

Case C-605/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

17 November 2020

Referring court:

Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal)

Date of the decision to refer:

1 July 2020

Applicant and appellant:

Suzlon Wind Energy Portugal – Energia Eólica Unipessoal, Lda

Respondent:

Autoridade Tributária e Aduaneira (Tax and Customs Authority)

Subject matter of the main proceedings

Whether the services supplied by the company appearing as appellant in the dispute in the main proceedings to a company which has its registered office in India and is a member of the same group [as the appellant], as part of the supply of material to repair or replace, during the warranty period, wind turbine blades manufactured and supplied by the latter company to the former, are subject to VAT. Additional assessment to VAT not charged in the debit notes issued by the appellant to the Indian company. Whether the interpretation of subjection to VAT adopted by the Portuguese Tax Administration in Circular No 49424 of 4 May 1989 of the Direção de Serviços do IVA (Directorate for VAT Services) complies with EU law, more specifically with Article 2(1) of the VAT Directive (Directive 77/388/EEC).

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law, more specifically Article 2(1) of VAT Directive (Directive 77/388/EEC); Article 267(b) TFEU

Questions referred

I Is an interpretation to the effect that repairs carried out during the ‘warranty period’ are regarded as exempt transactions only where they are made free of charge and in so far as they are tacitly included in the sale price of the product covered by the warranty, with the result that supplies of services which are made during the warranty period (whether or not they involve the use of materials) and which form the subject of invoices are to be regarded as subject to VAT, on the ground that they must necessarily be classified as supplies of services for consideration, compliant with EU law?

II Must the issuing of a debit note to a supplier of wind turbine components with a view to obtaining reimbursement of the costs which the purchaser of those products has incurred during the warranty period in replacing components (new imports of products from the supplier to which VAT was applied and which gave rise to a right to deduct input tax) and repairing them (by purchasing from third parties services on which VAT was charged), in the context of the supply to third parties of services in connection with the installation of a wind farm by that purchaser (a member of the same group [of companies] as the vendor, which is established in a third country), be classified as a mere transaction for passing on costs and, as such, exempt from VAT, or as a supply of services for consideration which must give rise to a charge to tax?

Provisions of EU law relied on

Article 2(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

Judgment of the Court of Justice of 29 April 2004, *EDM* (C-77/01).

