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Compensation for Services of General Economic Interest Due to a Municipal Company Wholly Owned by a Local Authority and VAT

Rekompensata za usługi w ogólnym interesie gospodarczym należna spółce komunalnej, której jedynym wspólnikiem jest jednostka samorządu terytorialnego, a podatek od towarów i usług

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Abstract

This paper shall consider the issues of Value Added Tax (podatek od towarów usług) governed in Poland by the Act of 11 March 2004 on VAT and taken together with Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax vis-à-vis compensation payable to a body that is wholly owned by a local authority (jednostka samorządu terytorialnego), such as a municipal company, and where that body provides a service of general economic interest (a SGEI) subject to Article 106 (2) TFEU. This paper revisits those issues in light of the recent case-law of Polish administrative courts and the case-law of the Court of Justice. The law is stated as it stood on 30 November 2021.

Keywords: SGEI; Article 106 (2) TFEU; compensation; Value Added Tax (VAT); body governed by public law.

Streszczenie

W niniejszym artykule autor rozważa kwestię opodatkowania podatkiem od towarów i usług, uregulowanym w prawie polskim ustawą z dnia 11 marca 2004 r. o podatku od towarów i usług, w związku z dyrektywą Rady 2006/112/WE z dnia 28 listopada 2006 r. w sprawie wspólnego systemu podatku od wartości dodanej, rekompensaty płatnej podmiotowi, którego jedynym wspólnikiem (akcjonariuszem) jest jednostka samorządu terytorialnego, takiemu jak spółka komunalna, wtedy gdy taki podmiot świadczy usługę w ogólnym interesie gospodarczym (UOIG), o której mowa w art. 106 ust. 2 TFUE. Autor powraca do tychże zagadnień na kanwie ostatniego orzecznictwa polskich sądów administracyjnych oraz Trybunału Sprawiedliwości Unii Europejskiej.

Stan prawny na dzień 30 listopada 2021 r.

Słowa kluczowe: UOIG; art. 106 ust. 2 TFUE; rekompensata; podatek od towarów i usług (p.t.u.); podmiot prawa publicznego.

INTRODUCTION

While it might be trivial to say, local authorities may perform their statutory duties and thus the public services associated therewith, such as they are, either on their own or through an intermediary to whom the duty is entrusted. The intermediary may be a municipal company (in Polish: "*spółka komunalna*") that is a legal person and whose sole member (or the only shareholder) is a local authority, with that body providing a service of general economic interest (a SGEI) for that local authority. In the context of this paper, it is to such bodies the remarks following here shall refer. Pursuant to Article 106 (2) TFEU, "undertakings entrusted with the operation of services

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of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union". The legal relationship in national law vis-à-vis that intermediary to which the act of entrustment refers may differ, and one such option is to provide compensation ("*rekompensata*") therefor, with various options for its calculation. Compensation, where it is granted in the context of a service of general economic interest, is often subject to the case-law of the Court in the field of State aid that form part of the rules on competition. However, Article 106 (2) TFEU is not limited to the rules of competition, and other rules contained in the Treaties or introduced pursuant to them as secondary Union law might obstruct the performance of the tasks assigned to such a body. One of the areas governed by the Treaties is the field of taxation (Articles 110–113 TFEU) that include turnover taxes (viz. Article 113 TFEU), and, specifically, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[1]. In Poland, that Directive is transposed mainly by the Act of 11 March 2004 on VAT ("*ustawa z dnia 11 marca 2004 roku o podatku od towarów i usług*"). Against this background, the aim of this paper is to check whether a body that is a company wholly owned by a local authority and which discharges a SGEI, is subject to VAT when granted compensation in the context of a SGEI. This aim shall be carried out by recalling the position of EU law on the matter (that ought to serve as a benchmark for any national authority applying the rules on VAT), and then assessing the national approach thereto, to check whether the latter conforms to the former. It might be said here that the two do indeed remain somewhat reluctant to reconcile.

THE NATURE OF ARTICLE 106 (2) TFEU AND ITS SCOPE AS REGARDS FISCAL RULES

Traditionally, the rule in Article 106 (2) TFEU is most associated in the case-law of the Court with the rules on competition, including those that relate to State aid[2]. This is perhaps not surprising, as the compensation granted by Member States for providing a service of general economic interest is subject to compliance with the rules laid down by the EU legislature in Articles 107 and 108 TFEU[3]. Nevertheless, Article 106 (2) TFEU refers to all the rules contained in the TFEU[4], fiscal rules thus included. Its nature is that of a derogation introduced at the level of primary Union law from the other rules contained in Union law (including, but not limited to the rules on competition), where such rules "obstruct" the performance of a SGEI. Undertakings providing a SGEI may rely on Article 106 (2) TFEU where it is necessary vis-à-vis some other legal rules that would negatively affect their performance, in order to ensure the performance of the particular tasks assigned to them[5]; as such, given that it can be relied upon by private parties providing a SGEI, it is my view that this rule has direct effect vis-à-vis e.g. a Member State trying to impose any such obstruction (e.g. in the field of competition law, but not limited to that field). Its general purpose is to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the EU's interest in ensuring compliance with the rules on competition and preserving the unity of the internal market[6]. The Member States have "wide discretion" (albeit not unlimited discretion) in defining what constitutes a SGEI, and the Commission – in its capacity as the enforcer of Union law – may contest such a definition only in the event of a manifest error[7]. Thus, Union law (as it stands now) recognizes the importance of SGEIs and provides a safeguard against "obstructing" them in Article 106 (2) TFEU. On the nature of the "obstruction" foreseen by Article 106 (2) TFEU, the Court supplied that "it is not necessary that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions[8]". This includes a situation where a body so obstructed would be forced to increase prices or decrease the quality of service vis-à-vis "a comparable service" offered by private operators[9]. It was posited in the learned writing that the use of the word "obstruct" implies that any such obstruction must go beyond "any minor impact" for Article 106 (2) TFEU to apply[10]. However, the case-law does not support this view, as no such "de minimis" approach follows from it. Even a "minor" impact may have the capability to e.g. decrease the quality of service vis-à-vis a comparable service, which in my view would make Article 106 (2) TFEU applicable. This is in my view supported by the earlier case-law, to which the CJEU still refers now, that the SGEI provider is to operate in a state of "equilibrium" between profitable and unprofitable parts ("sectors") of their operation, whereas comparable private operators would have focussed solely on the profitable part, competing with the SGEI provider only then and there and leaving the unprofitable parts of the operation to them[11]. It is likely that a SGEI provider, which already provides a service regardless of its economic viability in certain areas of their operation, would be affected as to their "equilibrium" by the allegedly minor "impacts".

