisão and then to supply taxable services to that company. That expenditure has a direct and immediate link with the planned taxable services. In that regard, Sonaecom is entitled, in principle, to make a deduction in full.

4. ***The scope of the right to deduct***

41. Even though the referring court did not state how high the value of the planned taxable services would have been, it must be assumed that the VAT arising from those activities is much lower than the deduction claimed.

42. In the present case, there was a deduction of approximately EUR 210 000, together with a further amount of approximately EUR 770 000 from the organisation of the issue of the bond loan. This disproportion between the scope of the deduction and the company's own tax liability is inherent in most cases involving holding companies. This is somewhat concerning at first sight and raises the question whether the scope of the deduction should be limited in such cases.

43. On closer inspection, however, that concern is dispelled. First, the disproportion occurs only on the basis of a selective approach which does not take account of the fact that the taxable services are supplied over a number of years. Second, VAT law does not prescribe a mandatory connection between the amount of the deduction and the amount of the tax liability. (23)

44. A flat-rate reduction of the deduction based on non-taxable activities as a holding company is also ruled out if the costs of the inputs can be allocated directly to particular taxable outputs. Nor can the judgment in *Larentia + Minerva and Marenave Schiffahrt* (24) be invoked in support of a pro rata reduction. It is true that a pro rata input tax deduction was considered in that case. However, this applied only if the expenditure on which input tax was charged could also be allocated to other subsidiaries in the taxable management of which the holding company was not involved. That is not the case here.

45. Furthermore, such a disproportion is, in the final analysis, a consequence of the Court's case-law according to which holding companies have a right to deduct only where they provide remunerated services to their affiliated companies (see point 26 et seq.). If controlling holding companies, which are economically active through the affiliated companies controlled by them, had been recognised in principle as having the right to deduct from their expenditure as a holding company, they would not be reliant on having recourse to seemingly artificial constructions of taxable services (25) in order to prevent a definitive VAT burden within the group.

46. Rather, the principle of neutrality of legal form, which has also been affirmed by the Court in VAT law, (26) militates in favour of a full deduction by a controlling holding company. It is perfectly true that holding a share does not make a shareholder an economically active taxable person (see above, point 27). It is another question, which the Court has never expressly answered in the negative, whether a fully controlling shareholder is economically active through 'its' controlled company to the same extent as a single trader and should, like a single trader, thus be relieved of the VAT based on that activity.

47. The principle of neutrality of legal form suggests that in both cases expenditure for the management of the undertaking should be relieved of VAT where the undertaking itself carries out transactions giving entitlement to deduction. The single trader is economically active directly and the controlling shareholder indirectly, through the controlled company. Neither (the single trader nor the controlling shareholder) should therefore be compelled to conclude service contracts for consideration with 'its' undertaking in order to be regarded as a taxable person.

5. ***Conclusion***

48. Consequently, a mixed holding company like Sonaecom has the right to full deduction pursuant to Articles 17 and 4 of the Sixth Directive in respect of expenditure for the acquisition of shares in a company to which it intended to supply taxable services. It is for the referring court to determine whether that is the case. The right to deduct also arises if that acquisition ultimately did

not materialise and applies irrespective of the amount of VAT payable in respect of the planned services.

B. **Deduction in respect of expenditure for the issue of bonds (second question)**

49. The second question should also be reformulated. (27) In essence, the referring court wishes to know whether a mixed holding company has the right to deduct under Articles 17 and 4 of the Sixth Directive in respect of expenditure for organising and putting together a bond loan with a view to the acquisition of shares in an undertaking to which the holding company intended to supply remunerated services. The referring court asks in particular about the effects if the acquisition of the shares did not materialise and the holding company instead made available the capital obtained to the parent company of the group as an exempt loan.

50. For this purpose, it must be examined whether the planned taxable use of the capital raised or the exempt use which actually took place determines the deduction by Sonaecom (see under 1). Consideration will then be given to the question raised by Sonaecom whether the ‘use’ of the capital for the benefit of operational companies, which took place subsequently in another tax period, has any effects (see under 2).

1. ***Determination of the deduction based on the actual use***

51. The scope of the right to deduct is regulated in Article 17(2)(a) of the Sixth Directive (now Article 168 of the VAT Directive). Under that provision, the taxable person is entitled to deduct in so far as the goods and services are used for the purposes of his or her taxable transactions.

52. In the present case, Sonaecom had planned to utilise the capital raised through the issue of the bonds for the acquisition of shares in Cabovisão. The expenditure for the issue of the bonds thus has a direct and immediate link with the acquisition of the shares. As has already been stated above, (28) it is immaterial that the planned transactions did not materialise.