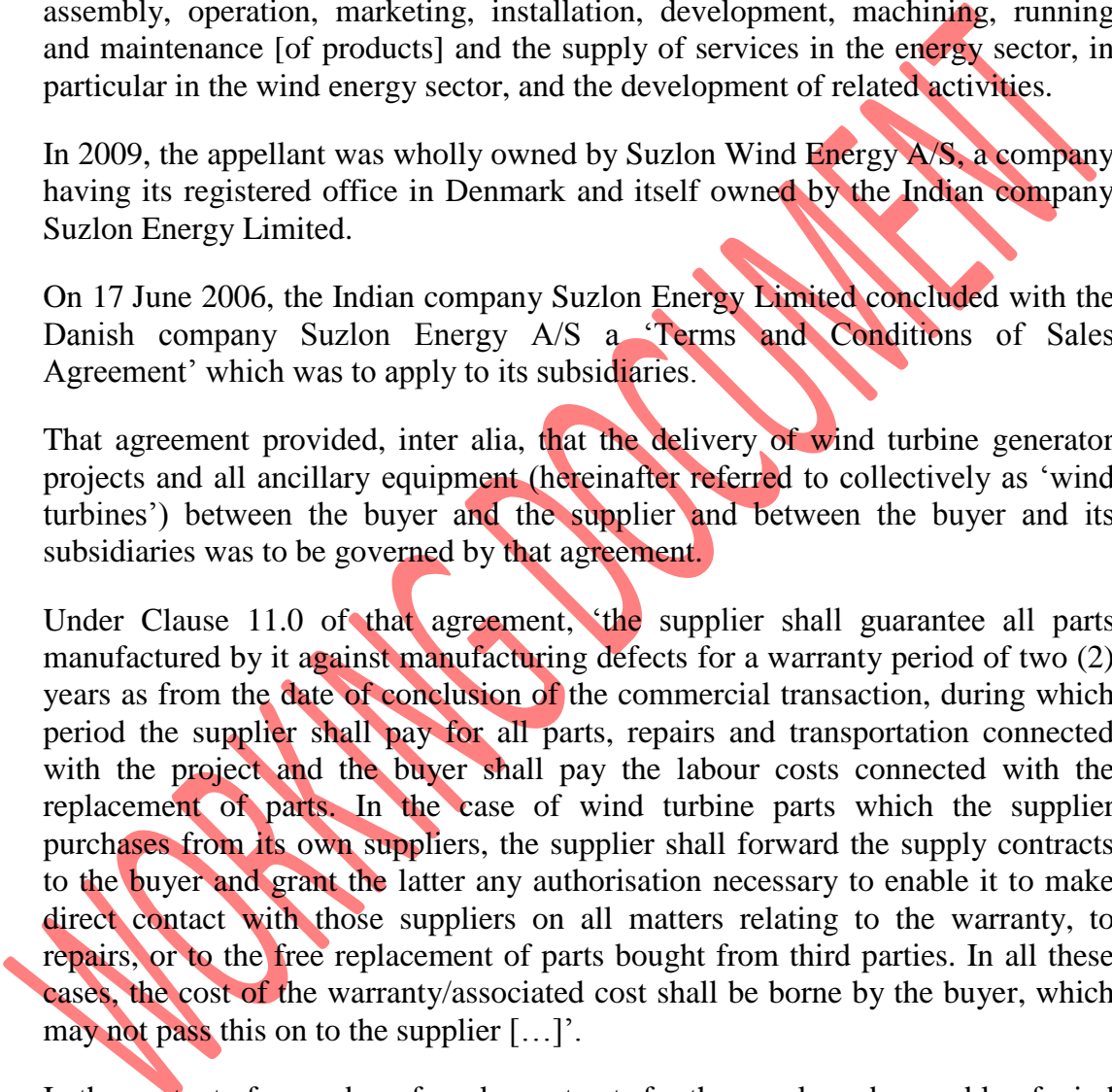
Provisions of national law relied on

Articles 4 and 16(6) of the Código do IVA (VAT Code; ‘CIVA’), Legislative Decree 394-B/84 (published in *Diário da República* No 297/1984, 1.º Suplemento, Serie I, of 26 December 1984), in the version in force at the time when the facts occurred.

Circular No 49424 of 4 May 1989 of the Direção de Serviços do IVA (Directorate for VAT Services), available on the Portal das Finanças (Finance Portal) at:

https://info.portaldasfinancas.gov.pt/pt/informacao_fiscal/legislacao/instrucoes_administrativas/Documents/oficio-circulado_49424_de_04-05-1989_direccao_de_servicos_do_iva.pdf.

Brief presentation of the facts and the main proceedings

- 1 The company appearing as applicant and appellant in the dispute in the main proceedings ('the appellant') has as the object of its business the manufacture, assembly, operation, marketing, installation, development, machining, running and maintenance [of products] and the supply of services in the energy sector, in particular in the wind energy sector, and the development of related activities.
- 2 In 2009, the appellant was wholly owned by Suzlon Wind Energy A/S, a company having its registered office in Denmark and itself owned by the Indian company Suzlon Energy Limited.
- 3 On 17 June 2006, the Indian company Suzlon Energy Limited concluded with the Danish company Suzlon Energy A/S a 'Terms and Conditions of Sales Agreement' which was to apply to its subsidiaries.
- 4 That agreement provided, inter alia, that the delivery of wind turbine generator projects and all ancillary equipment (hereinafter referred to collectively as 'wind turbines') between the buyer and the supplier and between the buyer and its subsidiaries was to be governed by that agreement.
- 5 Under Clause 11.0 of that agreement, 'the supplier shall guarantee all parts manufactured by it against manufacturing defects for a warranty period of two (2) years as from the date of conclusion of the commercial transaction, during which period the supplier shall pay for all parts, repairs and transportation connected with the project and the buyer shall pay the labour costs connected with the replacement of parts. In the case of wind turbine parts which the supplier purchases from its own suppliers, the supplier shall forward the supply contracts to the buyer and grant the latter any authorisation necessary to enable it to make direct contact with those suppliers on all matters relating to the warranty, to repairs, or to the free replacement of parts bought from third parties. In all these cases, the cost of the warranty/associated cost shall be borne by the buyer, which may not pass this on to the supplier [...]'.

- 6 In the context of a number of works contracts for the supply and assembly of wind turbines intended for wind farms situated in various locations in mainland Portugal, identified in more detail in the documents in the main proceedings, and owned by third-party undertakings, the appellant, in 2007 and 2008, purchased from the Indian company Suzlon Energy Limited, by direct importation, a set of twenty-one wind turbines, made up of sixty-three blades, at a total cost of EUR 3 879 000.