However, according to the Court, the exemptions to the FEU Treaty rules are permitted under that provision solely where they are necessary for performance of the particular tasks assigned to an undertaking entrusted with the operation of a service of general economic interest[12]. The rule in Article 106 (2) TFEU cannot apply where a Member State has not assigned any task to an undertaking[13], or where the alleged SGEI provider does not perform a service, as undertakings concerned must be under an obligation to act themselves in order to achieve the objective of the general economic interest pursued[14]. Article 106 (2) TFEU does not amount to a blanket exemption from EU law in general, as while Member States are entitled to define the scope and organisation of their services of general economic interest and they may in particular take account of objectives pertaining to their national policy, they are called to do so while complying with EU law[15]. In addition, it is for the Member State which relies on

Article 106 (2) TFEU to show that all the conditions for application of that provision are fulfilled[16]. Specifically, Article 106 (2) TFEU does not refer to "overcompensation" and arguments by Member States based on absence of any such "overcompensation" are unlikely to be effective[17]. Finally, application of Article 106 (2) TFEU, itself a part of Article 106 TFEU, presupposes compliance with the general principle of Union law – the principle of proportionality[18].

From the temporal point of view, the Court has provided that the interpretation of the condition relating to general economic interest as enshrined in Article 106 (2) TFEU must be set in the new context following from the entry into force of the Treaty of Lisbon, which includes, as well as Article 106 TFEU, Article 14 TFEU, Protocol (No 26) on services of general interest, annexed to the EU Treaty, as amended by the Treaty of Lisbon, and the FEU Treaty ('Protocol No 26'), and the Charter of Fundamental Rights of the European Union, which has acquired the same legal value as the Treaties, in particular Article 36 of the Charter on access to services of general economic interest. According to the Court, it is so in particular because Protocol No 26 expressly recognises the essential role and the wide discretion of the authorities of the Member States in providing, commissioning, and organising SGEIs[19]. Thus, it is my view that pre-Lisbon case-law, which does not recognize this role and discretion, is no longer relevant[20]. Nevertheless, insofar as the older views of the Court do not attempt this non-recognition, and having in mind that the Court at times refers to its pre-Lisbon case-law, it is in my view still possible to take into consideration, in order to measure the ambit of "obstruction", the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject[21]. While the Court has already recognized that the scope of Article 106 (2) TFEU is broader than the rules on competition, it would appear that there was no express decision by the Court on fiscal rules that may obstruct operation of a SGEI.

MUNICIPAL COMPANIES WHOLLY OWNED BY LOCAL AUTHORITIES AND DIRECTIVE 2006/112/EC

As regards specifically the field of fiscal rules and VAT, the VAT Directive does not expressly refer to municipal companies or to SGEIs for its purposes, and only sparsely refers to companies in general (e.g. in the context of Article 19). The Court of Justice has also held due to a reference that concerned non-profit companies that the fact that a given activity in the performance of duties conferred and regulated by law in the public interest is irrelevant for the purposes of determining whether that activity can be classified as a supply of services effected for consideration for the purposes of VAT, and even where the activity in question is designed to fulfil a constitutional obligation exclusively and directly incumbent upon the Member State concerned, the direct link between the supply of services and the consideration received cannot be called into question by this fact alone[22].

However, in Article 13, Directive 2006/112/EC does provide in (1) therein that States, regional and local government authorities, and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions, or payments in connection with those activities or transactions. However, it adds that when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. Furthermore, and in any event according to the last subparagraph, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I of that Directive[23], provided that those activities are not carried out on such a small scale as to be negligible. Paragraph (2) provides that Member States may regard activities, exempt under Articles 132, 135, 136 and 371, Articles 374 to 377, Article 378 (2), Article 379 (2) or Articles 380 to 390b, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.

The concept of a "body governed by public law", while referred to in the VAT Directive, is not explained therein. Thus, it has fallen to the CJEU to rule on the issue, and the Court has already offered in its case-law that a body governed by public law for the purposes of VAT is different from that which is referred to in the context of public procurement law[24]. In C174/14 *Saudaçor* it has been held that the concept of bodies governed by public law is "not intended to define the scope of VAT but, on the contrary, makes an exception to the general rule on which the common system of that tax is based, namely the rule that the scope of that tax is defined very broadly as covering all supplies of services for consideration, including those provided by bodies governed by public law", and is to be interpreted strictly, while being an autonomous concept of Union law. It has been also held that "it is clear from Article 13 (1) of Directive 2006/112, when examined in the light of the aims of the directive, that two conditions must both be fulfilled for the rule of treatment as a non-taxable person to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority[25]". The Court confirmed that the idea of "other" bodies governed by public law as enshrined in Article 13 (1) of Directive 2006/112/EC refers to a residual category not caught by the remainder of Article 13 (1) of the VAT Directive pointing to States, regional and local government authorities as examples of such bodies[26]. The decision in C174/14 *Saudaçor* provides certain indicators on the issue whether a body should be deemed to be "governed by public law". First, a person which, not being part of the public administration, independently performs acts falling within the powers of the public authority cannot be classified as a body governed by public law within the meaning of that provision. Second, the status as a 'body governed by public law' cannot stem from the mere fact that the activity at issue consists in the performance of acts falling within powers conferred by public law. Third, whilst the fact that the body in question has, under the applicable national law, powers conferred by public law is not decisive for the purposes of that classification, it does constitute, in so far as it is an essential characteristic specific to any public authority, a factor of definite importance in determining that the body must be classified as a body governed by public law[27]. On the facts in C174/14 *Saudaçor*,

