

Provisional text

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 23 April 2020 (1)

Case C-312/19

XT

Intervening parties:

Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos,

Vilniaus apskrities valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos

(Request for a preliminary ruling by the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania))

(Request for a preliminary ruling — Tax law — Value added tax — Directive 2006/112/EC — Article 9(1) — Concept of taxable person — Capacity to be a taxable person — Legal capacity — Allocation of transaction to a taxable person — Joint action by several persons — Action by an undisclosed partnership)

I. Introduction

1. In this case, two persons planned and implemented a construction project for several buildings; however, only one of them (the applicant in the main proceedings) actively conducted himself outwardly, whereas his business partner, who only funded 70% of the acquisition costs, was involved in project decisions and received a corresponding share from the applicant on completion of the joint project and the sale of the new buildings.

2. Where two persons work together, but only one person conducts himself outwardly in his own name, which of them is the taxable person (supplier) liable for payment of the VAT charged? The answer is important not only in terms of the supplier's tax liability, but also in terms of the customer's right of deduction. After all, the customer needs an invoice on which the name and address of the taxable person who sold the supply must be stated.

3. Judgments of the Court to date have not concerned cases in which a person was involved in the background (i.e. silently) in an activity which another person performed in his own name alone. The Court has so far only addressed the question of the (pro rata) right of deduction of one

co-owner in fact in respect of an invoice addressed to both co-owners. (2) Therefore, this case affords an opportunity to explore the very fundamental issue of how to determine the taxable person where third parties are involved in his activities.

II. Legal context

A. EU law

4. The legal context under EU law is determined by Article 9(1), Article 193 and Article 287 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (3) ('the VAT Directive').

5. The first sentence of Article 9(1) of the VAT Directive provides:

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

6. Article 193 of the VAT Directive concerns the person liable for payment of VAT and provided as follows in the version applicable in the contested years:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services ...'

7. Article 287 point 11 of the VAT Directive contains an exemption for small enterprises. It provides:

'Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession: ...'

11. Lithuania: EUR 29 000; ...'

B. Lithuanian law

8. Article 2(15) of the Lietuvos Respublikos pridėtinės vertės mokesčio įstatymas (Law of the Republic of Lithuania on value added tax, 'the Law on VAT') states:

"Taxable person of the Republic of Lithuania" means a legal or natural person of the Republic of Lithuania carrying out economic activities of any type, as well as a collective investment undertaking established in the Republic of Lithuania which does not have the status of legal person and acts as an investment fund'.

9. Article 71(1) of the Law on VAT provides:

'Taxable persons who supply goods or services in the territory of the country are required to register for VAT, calculate VAT and pay it to the State ... A person required to register for VAT must submit an application for registration for VAT.'

10. However, Article 71(2) of the Law on VAT provides:

'Notwithstanding paragraph 1 [of Article 71 of the Law on VAT], a taxable person of the Republic of Lithuania shall not be required to submit an application for registration for VAT, calculate VAT or pay it to the State, in the manner laid down ..., where the total annual consideration within the last 12 months for goods and/or services supplied in the territory of the country from carrying out economic activities did not exceed 155 000 [Litas (LTL)]. VAT shall be calculated from the month in which that limit is exceeded. No VAT shall be calculated for the goods and services supplied for

which the consideration does not exceed the sum of LTL 155 000. ...'

III. Main proceedings

11. On 19 February 2010, the applicant in the main proceedings ('the applicant') and another natural person ('the business partner') concluded a joint activity agreement for the purpose of cooperation in constructing a residential property in or around Vilnius (Lithuania).

12. On 25 April 2010, the applicant together with his business partner decided to purchase a parcel of agricultural land of 0.5 ha in the District of Vilnius. On 27 April 2010, the applicant and the owners of that parcel of land signed a sale contract for the parcel of land. The business partner contributed 70% and the applicant contributed 30% of the transaction amount. They made a decision to register ownership of the parcel of land in the applicant's name.

13. On 5 May 2010, the applicant and his business partner decided to build a complex of five buildings, to oblige the applicant to deal with all documents required for the construction and to appoint the private limited company Konsela ('Konsela UAB'), the director of which was the applicant, to manage the construction.