53. If the taxable person now actually carries out exempt activities in the same tax period, rather than the originally planned taxable activity, the question is raised whether this affects the deduction which has already arisen. Ultimately, this is a question of the relationship between the planned activity and the activity actually carried out in respect of the deduction. In my view, the actual use must be decisive where an input transaction can be allocated to a particular actual output transaction.

54. This follows, first, from Article 17(2) of the Sixth Directive (now Article 168 of the VAT Directive). Under that provision, the taxable person is entitled to deduct only in so far as the goods and services are *used* for his or her taxable transactions. The right to deduct is thus based on a transaction-related perspective where the actual use is decisive.

55. Furthermore, the Court has ruled with regard to input tax allocation for mixed-use goods that Member States may provide for calculation methods different from the turnover-based allocation key provided for in the Sixth Directive and the VAT Directive if the method chosen guarantees a more precise result. (29) The allocation based on the actual use is the most precise way of determining the deduction accurately and therefore takes precedence over having regard solely to the intended — and thus still uncertain — use by the taxable person. In addition, the rules on the adjustment of deductions (Article 20 of the Sixth Directive and now Articles 184 and 185 of the VAT Directive) show that the initial deduction is ultimately adjusted as precisely as possible to the actual use ‘to ensure that the taxable person neither benefits nor is prejudiced unjustifiably’ (see Article 20(6) of the Sixth Directive and Article 192 of the VAT Directive).

56. Lastly, the assessment of Article 17 of the Sixth Directive (now Articles 168 and 169 of the VAT Directive) and the principle of neutrality also indicate that regard should be had primarily to the actual use, where it exists. Under Article 17(2) and (3) of the Sixth Directive and Articles 168 and 169 of the VAT Directive, in making the deduction the taxable person is intended to be relieved only of VAT which has a link with (generally (30)) taxable output transactions. A right to deduct does not, however, exist in principle where there is a direct and immediate link with an exempt activity. (31)

57. In the present case, Sonaecom granted a loan to the parent company of the group. The granting of credit is exempt from VAT under Article 13(B)(d)(1) of the Sixth Directive. A deduction pursuant to Article 17 of the Sixth Directive (now Article 167 et seq. of the VAT Directive) is therefore precluded.

58. Furthermore, the principle of fiscal neutrality precludes economic operators actually carrying on the same activities from being treated differently as far as the levying of VAT is concerned (32) in order to avoid distortions of competition. If, however, the two taxable persons ultimately carry out only exempt transactions in the same tax period, neither has a right to deduct. A right to deduct existing solely on the basis of one's undertaking's former intention to carry out taxable transactions would afford it a competitive advantage. In addition to the problem of an adequate review of that intention, such an outcome would also run counter to the approach taken by the Court, according to which regard should be had, in assessing a transaction to be taxed, to the objective character of the transaction and not to subjective intentions. (33)

59. The precedence of the actual use over the planned use is not precluded by the judgments in *Sveda* and *Iberdrola*. (34) Those judgments permitted the deduction in very generous terms even though the expenditure in each case was closely linked to services supplied free of charge in support of municipal infrastructure (recreational path to promote tourism and reconstruction of a pump station to connect buildings to be constructed).

60. In these circumstances, the Court did not rule on the precedence of the actual exempt use over the planned taxable use. The decisions concerned only the link between input transactions and the taxable person's economic activity as a whole which would not have been possible without the service supplied free of charge. (35) There are no such circumstances here, however.

61. Consequently, the actual use within the tax period in which the right to deduct arose has precedence over the original intention.

62. It is clear in the present case that Sonaecom did not utilise the capital raised through the issue of the bonds for the originally planned acquisition. Instead, in the relevant year, 2005, Sonaecom transferred that capital to the parent company of the group as an exempt loan. This point is also emphasised by Portugal.

63. Sonaecom is incorrect in its assertion that the expenditure for the issue of its bonds is deductible as general costs of the undertaking. Sonaecom claims in this regard that the intended purpose of the issue of the bonds was to continue the group's economic activities. It merely 'parked' the capital obtained through the issue of the bonds with the parent company of the group. The capital was subsequently returned to Sonaecom so that it was able to purchase shares in other undertakings.

64. However, the taxable person's general costs can be used only in the absence of a direct and immediate link between a particular input transaction and output transactions giving entitlement to deduct. (36) It is only where an input transaction cannot be allocated to an output

transaction that the link between an input transaction and an undertaking's overall economic activity should be examined as a secondary point. (37) In the present case, however, there is a direct and immediate link with the granting of the exempt loan giving entitlement to deduct.

65. In conclusion, the actual exempt transfer of the capital raised from a mixed holding company to the parent company of the group thus precludes a deduction under Article 17 of the Sixth Directive (now Articles 168 and 169 of the VAT Directive) in respect of capital procurement costs. The direct link with the exempt loan actually provided takes precedence over the original intention to supply taxable services to a subsidiary to be acquired with that capital.