the Court could not have ruled out there that a limited company not open to equity investments by private parties such as the titular body, converted into a company "following a process of transformation by decentralising the functions of an existing State body", which possesses "the same powers conferred by public law" as its sole member that is a public authority (including, according to the Court, a power to carry out expropriations), with said authority "in a position to exercise decisive influence over the activities of Saudaçor", including where that influence may be exerted by the setting of guidelines and exercise of supervision, is a body governed by public law for the purposes of VAT[28]. The Court has noted that private law is secondary in relation to the rules establishing the legal regime for Saudaçor as a public undertaking. It has also found that the mere fact that such a body concludes agreements for services with its supervising authority that is also its sole member, "in particular regarding the compensation payable in respect of those services", while those services are performed exclusively by the body at issue in accordance with its task provided for in the public law act that created it and that they are not awarded to private operators by means of, for example, a tender procedure, do not preclude a status of a body governed by public law for the purposes of VAT[29].

Nevertheless, even if a body such as the one at issue in C174/14 *Saudaçor* were to be deemed a body governed by public law, the Court has further noted that in order to be treated as a non-taxable person for the purposes of VAT, that body must have acted as a public authority, as only activities carried out by a body governed by public law acting as a public authority are to be exempted from VAT. According to the Court, such activities are activities carried out by those bodies under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators. Furthermore, the subject-matter or purpose of the activity is in that regard irrelevant; the fact that the pursuit of the activity at issue in the main proceedings involves the use of powers conferred by public law shows that that activity is subject to a public law regime. The exception in Article 13 (1) of the VAT Directive covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of powers conferred by public law[30]. On this point, the Court has opined that where such public powers are not actually used for the allegedly exempt activities (such as it has been the case for Saudaçor), then the body at issue does not benefit from the status of a non-taxable person for the purposes of VAT[31]. The Court has also recalled that no exemption would be applicable for that body, even where it would act as a public authority, "if it were to be found that its treatment as a non-taxable person would lead to significant distortions of competition". Such distortions "must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical[32]".

While the above decision lays down the principles for the approach of the Court to the status of companies wholly owned by local public authorities, it does not explicitly address the issue of Article 106 (2) TFEU. This omission might come from the fact that the rule contained in it was not the subject of the order of reference, although the facts that there was a SGEI – and a compensation therefor – were noted.

The Court of Justice returned to Article 13 (1) of Directive 2006/112/EC and municipal companies in C182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft*[33], wherein the decision has been made in regard to a non-profit-making limited company 100% owned by a municipality (specifically, a commercial company entered on the register of companies), with which the company concluded a contract to perform certain public tasks in exchange for compensation. Those tasks were "in particular, management of housing and other property, management of local public roads, quarantine, the control of vermin and mosquitoes, maintenance of parks, public spaces and other green areas, management of knackers' yards and their services, and the upkeep of the local market". It appears from the statement of reasons that the compensation due to that company was calculated per annum with the amount of compensation capable of being adjusted, and that the performance of the tasks delegated to the company was continuous from at least 2007. On that, the Court held that Article 2 (1) (c) of Directive 2006/112 must be interpreted as meaning, subject to verification of the relevant facts by the referring court, that an activity such as that at issue in the main proceedings, whereby a company performs certain public tasks under a contract concluded between that company and a municipality, constitutes a supply of services effected for consideration and subject to VAT under that provision[34]. Thus, it would follow that compensation for what appears to be a SGEI was deemed to be consideration for a supply of services for the purposes of VAT.

What is more, on the issue whether such supply of services would be nonetheless exempt from VAT due to the rule in Article 13 (1) of Directive 2006/112/EC, the Court posited that the set of facts in C182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft* was different from the one in C174/14 *Saudaçor* in that the company at issue was not organized in accordance with a special legislative act that would create it and provide its remit, but in accordance with "normal" rules of commercial law. It did not enjoy any "rights and powers" conferred by public law that its sole member (a municipality) had, and the Court noted that the company was "primarily a legal person governed by private law that, under the rules applicable to it, enjoys autonomy vis-à-vis the municipality with regard to its operation and day-to-day management". According to the Court, the fact that the share capital of the company was wholly owned by a municipality and not open to investment by private parties is outweighed by other facts of the case. Those are the supply of services not only to the sole member, but also to other "customers" which were more than of marginal importance and were taxed; the fact that the Court assumed that the municipality was in no position to have effective control over the company; and the inability to issue guidelines to the company[35]. The Court ultimately has ruled that the body at issue was not an instance of

"other" bodies governed by public law for the purposes of VAT.