- 7 From September 2007, the S88 V2 turbines, by then in operation, began to show a crack, common in the blades of the wind turbines mentioned the previous paragraph, the location and geometry of which highlighted that this was not a one-off anomaly but a general batch fault requiring repair or replacement.
- 8 On 25 January 2008, the appellant ('SWEP') concluded with the Indian company Suzlon Energy Limited ('SEL') a 'Services Agreement' which provided, so far as the present case is concerned, as follows:

'A – SEL is a trading company, having its registered office in India, which specialises and is the leader in the field of wind energy equipment and technology.

B – SWEP is a Portuguese trading company engaged in the marketing, assembly, installation and repair of wind energy equipment [(wind turbines)] and has the capacity to set up a [wind turbine] repair facility in Portugal

...

D – SEL wishes to have 63 of the blades in the 21 [wind turbines] located in the wind farms [identified in the contract] each repaired or replaced.

E – The substitute blades that will replace the damaged blades currently fitted in the turbines shall be transported from India to Portugal.

F – The blades to be repaired are currently fitted in the [wind turbines]. These shall be removed, repaired in the 'recovery area' and later refitted in a [wind turbine].

Clause One – Services

1. SEL undertakes to provide to SWEP the following services [...], in accordance with the provisions of this contract:

a) Assist SWEP with the repair or individual replacement of the blades [identified] [...] as requested by SWEP and in accordance with its instructions.

b) Assist SWEP with all of the logistics relating to the repairs referred to in the previous subparagraph.

c) [Customs assistance]

2. For the purposes of the correct performance of the services provided by SEL to SWEP, the latter gives an undertaking to the former that it will:

a) make available to it 'recovery area' facilities and services relating to the storage and handling of blades;

b) purchase, on behalf of SEL, all equipment and materials necessary for the retrofitting of blades;

c) [Transport]

[...]

Clause Two – Repair (retrofitting) procedure and timetable ...

Clause Four – SEL is not an agent of SWEP

The relationship which the present contract establishes between SEL and SWEP is that between a customer and a service provider, not that between an employer and an employee, or between partners, or between the parties to a joint venture, inasmuch as SEL acts on its own account and not in the interests of SWEP, and does not have vested in it any power to enter into obligations, whether express or implicit, in the interests or on behalf of SWEP, or to bind SWEP in any way ...?

- 9 Between September 2007 and March 2009, the appellant carried out repairs on, or provided replacements for, the blades mentioned in the aforementioned contract, as well as other wind turbine components exhibiting technical faults, in national territory. To that end, it purchased materials from, and subcontracted services to, third parties, which issued invoices for those materials and services on the appellant's behalf, the appellant having entered those documents in the accounts as debit transactions in respect of which it exercised the right to deduct input VAT.
- 10 On 27 February and 31 March 2009, the appellant issued to the Indian company Suzlon Energy Limited three debit notes, relating to the services provided by the appellant in Portugal, in the amounts of EUR 2 909 643, EUR 1 913 533.68 and EUR 3 263 454.84 respectively.
- 11 In 2011, the Serviços de Inspeção Tributária (Tax Inspection Services) of the Direção de Finanças (Finance Directorate) in Lisbon carried out a partial tax audit on the appellant company in relation to the application of VAT in the 2009 tax year.
- 12 The document drawn up following the tax audit of 31 May 2012 proposed a number of purely arithmetic corrections amounting in total to EUR 1 485 940.93, in relation to the VAT owed for the 2009 tax year, and arising in particular from irregularities in the aforementioned debit notes issued by the appellant to the Indian company Suzlon Energy Limited, which had not included a charge to VAT and had not specified the reason for that exemption, the taxable person having taken the view that those notes had originated from compensation for damage and were thus excluded from the taxable amount, in accordance with the provisions of Article 16(6) of the VAT Code.
- 13 In the light of the facts set out in the tax audit document, the Tax Administration made additional assessments of charges to VAT, together with the corresponding interest, for the months of February, March and November, amounting in total to EUR 1 666 710.02.

- 14 The appellant brought an action challenging those additional assessments before the Tribunal Tributário de Lisboa (Tax Court, Lisbon), which, by judgment of 30 June 2017, declared the action inadmissible. An appeal against that judgment has been brought before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), the referring court in this case.