2. ***Subsequent actual use of the capital***

66. Sonaecom maintains that it merely 'parked' the capital with the parent company of the group and utilised it in a subsequent tax period for shares, as originally intended. If, subsequently, Sonaecom actually used the capital obtained for taxable services, consideration might have to be given to an adjustment of the deduction pursuant to Article 20 of the Sixth Directive (now Article 184 et seq. of the VAT Directive).

67. However, this does not affect the deduction in the relevant tax period at issue. Possible effects would become apparent only in the tax period of the change in use.

68. In addition, Article 20 of the Sixth Directive (now Article 184 et seq. of the VAT Directive) provides for the initial deduction to be adjusted only under certain conditions. That is the case inter alia where that deduction was lower than that to which the taxable person was entitled. The aim, having regard to the principle of neutrality, is for the taxable person to be relieved in full of input tax charged on long-lived assets. (38) The Sixth Directive and the VAT Directive employ the notion of 'capital goods' to this effect.

69. It nevertheless seems doubtful whether services for the issue of bonds are to be regarded as capital goods within the meaning of Article 20(2) of the Sixth Directive (now Article 187 of the VAT Directive). According to the Court's case-law, 'capital goods' covers goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but are written off over several years. (39) These should be distinguished from supplies consumed immediately, where it is not possible to adjust the deduction over time. That is generally the case with services.

70. However, Sonaecom used services for the issue of bonds. Those services are consumed in full when the capital is obtained such that the change in use of the capital raised does not affect the deduction in respect of those services in subsequent years.

VI. **Conclusion**

71. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling as follows:

1. Articles 17 and 4 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment are to be interpreted as meaning that a mixed holding company like Sonaecom has the right to full deduction in respect of expenditure for the acquisition of shares in a company to which it intended to supply taxable services. It is for the referring court to determine whether that is the case. The right to deduct also arises if that acquisition ultimately did not materialise and applies irrespective of the amount of VAT payable in respect of the planned services.

2. The actual exempt transfer of the capital raised from a mixed holding company to the parent company of the group precludes a deduction. The direct link with the exempt service actually provided takes precedence over the original intention to supply taxable services to a subsidiary to be acquired with that capital.

1 Original language: German.

2 See, inter alia, judgments of 8 November 2018, *C&D Foods Acquisition* (C?502/17, EU:C:2018:888); of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834); of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537); of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496); of 13 March 2008, *Securenta* (C?437/06, EU:C:2008:166); and of 6 September 2012, *Portugal Telecom* (C?496/11, EU:C:2012:557).

3 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), as amended by Council Directive 2004/66/EC of 26 April 2004 (OJ 2004 L 168, p. 35).

4 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive (EU) 2019/475 of 18 February 2019 (OJ 2019 L 83, p. 42).

5 Judgments of 8 November 2018, *C&D Foods Acquisition* (C?502/17, EU:C:2018:888, paragraph 30); of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 16); and of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 28).

6 Judgments of 8 November 2018, *C&D Foods Acquisition* (C?502/17, EU:C:2018:888, paragraph 32); of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 17); and of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 29).

7 Judgment of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834), and my Opinion in that case (EU:C:2018:301).

8 Judgments of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 27), and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 18).

9 Judgments of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 28), and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 19).

10 Judgments of 8 November 2018, *C&D Foods Acquisition* (C?502/17, EU:C:2018:888, paragraph 32); of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 17); of 5 July

2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 29); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 20).

11 As is expressly held in the judgment of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 31).

12 Judgments of 8 November 2018, *C&D Foods Acquisition* (C?502/17, EU:C:2018:888, paragraph 32); of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraphs 30 and 31); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 21).

13 See, with regard to the latter, judgment of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 32). It is rather doubtful, however, whether the letting of a property can and must really be understood as ‘involvement of a holding company in the management of its subsidiary’.

14 Judgments of 8 November 2018, *C&D Foods Acquisition* (C?502/17, EU:C:2018:888, paragraph 33); of 29 October 2009, *AB SKF* (C?29/08, EU:C:2009:665, paragraph 31); and of 29 April 2004, *EDM* (C?77/01, EU:C:2004:243, paragraph 70).

15 My Opinion in *Ryanair* (C?249/17, EU:C:2018:301, point 31 and footnote 21); Opinion of Advocate General Léger in *EDM* (C?77/01, EU:C:2002:483, point 2 and footnote 3); and Opinion of Advocate General Stix-Hackl in *Cibo Participations* (C?16/00, EU:C:2001:131, point 16).