It follows from *Saudaçor* and *Nagyszénás Településszolgáltatási Nonprofit Kft* that the position of the Court on compensation granted to municipal companies and VAT is nuanced. Where it would be that municipal companies wholly owned by a local or regional authority would exhibit the nature referred to in *Saudaçor*, they could fall within the rule in Article 13 (1) and be non-taxable persons where they acted as public authorities (provided that their activities neither lead to significant distortions of competition, nor fall within the scope of Annex I to the VAT Directive). On the other hand, where a company wholly owned by a local (or regional) authority shows none of the special features noted by the Court (such as organizational links between the company and the public authority; being created by a special act that sets out the remit of the company; enjoyment of the public powers of the authority that go beyond private law; being the addressee of guidelines adopted by the local authority that exerts decisive influence over the company; the fact that the company performs all, or virtually all, of its activities to the benefit of the authority), outside being wholly owned by a public authority, it is unlikely to be deemed a body governed by public law. In addition, it is perhaps puzzling that the Court has not explicitly addressed the question of Article 106 (2) TFEU in its jurisprudence hitherto as regards compensation due to municipal companies performing SGEIs to the benefit of their sole members that are public authorities.

THE APPROACH TO VAT PAYABLE ON COMPENSATION DUE TO MUNICIPAL COMPANIES PROVIDING SGEIS IN POLISH LAW

Article 13 (1) of Directive 2006/112/EC is transposed by the VAT Act, referred to above, and specifically by Article 15 (6)[36]. The VAT Act does not explicitly distinguish between compensation payable to a SGEI provider and other services, and it appears further that the issue is a contentious one both for the tax authorities and for the administrative courts exercising judicial review. This contention has reached the highest level of administrative courts, that being the *Naczelny Sąd Administracyjny* (hereinafter "Supreme Administrative Court", or "the NSA"), and does not seem to abate[37]. This paper shall restrict itself to the period after the decision in C182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft* has been made, i.e. after 22 February 2018, since when the position of the CJEU could have been followed, and then suggest a solution to this contention. At any rate, and as far as possible where such interpretation would resolve a potential conflict of rules, the national rule must be interpreted in conformity with Article 13 (1) of the VAT Directive[38].

According to the view of the Supreme Administrative Court made known in a judgment of 16 July 2019, case ref. no I FSK 587/17[39], a municipal company wholly owned by a voivodeship ("*województwo*") and at the same time an in-house entity for the purposes of public procurement law to which that voivodeship grants compensation for the purposes of providing a SGEI (specifically, a SGEI (administration of legacy resources repaid from EFSI, as well as assistance in urban development) subject to Commission Decision no 2012/21/EU of 20 December 2011 on the application of Article 106 (2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest[40]) is exempt from VAT. Upon noting the decision in *Saudaçor*, but making no reference to C182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft*, the NSA distinguished five facts of the case it deemed material, in that the company has had a sole member (the voivodeship), that the company was to perform that voivodeship's own task aimed at addressing societal needs in its territory pursuant to a contract (and thus "acts as a public authority"), that such tasks entrusted by way of such a contract have been the only tasks of the company, that the company was not to maximize profit, but to legally, honestly and effectively administer public finances in other to achieve best quality of effective support for the businesses of SMEs and for urban development assistance, and that, lastly, the company at issue is not a body participating in the free market, i.e. not a body whose aim is to maximize profit gained by virtue of running a business. Having the foregoing in mind, the NSA deemed the company a body governed by public law covered by the exception in Article 15 (6) of the VAT Act. The above decision of the NSA was reiterated in the judgment of the Supreme Administrative Court of 22 July 2020, case ref. no I FSK 1366/17, which referred to a municipal company wholly owned by a municipality ("*gmina*"). Again, the company was providing a SGEI, specifically administration of the municipal real estate – immovable property for sports, tourism, and recreational activities. Such a body was deemed to be a non-taxable person, again due to the above five features[41].

The above views appear to be shared by a number of lower courts, i.e. judgments of the Voivode Administrative Court in Gliwice of 6 September 2021, case ref. no I SA/Gl 827/21 and of 3 February 2021, case ref. no I SA/Gl 885/20, judgment of the Voivode Administrative Court in Szczecin, case ref. no I SA/Sz 457/21, judgments of the Voivode Administrative Court in Łódź of 13 April 2021, case ref. no I SA/Łd 628/20, and of 26 January 2021, case ref. no I SA/Łd 525/20, judgment of the Voivode Administrative Court in Wrocław of 26 January 2021, case ref. no I SA/Wr 388/20, judgment of the Voivode Administrative Court in Kraków of 23 July 2020, case ref. no I SA/Kr 398/20, judgment of the Voivode Administrative Court in Poznań, case ref. no I SA/Po 282/20, which explicitly defer to one or to both of the above decisions of the NSA.

On the other hand, there are the judgments of the NSA of 6 November 2020, case ref. no I FSK 211/18, and of 26 May 2021, case ref. no I FSK 1803/18, together with the decisions of lower courts (judgment of the Voivode Administrative Court in Warsaw of 14 August 2019, case ref. no III SA/Wa 3089/18, judgment of the Voivode Administrative Court in Rzeszów of 23 February 2021, case ref. no I SA/Rz 66/21). This group of decisions follows in the wake of C182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft*. Their position is that municipal companies are not (or at least, are not in general) bodies governed by public law, and thus are taxable persons where compensation is granted to them[42]. However, none of the

above approaches appear to go into detail as regards the nuances of the decision in C182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft*, with the former (and more numerous) approach opposed to it even some two years after its adoption. To resolve the above conundrum, the particular features of the decision of the Court of Justice must be recalled. A municipal company may enjoy a status of a non-taxable person where it is a "other" body governed by public law and a public authority. As such, for a company to fall within Article 13 (1) of the VAT Directive and Article 15 (6) of the VAT Act, there ought to be:

– share capital of the company at issue fully owned by a public authority, not open to investment by private parties[43],
– organizational links between the company and the public authority[44],
– creation by a special act that sets out the remit of the company[45],
– enjoyment of the public powers of the authority that go beyond private law[46],
– being the addressee of guidelines adopted by the local authority, which also exerts decisive influence over the company[47],
– the fact that the company performs all, or virtually all, of its activities to the benefit of the authority[48].