14. On 2 November 2010, the applicant received a construction permit issued in his name from the Vilnius District Municipal Authority giving permission to construct five buildings on the parcel of land. On 22 April 2010, the construction works contract was concluded, signed by the applicant, as the client, and the representative of Konsela UAB. The contractor issued a VAT invoice for the construction of Buildings Nos 1 to 4 on 15 February 2011 and for the construction of Building No 5 on 11 February 2013.

15. On 2 December 2010, the applicant and his business partner decided to sell Building No 1 with a part of the parcel of land and to use the amount received for construction. That immovable property was sold under a sale contract of 14 December 2010 between the applicant and the purchasers (natural persons).

16. On 10 January 2011, the applicant and the business partner concluded an agreement concerning termination of the joint activity agreement of 19 February 2010 and the division of property and liabilities. Under that agreement, it was decided to terminate the joint activity agreement and to grant the right to produced assets (Buildings Nos 4 and 5) to the business partner, while the applicant undertook to reimburse to the business partner by 2017 the difference between his contributions and the share of the joint assets received in the amount of LTL 300 000 (EUR 86 886).

17. Buildings Nos 2 and 3 fell to the applicant under that agreement and were sold together with the parts of the parcel of land allocated to them on 30 May 2011 and 13 November 2012.

18. On 1 February 2013, the applicant and his business partner drew up a property transfer (alienation) deed stipulating that, having regard to the agreement of 10 January 2011, the applicant transferred to his business partner Buildings Nos 4 and 5 together with the parts of the parcel of land allocated thereto.

19. By decision of 6 February 2013, under the joint activity agreement of 19 February 2010, the applicant and his business partner resolved that the applicant would sell Building No 5 and the part of the parcel of land allocated thereto, registered in his name, and immediately transfer the amount received to the business partner. By sale contract of 13 February 2013, that immovable property was sold to a legal person established in Lithuania.

20. The applicant and his business partner did not regard those sales of immovable property carried out on 14 December 2010, 30 May 2011, 13 November 2012 and 13 February 2013 as (economic) activity subject to VAT, which was why they did not calculate and identify the VAT to be paid by the purchasers, did not declare and pay the VAT and did not use a VAT deduction.
21. After carrying out a tax inspection in respect of the applicant regarding personal income tax and VAT for 2010 to 2013, the local tax authority classified the contested supplies as a single activity subject to VAT and held the applicant to be a taxable person liable for the VAT relating to all those supplies.
22. When calculating the VAT due, the local tax authority acknowledged on its own initiative the applicant's right of deduction of VAT under the aforementioned VAT invoices issued by Konsela UAB and calculated the contested VAT amounts payable after deducting the VAT for the acquisition (construction) of the buildings.
23. The applicant was asked to pay the calculated VAT of EUR 39 586.71, plus late payment interest of EUR 11 695. By decision of 3 November 2015, the Vilniaus apskrities valstybinė mokesčių inspekcija (Vilnius County State Tax Inspectorate) confirmed the tax notice. The complaint concerning that decision was dismissed by the Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania) by decision of 3 March 2016.
24. The applicant's further appeals were dismissed by decision of the Mokestininių ginčų komisija (Commission on Tax Disputes) of 18 July 2016 and by judgment of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania). The applicant lodged an appeal against that judgment before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania).

IV. Request for a preliminary ruling and proceedings before the Court

25. By order of 10 April 2019, the Supreme Administrative Court of Lithuania referred the following questions to the Court for a preliminary ruling pursuant to Article 267 TFEU:

(1) Are Article 9(1) and Article 193 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as meaning that, in circumstances such as those in the case under consideration, a natural person such as the applicant cannot be regarded as having “independently” carried out the (economic) activity in question and as having to pay by himself the value added tax on the contested supplies, that is to say, for the purposes of Article 9(1) and Article 193 of Directive 2006/112, is the taxable person liable for the obligations at issue to be taken to be the joint activity/partnership (the participants in the joint activity collectively; in the instance under consideration, the applicant and his business partner collectively) — which under national law is not regarded as a taxable person and does not enjoy legal personality — and not solely a natural person such as the applicant?