16 Judgments of 13 March 2008, *Securenta* (C?437/06, EU:C:2008:166, paragraph 31); of 29 April 2004, *EDM* (C?77/01, EU:C:2004:243, paragraph 80); and of 27 September 2001, *Cibo Participations* (C?16/00, EU:C:2001:495, paragraph 22).

17 Judgments of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 18); of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 20); of 14 March 2013, *Ablessio* (C?527/11, EU:C:2013:168, paragraph 25); of 29 February 1996, *Inzo* (C?110/94, EU:C:1996:67, paragraph 17); and of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraphs 23 and 24); see, also, my Opinion in *Ryanair* (C?249/17, EU:C:2018:301, points 16 and 26).

18 Judgment of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 19 and operative part).

19 Judgments of 3 July 2019, *The Chancellor, Masters and Scholars of the University of Cambridge* (C?316/18, EU:C:2019:559, paragraph 25); of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 26); of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:683, paragraph 28); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 23).

20 Judgments of 3 July 2019, *The Chancellor, Masters and Scholars of the University of Cambridge* (C?316/18, EU:C:2019:559, paragraph 26); of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 27); of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:683, paragraph 29); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 24).

21 Judgment of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 32 and operative part).

22 Judgments of 5 July 2018, *Marle Participations* (C?320/17, EU:C:2018:537, paragraph 36);

of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 25); and of 13 March 2008, *Securenta* (C?437/06, EU:C:2008:166, paragraph 28).

23 See judgments of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 23); of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 17); of 14 March 2013, *Ablessio* (C?527/11, EU:C:2013:168, paragraph 23); and of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 19). The common system of VAT ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT.

24 Judgment of 16 July 2015 (C?108/14 and C?109/14, EU:C:2015:496, paragraph 29).

25 I have already referred to this problem in my Opinion in *Ryanair* (C?249/17, EU:C:2018:301, point 28).

26 See, inter alia, with regard to exemptions: judgments of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C?363/05, EU:C:2007:391, paragraph 26); of 4 May 2006, *Abbey National* (C?169/04, EU:C:2006:289, paragraph 53); of 3 April 2003, *Hoffmann* (C?144/00, EU:C:2003:192, paragraph 24); of 10 September 2002, *Kügler* (C?141/00, EU:C:2002:473, paragraph 30); and of 7 September 1999, *Gregg* (C?216/97, EU:C:1999:390, paragraph 20).

27 See point 20 et seq. of this Opinion.

28 Point 32 et seq. of this Opinion.

29 Judgments of 9 June 2016, *Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft* (C?332/14, EU:C:2016:417, paragraph 33); and of 8 November 2012, *BLC Baumarkt* (C?511/10, EU:C:2012:689, paragraph 23 et seq. and operative part), with regard to the allocation key based on floor area in German turnover tax law.

30 Certain exceptions are, for example, regulated in Article 169 of the VAT Directive.

31 Judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:683, paragraph 30); of 29 October 2009, *AB SKF* (C?29/08, EU:C:2009:665, paragraph 59); and of 13 March 2008, *Securenta* (C?437/06, EU:C:2008:166, paragraph 30); see, also, my Opinion in *C&D Foods Acquisition* (C?502/17, EU:C:2018:676, point 37).

32 Judgments of 3 April 2003, *Hoffmann* (C?144/00, EU:C:2003:192, paragraph 24); of 10 September 2002, *Kügler* (C?141/00, EU:C:2002:473, paragraph 30); and of 7 September 1999, *Gregg* (C?216/97, EU:C:1999:390, paragraph 20).

33 Judgments of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 39); of 6 July 2006, *Kittel and Recolta Recycling* (C?439/04 and C?440/04, EU:C:2006:446, paragraph 42); of 12 January 2006, *Optigen and Others* (C?354/03, C?355/03 and C?484/03, EU:C:2006:16, paragraph 44); and of 6 April 1995, *BLP Group* (C?4/94, EU:C:1995:107, paragraph 24).

34 Judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:683, paragraphs 33 and 34), and of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 22).

35 Judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:683, paragraph 29), and of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 28); see, also, my Opinion in *C&D Foods Acquisition* (C?502/17, EU:C:2018:676, point 49).

36 Point 37 of this Opinion, and my Opinion in *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:283, point 35).

37 My Opinions in *C&D Foods Acquisition* (C?502/17, EU:C:2018:676, point 51), and *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:283, points 36 and 37).

38 Judgment of 25 July 2018, *Gmina Ryjewo* (C?140/17, EU:C:2018:595, paragraph 55), and my Opinion in that case (C?140/17, EU:C:2018:273, point 40).

39 Judgment of 16 February 2012, *Eon Aset Menidjmunt* (C?118/11, EU:C:2012:97, paragraph 35 and the case-law cited).