The above indicators support a finding that a body is a body governed by public law; it still must be acting as a public authority, i.e. must perform its activities under the special legal regime applicable to it, where that legal regime is different than the legal conditions that apply to private economic operators[49]. Where that is the case, for the non-taxable status to be conferred in the context of compensation, the body must not cause significant distortions of competition and do not perform any of the activities listed in Annex I to the VAT Directive. Lastly, the principle of proportionality must be respected. As to the issue of significant distortions of competition, the case-law appears to not go into detail on what exactly is meant by "significant distortions" for the purposes of Article 13 (1) of the VAT Directive. According to the Court in C-344/15 NRA, the distortion must not be hypothetical for this rule to be even engaged, as "the significant distortions of competition which treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead to must be evaluated by reference to the activity in question, as such, without that evaluation relating to any particular market, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical[50]". Assuming that competition is possible (i.e. not only hypothetical), and following the decision in C-344/15 NRA, there have been doubts in the learned writing where the "threshold" therefor lies[51]. In my view, at least as regards compensation for a SGEI, this should be seen against the background of the distortive effect a given activity may have in the context of a SGEI. In my view, from the point of view of antitrust law, breaches of Articles 101 TFEU (esp. by object) and 102 TFEU committed in the context of a SGEI would meet the threshold of "significant" distortions of competition, especially where they are investigated by the Commission. As for the rules on State aid, it might be added here that compensation due to a SGEI provider may be granted either on such conditions that it is not considered State aid at all (pursuant to the *Altmark* case-law of the Court), as de minimis SGEI aid, or as State aid compatible with the internal market either due to the Commission Decision above or due to a positive decision by the Commission after notifying such aid. As all of those are compatible with the internal market, they would not in my view meet this threshold of "significant distortion". On the other hand, where there would be unlawful aid, especially where such aid would also be incompatible with the internal market, such instances would qualify as significant distortions of competition. State aid, in itself, has a feature of being capable of distorting competition, and where it is additionally unlawful (including in particular where it is also incompatible with the internal market), competition would be particularly distorted. Finally, in any event, activities listed in Annex I to the VAT Directive make even a body governed by public law a taxable person for the purposes of VAT, "provided that those activities are not carried out on such a small scale as to be negligible". Again, the VAT Directive does not define what is to be understood as "negligible" for these purposes. Here, I would also recall the distortive effect a given activity may have in the context of a SGEI as evidence for whether it is relevant for the rule on negligibility in Article 13 (1) of the VAT Directive[52]. On that point, and specifically as regards compensation for a SGEI due to a municipal company from a public authority, which is at least capable of constituting State aid (as it involves a transfer of public funds imputable to a public authority, constituting an advantage outside the *Altmark* case-law, made to a specific undertaking, and thus selectively) it might be noted that State aid has in principle no threshold only beyond which it would become distortive. It is settled case-law that even the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-EU trade might be affected, and the competition distorted[53]. Thus, in my view, where there would be a SGEI financed by compensation, any such compensation capable of constituting State aid would be more than negligible[54], and thus open to VAT pursuant to the last paragraph of the rule in Article 13 (1) of Directive 2006/112/EC. Outside the prerequisites set by the Court of Justice for the status of non-taxable persons to apply, consideration pursuant to a contract between a municipal company and its sole member who is a local authority should be deemed to be subject to VAT, and the body at issue a taxable person. Given the absence of express case-law from the Court on the effect of Article 106 (2) TFEU, whether Article 106 (2) TFEU might apply as a self-standing exemption is yet unanswered by the Court. However, given that the latter has already held that the rule in Article 106 (2) TFEU is applicable to all rules in the Treaty, such a case cannot be ruled out.

CONCLUSIONS

Some two years after the decision in C182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft*, it appears that the majority of case-law of Polish administrative courts has not taken account of that judgment. The rule in Article 13 (1) of the VAT Directive, as an exception, should be interpreted strictly, and

thus Article 15 (6) of the VAT Act should be applied accordingly. This is currently not the case for the majority of administrative courts' case-law. It is perhaps also surprising that Article 106 (2) TFEU has not yet come into view in regard to SGEIs and municipal companies. Recent views of the Court confirm that this rule is applicable not only to competition rules, but to the rules contained in the Treaty in general, which includes fiscal provisions. Thus, it is something to look for, in the event that one of the courts seised of a dispute involving VAT and compensation would begin to entertain doubts that the provision of the SGEI could be obstructed due to VAT payable in relation to it. While virtually all decisions of national administrative courts have referred to a SGEI, none of them so far have engaged in a self-standing review based directly on Article 106 (2) TFEU. Should that finally happen, any such court would have the option of making a preliminary reference to the Court of Justice pursuant to Article 267 TFEU, with a view to acquiring a decision from the Court on Article 106 (2) TFEU.

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B. Brzeziński, D. Dominik-Ogińska, K. Lasiński-Sulecki, A. Zalasiński (eds), Polskie prawo podatkowe a prawo unijne. Katalog rozbieżności, LEX 2016

M. Geiger, D. Khan, M. Kotzur (eds), EU Treaties, Commentary, München 2015

M. Kellerbauer, M. Klamert, J. Tomkin (eds), The EU Treaties and the Charter of Fundamental Rights, Commentary, OUP/Oxford 2019

J. Matarewicz, Ustawa o podatku od towarów i usług. Komentarz aktualizowany, LEX/el. 2021

T. Michalik, VAT. Komentarz, Legalis 2021

S. Owczarczuk, Działalność gmin poza systemem VAT – permanentny stan niepewności, ST 2020/9/48–58

A. Wesołowska, Opodatkowanie podatkiem VAT podmiotów prawa publicznego. Glosa do wyroku TS z dnia 19 stycznia 2017 r., C-344/15: LEX/el. 2017

Footnotes

1 OJ L 347, 11.12.2006, p. 1–118, hereinafter "Directive 2006/112/EU", or "the VAT Directive", latest consolidated version: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A02006L0112–20210701&qid=1638303975102.