(2) If the first question is answered in the affirmative: Is Article 193 of Directive 2006/112 to be interpreted as meaning that, in circumstances such as those in the case under consideration, VAT is paid individually by each of the participants (in the instance under consideration, the applicant and his business partner) in the joint activity/partnership — which joint activity/partnership is, under national law, not regarded as constituting a taxable person and does not enjoy legal personality — on the part of each payment by way of consideration that is received by them (or is receivable by or owed to them) for the taxable supplies of immovable property? Is Article 287 of Directive 2006/112 to be interpreted as meaning that, in circumstances such as those in this case, the

annual turnover referred to in that provision is established by taking into account the entire revenue of the joint activity (received collectively by the participants in the joint activity)?'

26. In the proceedings before the Court, only the Republic of Lithuania and the European Commission submitted written observations.

V. Legal assessment

A. First question and first part of second question: Who is the correct taxable person in this case?

27. By the first question and the first part of the second question, which can be examined together, the referring court wishes to know who ultimately is the taxable person in accordance with Article 9(1) of the VAT Directive and therefore liable for payment of the VAT on the parcels of land supplied in this particular case.

28. The only possibilities are the applicant alone (according to the Lithuanian tax authorities), the partnership between the applicant and the business partner (in part, according to the Commission), the applicant and his business partner collectively (in the opinion of the referring court) or, in part at least, the business partner alone (in part, according to the Commission).

29. The answer to this question depends on at least one of the four possibilities (applicant, business partner, partnership between applicant and business partner, applicant and business partner together) qualifying for recognition as a taxable person within the meaning of the VAT Directive (1.). This then raises the following question: what criteria should be applied in this case to decide which of the four possible taxable persons is liable for payment of the VAT on the sale of the parcels of land. That ultimately comes down to the question of how the specific transactions are allocated to each of the possible taxable persons (2.).

1. *Capacity to be a taxable person*

30. According to the first sentence of Article 9(1) of the VAT Directive, 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. (4)

31. According to the case-law of the Court, the terms used in Article 9(1) of the VAT Directive, in particular the term 'any person who', give to the notion of 'taxable person' a broad definition. (5) That definition focuses on independence in the pursuit of an economic activity to the effect that all persons — natural or legal, both public and private, even entities devoid of legal personality — which, in an objective manner, satisfy the criteria set out in that provision must be regarded as being taxable persons for the purposes of VAT. (6)

32. Thus, according to the Court, in order to establish that an economic activity is being carried out in an independent manner, it is necessary to examine whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with the carrying-out of those activities. (7)

33. Although that final consideration is concerned more with the allocation of the transaction to a particular person and less with the status of the taxable person, it is, according to the case-law of the Court, a basic requirement of an economic activity according to Article 9 of the VAT Directive, whereas the legal form in which those activities are performed (natural person, legal person or partnership) and whether that legal form is recognised as having its own legal personality under national law are immaterial. (8)

34. However, economic activity requires the respective national legal system to recognise the capacity to act (in an economic sense) in legal transactions. (9) However, only structures which are able to have rights and obligations can act in legal transactions and therefore have legal capacity.

35. Natural and legal persons have legal capacity *per definitionem*. Other structures (that is other forms of activity) may too under the respective national legal system, without (as the Court rightly emphasised) needing to have their own legal personality. However, without one's own legal personality, one cannot be a taxable person within the meaning of the VAT Directive.

36. On the one hand, this is confirmed by the case-law of the Court on the existence of a taxable supply, in which the Court emphasises that, in order for a taxable supply of a taxable person to exist, a legal relationship between the parties is needed, within the framework of which the supplies and the consideration are exchanged. (10) However, only a person with legal capacity can establish a legal relationship.

37. On the other hand, this confirms the case-law of the Court on the function of a taxable person in the system of VAT, (11) in which the Court has found that the taxable person performs the function of tax collector on behalf of the State. (12) However, only a structure with legal capacity can identify tax on an invoice and collect it via the price or enforce it.

38. The Commission's counter-contention that the Court has already recognised a civil partnership/marital community (without legal capacity) as a taxable person, (13) must be refuted.

39. That is because the judgment of the Court cited by the Commission (14) did not concern the question of who in that particular case was the taxable person liable for payment of the VAT. On the contrary, it concerned co-ownership in fact in which several persons co-owned a property in Germany with undivided shares. That community by undivided shares was simply a participation *in rem* in a property which could not act as such in legal transactions. (15) However, one of the co-owners was already a taxable person and wanted to exercise the right of deduction in respect of the production costs of part of the property used for business purposes.