Main arguments of the parties to the main proceedings

- 15 The appellant claims, for the purposes of the present proceedings, that the contested transactions which formed the subject of the tax audit and gave rise to the additional VAT assessment are exempt transactions, since they were carried out free of charge.
- 16 This is because the mere passing-on to the supplier of the exact amount of the costs which the customer incurred in repairing or replacing products purchased within the warranty period does not serve the purpose of generating revenue — in the form of remuneration — on an ongoing basis and is not therefore economic in nature.
- 17 In the present case, that passing-on was effected not in return for compensation from the supplier but with the sole objective of recovering the costs which the customer (the appellant) had incurred in performing a task which was incumbent on the supplier, inasmuch as it was covered by the warranty as to the product's proper operation that formed part of the sale price, that is to say in the exercise of a right of recovery.
- 18 It submits that the judgment under appeal wrongly inferred from the deduction of input tax applied by the appellant that a taxable transaction had taken place; the provisions of Article 168 of the VAT Directive and Article 19 et seq. of the CIVA are based on precisely the opposite reasoning.
- 19 The second error vitiating the judgment under appeal, according to the appellant, follows from its assumption as to the existence of a supply of services and, on that basis, its conclusion that a mere passing-on of costs, to which no margin is added, in the context of the repair of product faults during the warranty period is subject to tax.
- 20 As the appellant further submits, the Portuguese Tax Administration has repeatedly taken the view that the passing-on of costs in the exact amount in which they were incurred — that is to say, without the addition of any margin — is not a supply of services and does not fall within the scope of VAT.
- 21 The Court expressed the same opinion in its judgment of 29 April 2004, *EDM* (C-77/01), which, according to the appellant, supports the inference that, if a cost is passed on in the exact amount in which it was incurred — without a margin, as in the present case —, there is no remuneration and, therefore, no taxable transaction for the purposes of VAT.

- 22 The Tax Administration, on the other hand, considers that, on the basis of the description of the transactions that is contained in the debit notes at issue, the supplies of repair services covered by those notes, which SUZLON PORTUGAL issues to the manufacturer, the Indian undertaking SUZLON, are subject to the general rate of VAT in Portugal, in accordance with the provisions of Articles 4 and 18 of the CIVA, and that the tax owed on that basis therefore amounts to EUR 1 481 872.31.
- 23 This is because such transactions are governed by the doctrine reflected in Circular No 49424 of 4 May 1989 of the Direção de Serviços do IVA (Directorate for VAT Services), which applies to supplies of services made by a customer to a supplier during a warranty period, and according to which:
- ‘1. Repairs made in the course of the “warranty period” are to be regarded as exempt transactions only in the case where they are carried out free of charge, inasmuch as they have always been deemed to be tacitly included in the sale price of the product covered by the warranty, and may not therefore be treated in the same way as transactions performed for consideration, as they would have to be in other circumstances, in accordance with the provisions of Article 3(3)(f) and Article 4(2)(b) of the CIVA. However, where such supplies of services (whether or not they involve the use of materials) form the subject of invoices, they are unequivocally transactions performed for consideration and must therefore be taxable, in accordance with the general provisions of the [CIVA].
2. Consequently, whenever such repairs form the subject of invoices, that is to say whenever a debit against third parties is present (be this against the customer, the dealer or the manufacturer), tax must be charged. This is also the case where, instead of a debit note being issued by the repairer or dealer, a credit note is issued by the dealer or manufacturer.
- ...’

Brief summary of the grounds for the request for a preliminary ruling

- 24 The dispute pending before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) as part of the appeal brought by the appellant against the judgment of the Tribunal Tributário de Lisboa (Tax Court, Lisbon) is concerned with whether the appellant is justified in challenging the arithmetical correction of the assessments to VAT for the months of February, March and November 2009, which was made, in essence, as a result of the fact that the appellant did not charge VAT on the debit notes that it issued to the Indian company Suzlon Energy Limited, owner of the company Suzlon Wind Energy A/S, which has its registered office in Denmark and is itself the owner of all of the appellant’s equity capital. The transactions in question were therefore intra-group transactions.