2 See the list of the Court's cases, mostly occupied by those on competition law and State aid rules in particular: https://eur-lex.europa.eu/search.html?lang=en&text=106%282%29+TFEU&qid=1638535009863&type=quick&scope=EURLEX&FM_CODED=JUDG&sortOne=DD&sortOneOrder=desc&AU_CODED=CJ&DTS_SUBDOM=EU_CASE_LAW (as of 3.1.2021).

3 Judgment of the Court (Second Chamber) of 21 December 2016. TDC A/S v Teleklagenævnet and Erhvervs- og Vækstministeriet, Case C-327/15, EU:C:2016:974, para. 51.

4 Judgment of the Court (Fifth Chamber) of 12 December 2013. Ragn-Sells AS v Sillamäe Linnavalitsus, Case C-292/12, EU:C:2013:820, para. 38. In my view, the reference to "the Treaty" by the Court amounts to a reference to Union law in general.

5 Judgment of the Court (Second Chamber), 28 February 2013. Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência, Case C1/12, EU:C:2013:127, para. 106.

6 Judgment of the Court (Tenth Chamber) of 30 April 2020. „Overgas Mrezhi" AD and „Balgarska gazova asotsiatsia" v Komisia za energiyno i vodno regulirane (KEVR), Case C-5/19, EU:C:2020:343, para. 60.

7 Judgment of the Court (Fourth Chamber) of 20 December 2017. Comunidad Autónoma del País Vasco and Others v European Commission, Joined Cases C-66/16 P to C-69/16 P, EU:C:2017:999, para. 70. See also Protocol (No 26) on services of general economic interest, Article 14 TFEU, and Article 36 CFREU. According to the Court, certain minimum criteria must be met relating, inter alia, to the presence of an act of public authority entrusting SGEI tasks to the operators in question and to the universal and obligatory nature of those tasks (Judgment of the Court (Fourth Chamber) of 20 December 2017. Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal, SA (Retegal) v European Commission, Case C-70/16 P, EU:C:2017:1002, para. 77, wherein the Court has not disagreed with the GC on this specific point.

8 Judgment of the Court (First Chamber) of 8 March 2017. Viasat Broadcasting UK Ltd v European Commission, Case C-660/15 P, EU:C:2017:178, para. 30.

9 Judgment of the Court (First Chamber) of 3 March 2011. AG2R Prévoyance v Beaudout Père et Fils SARL, Case C-437/09, EU:C:2011:112, para. 77–79.

10 Cf. T. Rusche [in:] M. Kellerbauer, M. Klamert, J. Tomkin (eds), The EU Treaties and the Charter of Fundamental Rights, Commentary, OUP/Oxford 2019, p.1101.

11 Judgment of the Court of 19 May 1993. Criminal proceedings against Paul Corbeau, Case C-320/91, EU:C:1993:198, para. 17, Judgment of the Court (First Chamber) of 15 November 2007. International Mail Spain SL v Administración del Estado and Correos, Case C-162/06, EU:C:2007:681, para. 36.

12 Judgment of the Court (Grand Chamber) of 24 November 2020. Viasat Broadcasting UK Ltd v TV2/Danmark A/S and Kingdom of Denmark, Case C-445/19, EU:C:2020:952, para. 40.

13 Judgment of the Court (Fourth Chamber), 27 February 2014. OSA — Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s., Case C351/12, EU:C:2014:110, para. 81.

14 Judgment of the Court (Fifth Chamber) of 19 December 2019. Engie Cartagena S.L. v Ministerio para la Transición Ecológica, Case C-523/18, EU:C:2019:1129, para. 41.

15 Case C-5/19 Overgas, para. 61.

16 Judgment of the Court (Fourth Chamber) of 7 November 2018. European Commission v Hungary, Case C-171/17, EU:C:2018:881, para. 92.

17 Judgment of the Court (Sixth Chamber) of 30 June 2016. Kingdom of Belgium v European Commission, Case C-270/15 P, EU:C:2016:489, para. 41.

18 Judgment of the Court (Grand Chamber) of 20 April 2010. Federutility and Others v Autorità per l'energia elettrica e il gas, Case C-265/08, EU:C:2010:205, para. 33.

19 Judgment of the Court (Fifth Chamber) of 7 September 2016. Association nationale des opérateurs détaillants en énergie (ANODE) v Premier ministre and Others, Case C-121/15, EU:C:2016:637, para. 40 and 41. Following the adoption of Protocol No 26 and then the decision in *ANODE*, I would not go as far as to say that Article 106 (2) TFEU must be "narrowly interpreted" as the learned writing did before *ANODE* (cf. D.-E. Khan, Ch.-K. Suh [in:] M. Geiger, D. Khan, M. Kotzur (eds), EU Treaties, Commentary, München 2015, p. 523).

20 Pursuant to the decision in C-121/15 ANODE, I would say that the approach e.g. in the judgment of the Court of 10 December 1991. Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA, Case C-179/90, EU:C:1991:464, para. 28, in that a certain activity "may not" be a SGEI (there: dock-work) on the Court's and/or the Commission's say-so is no longer possible.

21 Judgment of the Court of 27 April 1994. Municipality of Almelo and others v NV Energiebedrijf Ijsselmij, Case C-393/92, EU:C:1994:171, para. 49.

22 Judgment of the Court (Eighth Chamber) of 2 June 2016. Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), Case C-263/15, EU:C:2016:392, para. 42.