40. In *HE*, the Court's ruling on the question of who was the recipient of the transactions was that the community by undivided shares formed by the two spouses was neither a partnership with legal personality nor a form which, although without legal personality, was able to act independently; therefore it was not carrying out an economic activity (16) and it was the co-owners who were the recipients of the transaction. (17) Thus, on the contrary, the Court rightly found that a form of cooperation without legal capacity (that is a community without the power to act) does not have the capacity to be a taxable person.

41. Therefore, the fact remains that a certain legal capacity is required in order to be a taxable person within the meaning of the VAT Directive. In this case, either the applicant or the business partner alone or the applicant together with his business partner could easily have that capacity by reason of the fact that they are natural persons and thus have legal capacity.

42. However, what is unclear in this case is whether the form of cooperation between the applicant and the business partner had that capacity. The referring court is required to decide, based on the rules of the national legal system, whether that form of cooperation can in fact act in legal transactions or whether it is, on the contrary, merely an undisclosed partnership that cannot conduct itself outwardly. After all, it might be a silent partnership in which the business partner merely has a financial interest in the activities of the applicant, while he (rather than the partnership) acts outwardly.

43. If the national legal system recognises the capacity of this form of cooperation between the applicant and his business partner to enter into such legal relationships, then it can also be a taxable person. However, it cannot be a taxable person if the national legal system does not recognise that capacity for this form of cooperation (an example in Germany would be a silent partnership within the meaning of Paragraph 230 of the Handelsgesetzbuch (Commercial Code)).

2. *Allocation of specific transactions to a taxable person*

44. Which of the three or four possible taxable persons should be allocated the taxable transactions and be liable for payment of VAT in this particular case is a separate question.

45. The case-law cited above (see points 31 and 32) provides a starting point. According to that case-law, in order to establish that an economic activity is being carried out in an independent manner, it is necessary to examine whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with the carrying-out of those activities. (18) That is because, where there are several possible taxable persons, only one taxable person can ultimately fulfil those criteria. As far as I am aware, it is not possible to act fully in one's own name and in the name of a third party at one and the same time.

46. These criteria established by the Court also guarantee that the customer can exercise any right of deduction with legal certainty as, according to Article 266, point 5, of the VAT Directive, the customer requires an invoice with the full name and address of the taxable person in order to do so. However, he can only verify that information on the invoice if he knows who has acted in relation to him (that is, outwardly).

47. In that sense, it is necessary in this case to examine who supplied the new buildings to each respective purchaser in light of those criteria.

48. According to the referring court, the applicant alone purchased the parcels of land in his own name and was the sole owner recorded in the land register, he alone applied for and obtained the construction permit and he alone sold the new buildings in his own name and raised the corresponding invoices. Even if the form of cooperation between the applicant and the business partner had legal capacity under national law, it did not conduct itself outwardly in its own name in the legal transactions. As the cooperation between the applicant and the business partner had already ended on 10 January 2011, it is also hard to imagine that they carried out the transactions in May 2011, November 2012 and February 2013 as well. Nor did the applicant and his business partner jointly conduct themselves outwardly, either before or after their cooperation had ended. Thus, it follows immediately from those facts that the applicant alone acted as a taxable person in this particular case.

49. The business partner's internal share of the profit and loss does not alter that. Contrary to the view taken by the referring court and the Commission, the fact that a third party has an internal financial interest does not mean that the person carrying out the activity outwardly (in this case the

applicant) has ceased to act independently. On the contrary, he has in any event initially acted alone, on his own behalf and at his own risk and is therefore the taxable person liable for payment of the VAT incurred on the transaction.

50. The applicant simply then has the opportunity to pass part of the risk on to another person or the obligation to share the profit with another person. Inasmuch as it is uncomfortable with the fact that the applicant alone is liable for payment of all the VAT, the referring court has overlooked the fact that, depending on how the internal arrangement is configured, the business partner also contributed to those additional project costs. If sharing of those costs was forgotten in the internal arrangement, that is simply a question of the interpretation of the arrangement. However, it has no impact on who qualifies as the taxable person carrying out the activity for VAT purposes.

51. The fact, mentioned by the referring court, that the tax authorities allocated certain income to the business partner for income tax purposes is also immaterial here, as national income tax law and EU VAT law pursue different objectives. For example, as a rule, income tax law generally taxes the income of persons who do not act independently, such as employees, whom the VAT Directive expressly excludes as taxable persons (Article 10).

52. Furthermore, the subsequent (internal) possibility of passing the risk on to a third party does not of itself change the fact that the person initially acted on their own behalf. This can be illustrated using an insurance policy as an example. Even if an insurance policy covers all the economic risks of a transaction conducted by an enterprise, that does not alter the fact that the acting enterprise is the taxable person. Therefore, the insurance policy does not become the taxable person in respect of that transaction, because the enterprise is able to pass on the risk of loss in the event of a claim. The same would apply to any internal sharing of profit from the insurance policy.

53. Similarly, it follows from Article 132(1)(f) of the VAT Directive that internal forms of cooperation must themselves conduct transactions in order to be treated as taxable persons. That is not the case here, however. According to the facts recounted, the initial transactions (the sale of the new buildings) were carried out by the applicant alone, not by the form of cooperation between the applicant and the business partner.

54. Even the business partner's internal involvement in business decisions, highlighted by the referring court, does not affect that conclusion. It has no outward effects and, therefore, cannot affect the taxable person status of the person acting outwardly. First, it is nigh impossible to determine with legal certainty the relevant impact of a third party required for that to happen. Second, the customer cannot identify that internal influence even approximately, meaning that his right of deduction would always be in jeopardy due to the absence of an invoice in due form. This would conflict with the principle of a simple and efficient system of value added tax. (19)

55. Moreover, as the Court has previously ruled, ‘the fact that some degree of cooperation occurs’ cannot suffice to call into question the independence of the person carrying out the activity. (20) In addition, the determinative role of a person in production ‘does not appear capable’ of calling into question the finding that the persons carry out their activities independently, in that each of them acts in his own name, on his own behalf and under his own responsibility. (21) In that context, the Court has also regarded persons which conduct themselves outwardly as such in relation to their suppliers, public authorities and, to a certain extent, their customers as independent undertakings which are taxable persons for VAT purposes, even though they acted for the most part under a common trade mark through a limited company whose share they hold. (22) This applies a fortiori in this case, in which the applicant conducted himself independently in relation to the vendor of the parcels of land and, later, in relation to the planning authorities and, subsequently, his purchasers.

56. The relevance of conducting oneself outwardly is also illustrated by the rules in the VAT Directive on commission payable on purchase or sale (Article 14(2)(c) and Article 28). In particular, Article 28 of the VAT Directive (23) clearly illustrates that the deciding factor is that the person is acting in his own name, even if not on his own behalf. That is because, where a taxable person acts in his own name but on a third party’s behalf, it is by performing the activity that he supplies the goods or services and he therefore remains an independent taxable person.

57. This might be important in particular in relation to the ‘termination agreement’ of 10 January 2013 and the property transfer deed of 1 February 2013 for Buildings Nos 4 and 5. After all, the subsequent sale of Building No 5 by the applicant to third parties might possibly have been a transaction for commission in accordance with Article 14(2)(c) of the VAT Directive.

58. However, even if this case did involve a transaction for commission, that would not change the applicant’s status as a taxable person acting independently. He acted in the sale of the buildings either in his own name and on his own behalf (‘trading for own account’) or in his own name on behalf of a third party (‘trading for commission’).

3. *Intermediate conclusion*

59. Thus, in this case, the applicant would appear to be the taxable person liable for payment of the VAT. He alone acted in his own name and on his own behalf (or possibly on behalf of a third party) and thus at his own risk in relation to his customers (that is, outwardly).

B. Second part of the second question: calculation of annual turnover for the purpose of the exemption for small enterprises

60. As, in my opinion, only the applicant can be regarded as a taxable person, there is no need to answer the second part of the second question.

61. However, it needs to be answered in the alternative, in case the Court holds that either the (silent) partnership between the applicant and the business partner or both those persons might possibly be taxable persons each for their own part. It concerns how annual turnover is calculated for the purpose of the exemption for small enterprises where several persons are involved in generating the turnover.

62. As the Commission rightly states, the exemption for small enterprises relates to the individual taxable persons and their turnover. That follows from the wording and the spirit and purpose of Article 287 of the VAT Directive.