23 Annex I, titled "List of the activities referred to in the third subparagraph of Article 13 (1)", consists in:
(1) Telecommunications services;
(2) supply of water, gas, electricity and thermal energy;
(3) transport of goods;
(4) port and airport services;
(5) passenger transport;
(6) supply of new goods manufactured for sale;

(7) transactions in respect of agricultural products, carried out by agricultural intervention agencies pursuant to Regulations on the common organisation of the market in those products;
(8) organisation of trade fairs and exhibitions;
(9) warehousing;
(10) activities of commercial publicity bodies;
(11) activities of travel agents;
(12) running of staff shops, cooperatives and industrial canteens and similar institutions;
(13) activities carried out by radio and television bodies in so far as these are not exempt pursuant to Article 132 (1) (q) [of the VAT Directive].

[24] Judgment of the Court (Fourth Chamber) of 29 October 2015. Saudaçor – Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública, Case C-174/14, EU:C:2015:733, para. 47. The Court is not persuaded by the fact that the VAT Directive and inter alia Directive 2014/24/EU use the same wording (cf. Article 2 (1) (1) of the latter).

[25] C174/14 *Saudaçor*, para. 47–53.

[26] C174/14 *Saudaçor*, para. 55.

[27] C174/14 *Saudaçor*, para. 56, 57 and 58.

[28] C174/14 *Saudaçor*, para. 61–65.

[29] C174/14 *Saudaçor*, para. 66. The Court has also posited that there "seems to exist" an "organizational link" if only due to the fact that that company was established by a legislative act adopted by the legislature of the regional authority that was the sole member, for the purpose of providing that region with 'services of general economic interest in the field of health', as it was apparent for the Court from the contents of the legislative act that created that body (para. 67).

[30] C174/14 *Saudaçor*, para. 70 and 71.

[31] C174/14 *Saudaçor*, para. 72.

[32] C174/14 *Saudaçor*, para. 73 and 74. In later case-law, the Court noted that the purely theoretical possibility of a private operator entering the relevant market, which is not borne out by any matter of fact, any objective evidence or any analysis of the market, cannot be assimilated to the existence of potential competition. The application of the second subparagraph of Article 13 (1) of the VAT Directive presupposes, first, that the activity in question is carried on in competition, actual or potential, with that carried on by private operators and, secondly, that the different treatment of those activities for VAT purposes leads to significant distortions of competition, which must be assessed having regard to economic circumstances, and the mere presence of private operators on a market, without account being taken of matters of fact, objective evidence or an analysis of the market, cannot demonstrate the existence either of actual or potential competition or of a significant distortion of competition (see judgment of the Court (Sixth Chamber) of 19 January 2017. National Roads Authority v The Revenue Commissioners, Case C-344/15, EU:C:2017:28, para. 42 and 3). In C-344/15 NRA, it was held that where a body that is assumed to be a body governed by public law exercising the powers of a public authority, in compliance with specific statutory obligations that apply only to it, performs the function of operating and maintaining the public network of roads and associated infrastructure, it cannot be held to genuinely or potentially compete with private operators as "there is no real possibility of a private operator entering the market in question by constructing a road that could compete with already existing national roads (cf. C-344/15 NRA, para. 49)".

[33] Judgment of the Court (Seventh Chamber) of 22 February 2018. Nagyszénás Településszolgáltatási Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-182/17, EU:C:2018:91.

[34] Case C-182/17 Nagyszénás Településszolgáltatási Nonprofit Kft, para. 14 and ff., para. 42.

[35] Case C-182/17 Nagyszénás Településszolgáltatási Nonprofit Kft, para. 46–53. It would appear that the Court has interpreted the contractual power of the municipality "to monitor performance of the tasks delegated to NTN" as evidence of *not* having control over that company (para. 52). Be that as it may, a power to unilaterally check the performance of a party of a contract might contribute to the exercise of influence over a company, so the position of the Court appears to be unpersuasive on that point.

[36] Which reads: "*Nie uznaje się za podatnika organów władzy publicznej oraz urzędów obsługujących te organy w zakresie realizowanych zadań nałożonych odrębnymi przepisami prawa, dla realizacji których zostały one powołane, z wyłączeniem czynności wykonywanych na podstawie zawartych umów cywilnoprawnych*", which may be translated as "The public authorities and public offices that serve those authorities shall not be deemed taxable persons in the scope of the tasks performed thereby, vested in them by separate provisions of law, for the performance of which they have been constituted, with the exception of acts performed in pursuance of the concluded agreements that are governed by civil law". The "exception of acts performed in pursuance of the concluded agreements that are governed by civil law" makes such acts subject to VAT, although this is not foreseen by the VAT Directive. To the extent it might conflict with the rule in Article 13 (1) of the VAT Directive, and having in mind that certain acts of the body at issue in *Saudaçor* were contractual yet the Court went on to state that it might be, subject to verification, that such a body were a body governed by public law acting as a public authority, a blanket inclusion of "civil-law-type" acts to VAT would in my opinion likely be contrary to Article 13 (1) of the VAT Directive.

[37] Neither it is limited to SGEIs vis-a-vis municipal companies, but also covers e.g. taxation of school meals (cf. S. Owczarczuk, Działalność gmin poza systemem VAT – permanentny stan niepewności, ST 2020/9/48–58, parts 3 and 4.

[38] Something that Polish learned writing advocated even before the adoption of the decision in C-182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft* (cf. A. Bartosiewicz, "II.VAT: Podmioty prawa publicznego jako podatnicy vat – polska praktyka a regulacje unijne" [in:] Brzeziński Bogumił, Dominik-Ogińska Dagmara, Lasiński-Sulecki Krzysztof, Zalasiński Adam (eds), Polskie prawo podatkowe a prawo unijne. Katalog rozbieżności, Wolters Kluwer/LEX 2016).