63. As the tax exemption is not objectively linked to the nature of the activity, but only to a turnover limit not being reached by the individual taxable persons, Article 287 of the VAT Directive provides for a subjective exemption. As the Court has already ruled (24) and I have stated elsewhere, (25) the purpose behind this subjective exemption resides primarily in administrative simplification.

64. Without such a limit, the tax authorities would have to treat any person who carries on even a limited economic activity for the purposes of Article 9 of the VAT Directive as a taxable person from the first euro. This would give rise to administrative expenditure not only for the taxable person but also for the tax authorities, for which there would be no corresponding tax revenue. (26) The *de minimis* limit in Article 287 of the VAT Directive is designed to avoid this. (27)

65. That purpose also applies where two taxable persons act jointly, but each on his own behalf, without being regarded jointly as an independent taxable person. The same applies where joint action gives rise to a new taxable person who, by reason of his own legal capacity, must be distinguished from his 'founders' and does not exceed the *de minimis* limit.

66. If, therefore, the partnership between the applicant and the business partner is the taxable person performing the activity, the turnover of the partnership would be the criterion for the purpose of establishing annual turnover within the meaning of Article 287 of the VAT Directive. If it is the applicant and the business partner in the amount of their respective interest in the joint transactions, then the annual turnover must also be considered separately for each of them. Provided the configuration selected in each case is not to be regarded as an abusive practice, (28) and there is no evidence of that in this case, this conclusion applies.

67. In the alternative, the answer to the second part of the second question must therefore be: Article 287 of the VAT Directive provides for a subjective exemption from VAT. Therefore, the annual turnover relates to the individual taxable persons carrying out the activity.

VI. Conclusion

68. To conclude, I propose that the Court answer the questions referred for a preliminary ruling by the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court of Lithuania) as follows:

(1) Article 9(1) and Article 193 of Directive 2006/112/EC are to be interpreted as meaning that the taxable persons referred to therein must be able to enter into legal relationships, identify VAT on an invoice and collect it on the basis of the agreed price. This depends upon their capacity to act as such in legal transactions under the national legal system, that is their legal capacity.

(2) Article 9(1) and Article 193 of Directive 2006/112/EC are to be interpreted as meaning that a person with the capacity to be a taxable person performs the economic activity concerned 'independently' if he acts in his own name and on his own behalf (or on behalf of a third party within the framework of trading for commission), as the applicant did in this case.

1 Original language: German.

2 Judgment of 21 April 2005, *HE* (C-25/03, EU:C:2005:241).

3 OJ 2006 L 347, p. 1.

4 See judgments of 12 October 2016, *Nigl* (C?340/15, EU:C:2016:764, paragraph 26); of 29 September 2015, *Gmima Wroc?aw* (C?276/14, EU:C:2015:635, paragraph 27); and of 29 October 2009, *Commission v Finland* (C?246/08, EU:C:2009:671, paragraph 35).

5 Judgments of 12 October 2016, *Nigl* (C?340/15, EU:C:2016:764, paragraph 27), and of 29 September 2015, *Gmima Wroc?aw* (C?276/14, EU:C:2015:635, paragraph 28).

6 Judgments of 12 October 2016, *Nigl* (C?340/15, EU:C:2016:764, paragraph 27), and of 29 September 2015, *Gmima Wroclaw* (C?276/14, EU:C:2015:635, paragraph 34).

7 Judgments of 12 October 2016, *Nigl* (C?340/15, EU:C:2016:764, paragraph 28), and of 29 September 2015, *Gmima Wroclaw* (C?276/14, EU:C:2015:635, paragraph 34). See also, to that effect, judgment of 18 October 2007, *van der Steen* (C?355/06, EU:C:2007:615, paragraph 23).

8 As expressly found in judgments of 12 October 2016, *Nigl* (C?340/15, EU:C:2016:764, paragraph 27); of 29 September 2015, *Gmima Wroc?aw* (C?276/14, EU:C:2015:635, paragraph 28); and of 21 April 2005, *HE* (C?25/03, EU:C:2005:241, paragraph 54).

9 The Court refers to a form which, although without legal personality, is able to act independently — see judgment of 21 April 2005, *HE* (C?25/03, EU:C:2005:241, paragraph 54).

10 Judgments of 27 March 2014, *Le Rayon d’Or* (C?151/13, EU:C:2014:185, paragraph 29); of 3 May 2012, *Lebara* (C?520/10, EU:C:2012:264, paragraph 27); and of 3 March 1994, *Tolsma* (C?16/93, EU:C:1994:80, paragraph 14). In its judgment of 29 October 2009, *Commission v Finland* (C?246/08, EU:C:2009:671, paragraph 43), the Court refers to agreement between the parties on a price. However, only a person with legal capacity can enter into such an agreement.

11 See judgments of 8 May 2019, *A-PACK CZ* (C?127/18, EU:C:2019:377, paragraph 22); of 23 November 2017, *Di Maura* (C?246/16, EU:C:2017:887, paragraph 23); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 21); and of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraph 25); and my Opinion in *Dong Yang Electronics* (C?547/18, EU:C:2019:976, point 41).

12 See judgments of 8 May 2019, *A-PACK CZ* (C?127/18, EU:C:2019:377, paragraph 22); of 23 November 2017, *Di Maura* (C?246/16, EU:C:2017:887, paragraph 23); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 21); and of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraph 25).

See also, in that regard, my Opinion in *Di Maura* (C?246/16, EU:C:2017:440, point 21).

13 The Commission cites in support of that statement the judgment of 21 April 2005, *HE* (C?25/03, EU:C:2005:241, paragraph 58), which expressly states: ‘Therefore, the answer to the second question must be that where a marital community which does not have legal personality and does not itself carry out an economic activity within the meaning of the Sixth Directive places an order for a capital item, the co-owners forming that community are to be regarded as recipients of the transaction for the purposes of the directive.’ How this means that the Court recognised the marital community as a taxable person is a mystery to me.

14 Judgment of 21 April 2005, *HE* (C?25/03, EU:C:2005:241).

15 See also, in that regard, the Court’s correct assessment judgment of 21 April 2005, *HE* (C?25/03, EU:C:2005:241, paragraph 32). This would not apply if the co-owners with undivided shares established a partnership which was able to conduct itself outwardly in legal transactions

and generate its own turnover, in which case the partnership would be the taxable person carrying out the activity based on that legal capacity.

16 Judgment of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 54).

17 Judgment of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 58).

18 Judgments of 12 October 2016, *Nigl* (C-340/15, EU:C:2016:764, paragraph 28), and of 29 September 2015, *Gmima Wrocław* (C-276/14, EU:C:2015:635, paragraph 34). See also judgment of 18 October 2007, *van der Steen* (C-355/06, EU:C:2007:615, paragraph 23).

19 In this regard, see in particular the fifth recital in the preamble to the VAT Directive.

20 Judgment of 12 October 2016, *Nigl* (C-340/15, EU:C:2016:764, paragraph 31) and, before that, Opinion of Advocate General Szpunar in *Nigl* (C-340/15, EU:C:2016:505, point 21), who states that ‘the very fact that there is cooperation, even close cooperation’ does not indicate that the person has ceased to be an independent taxable person.

21 Judgment of 12 October 2016, *Nigl* (C-340/15, EU:C:2016:764, paragraph 33).

22 Judgment of 12 October 2016, *Nigl* (C-340/15, EU:C:2016:764, paragraph 34).

23 Article 28 of the VAT Directive reads as follows: ‘Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself’.

24 Judgments of 2 May 2019, *Jarmuškienė* (C-265/18, EU:C:2019:348, end of paragraph 37), and of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 63).

25 Opinions in *Administrația Județeană a Finanțelor Publice Caraș-Severin — Serviciul Inspecție Persoane Fizice, Direcția Generală Regională a Finanțelor Publice Timișoara — Serviciul Soluționare Contestații 1* (C-716/18, EU:C:2020:82, points 22 et seq.), and in *Schmelz* (C-97/09, EU:C:2010:354, end of point 33).

26 As expressly stated in the judgment of 2 May 2019, *Jarmuškienė* (C-265/18, EU:C:2019:348, paragraph 38).

27 See p. 27 of the explanatory memorandum of the Commission proposal of 20 June 1973 (COM(73) 950 final) on Article 25 (small undertakings).

28 In that regard, see in particular, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraphs 31 et seq.).