[39] All the decisions referred to in this part are available at www.orzeczenia.nsa.gov.pl.

[40] OJ L 7, 11.1.2012, p. 3–10.

[41] This decision has forced the tax authorities to issue a tax ruling stating as much, cf. Tax ruling of 13 April 2021, no ITPP1/4441–35/14–5/S/MB, reported LEX no 584514.

[42] A category unto itself is the judgment of the NSA of 13 April 2021, case ref. no I FSK 659/18, wherein the NSA follows the decision in C-182/17, albeit broadens it to contribution surcharges ("dopłaty") made to a company by a local authority that was its sole member, essentially subsidizing it unilaterally. This is a feature of corporate law where a member may make an additional contribution to the company, either to the supplementary capital ("kapitał zapasowy") or to a reserve capital ("kapitał rezerwowy"). Such a surcharge is not reciprocal, or indeed is not even a contract. The NSA does not go into any length as to analyse why such unilateral features of corporate law may serve as an instance of the supply of services for consideration within the territory of a Member State by a taxable person acting as such. Thus, this decision plainly does not follow from the position of the Court of Justice and in my view is decided per incuriam. In addition, the Court of Justice has recently confirmed that unilateral means of financing, such as subsidies, do not fall within Article 2 (1) (c) of the VAT Directive (viz. Judgment of the Court (Fourth Chamber) of 16 September 2021. Balgarska natsionalna televizia v Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" – Sofia pri Tsentralno upravlenie na NAP, Case C-21/20, EU:C:2021:743, para. 39), in my view confirming that extension of the concept of the supply of services for the purposes of VAT to unilateral means of financing, such as contribution surcharges, is ill-advised. In this, I do not share the view of the learned writing to the extent that further conditions are necessary for a contribution surcharge to not be subject to VAT, namely those that the surcharges must cover losses related to the performance of the authority's own task by the municipal company, with that company at the same time not operating a different business on market terms (cf. J. Matarewicz, Ustawa o podatku od towarów i usług. Komentarz aktualizowany, LEX/el. 2021: "*Warunkiem nieopodatkowania jest jednak w tym przypadku to, aby dopłaty pokrywały straty związane z wykonywaniem przez spółkę komunalną zadania własnego samorządu, przy jednoczesnym nieprowadzeniu innej komercyjnej działalności przez tę spółkę*").

[43] Decision in C182/17, para. 50.

[44] Decision in C182/17, para. 49. Such links must go beyond ordinary private law. For instance, voivodeships may organize a regional development fund as a private or public limited company (viz. article 13 (1a) of the Act of 5 June 1998 on the Self-Government of a Voivodeship, or "*ustawa o samorządzie województwa*"), which is in my view an

example of an organizational link that follows from public law, rather than solely from private law and e.g. the status of a sole member.

45 Decision in C182/17, para. 49. The act at issue must be "legislative" according to the Court. In my view, having in mind the multitude of public powers there may be in various Member States, and the fact that the decision concerned a local authority (thus not a national parliament of any kind), this must be taken to mean an act which is public and contains rules of law going beyond "mere" private law, esp. where those rules include rules that are abstract and general.

46 Decision in C182/17, para. 46. These must not be available to an "ordinary" company. It is not inconceivable that a municipal company – i.e. a regional development fund organized by a voivodeship – might have, in some situations, public powers going beyond ordinary private law. For instance, where a regional development fund is a body that grants State aid ("*podmiot udzielający pomocy*"), it has a public power to order beneficiaries to furnish the fund with information on aid related to such beneficiaries, within the time-limits specified by the fund (viz. Article 39 (1) of the act of 30 April 2004 on the procedure in state aid cases, "*ustawa z dnia 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy publicznej*"). In addition, a regional development fund, where it is a granting authority, may have a self-standing power pursuant to order the recipient to pay back unlawful aid, together with illegality interest, pursuant to the direct effect of Article 108 (3), third sentence TFEU (Judgment of the Court (Grand Chamber) of 5 March 2019. Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium, EU:C:2019:172, para. 94).

47 Decision in C182/17, para. 48 and 53.

48 Decision in C182/17, para. 51.

49 Decision in C182/17, para. 55 and 56.

50 C-344/15 NRA, para. 41. The Court went on to say that "the purely theoretical possibility of a private operator entering the relevant market, which is not borne out by any matter of fact, any objective evidence or any analysis of the market, cannot be assimilated to the existence of potential competition (…) [the application of Article 13 (1) of the VAT Directive] presupposes, first, that the activity in question is carried on in competition, actual or potential, with that carried on by private operators and, secondly, that the different treatment of those activities for VAT purposes leads to significant distortions of competition, which must be assessed having regard to economic circumstances (…) the mere presence of private operators on a market, without account being taken of matters of fact, objective evidence or an analysis of the market, cannot demonstrate the existence either of actual or potential competition or of a significant distortion of competition (paras 42–44)".

51 A. Wesołowska, Opodatkowanie podatkiem VAT podmiotów prawa publicznego. Glosa do wyroku TS z dnia 19 stycznia 2017 r., C-344/15, LEX/el. 2017, in "4.Interpretacja pojęcia „organy władzy publicznej".

52 Thus I would share the view of the learned writing that associates this rule with the distortions of competition against the background of the case-law of the CJEU (cf. T. Michalik, VAT. Komentarz, Legalis 2021, nb. 233)

53 Judgment of the Court of 21 March 1990. Kingdom of Belgium v Commission of the European Communities, Case C-142/87, EU:C:1990:125, para. 43.

54 Barring any decision of the Court on the negligibility of the so-called "purely local measures" that escape Article 107 (1) TFEU (or, the "Dorsten-type" measures) in the context of VAT, as regards which so far there is none from the Court.