- 25 The issue underlying the dispute in this regard is whether or not passing on [costs] by issuing debit notes relating to transactions for the repair or replacement of wind turbine blades and other components, as performed by the appellant for its customers (undertakings with which the appellant had concluded works contracts for the supply and assembly of wind turbines which it had acquired from the Indian company Suzlon Energy Limited), is subject to VAT. The appellant takes the view that the transactions in question are not subject to VAT since it did not provide any services for consideration to the Indian company Suzlon Energy Limited. In its opinion, the debit transactions in question, which were the result of the aforementioned costs it had incurred in order to rectify defects in the wind turbine blades, must be classified as transactions with no economic content, since they are covered by the equipment warranty that it had received from the Indian undertaking. The appellant claims, in essence, that the transactions at issue amount to a mere passing-on to the Indian company of the costs it incurred, during the warranty period, in ‘correcting’ faults in components of the wind turbines which it had purchased from that company. As a result, it is argued, the costs in question are ones, arising from the purchase of products and services from third parties, which were incurred as an alternative to sending the products (in particular, the wind turbine blades) back to India or as an alternative to waiting for the delivery of new materials by the Indian company, the fact that those costs were incurred having been justified by the need to ensure that the problem would be resolved in time.
- 26 For that reason, according to the appellant, the facts presented as established should be regarded as a case in which costs borne as a result of having a defective product repaired are passed on from the purchaser to the seller of that product (in the exercise of a form of ‘right of recovery’) and not as a supply of services made for the benefit of the seller of the components concerned.
- 27 The appellant goes on to say that, even if the view were taken that a supply of services is present here, this could in no way be classified as being for consideration, since the appellant did not receive any remuneration from the Indian company for the steps it took to repair the defects in the products which that company had supplied to it, having been paid only the amount corresponding to the costs it had incurred, and that, for that reason also (the absence of any consideration for the transactions), VAT should not be charged.
- 28 However, the Tax Administration considers that the debit notes issued cannot be regarded as being a ‘mere discount on the cost of the components purchased’ by the appellant from the Indian company, since the blades were repaired under the contract for the provision of services that was concluded between the two undertakings and the appellant did not recognise in its accounts any ‘discount’ on the price originally paid for the imported materials or any correction to the amount of VAT paid and deducted as input tax at that time. In support of the argument that those transactions are subject to VAT, the Tax Administration goes on to say that, even if the transactions at issue were to be regarded as having to be covered by the parts warranty provided by the manufacturer in question — in which case

the amounts charged to Suzlon India would fall to be treated in law as the passing-on of costs — those transactions would in any event have to be regarded as having been performed for consideration, in accordance with Circular No 49424 of 4 May 1989 on ‘repairs to products during the warranty period’, whether because that activity entailed a transaction to import the materials replaced (an import instigated by the appellant in requesting a new supply from Suzlon India) in respect of which a further charge to VAT was applied (and later deducted as input tax) and customs duties were imposed, or because the purchase of services from third parties was made necessary by the carrying out of those repairs.

- 29 Now, on the basis of the facts taken to be established — which, as it makes clear in its submissions, the appellant does not wish to challenge —, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) finds that the Indian undertaking and the appellant concluded a contract for the provision of services (the Services Agreement referred to in the statement of the facts), the fourth clause of which expressly states that ‘the relationship which the present contract establishes between SEL [the Indian company] and SWEP [the appellant] is that between a customer and a service provider [...] inasmuch as SEL acts on its own account and not in the interests of [the appellant]’.
- 30 According to the referring court, a reading of the content of the contract supports the inference that this is a contract for the supply of services under which the Indian company provided the appellant with material and technical support to set up a facility for repairing wind turbines in Portugal.
- 31 There is no documentary evidence that the appellant pursued the activities of repairing and replacing components on behalf or on account of the Indian company and, as the latter company states in its submissions, there is no direct consumer relationship between the Indian company, which manufactures the equipment, and the wind farm developers, given that the appellant acts as an intermediary in that relationship (a common feature of such contracts), which is to say that the appellant is responsible for making repairs and replacements in the event that the project runs into any difficulties while the component manufacturer is responsible to the project manager (in this case, the appellant) for carrying out repairs and supplying new components where faulty ones have to be replaced (as provided for, moreover, in clause 11 of the sale and supply contract concluded between the Indian company and the Danish company which owns the appellant’s share capital). In short, what we have here is a product warranty provided by the manufacturer (the Indian company), and a technical works warranty (in this case, a warranty as to the operation of the wind farm) provided by the appellant to the wind farm developers, which technical works warranty must include the product warranty that falls to be enforced by the technical manager for the project.
- 32 It is in the context of that confluence of responsibilities that the recording of those transactions for accounting purposes, as set out in the document produced by the Tax Administration, must be interpreted. According to that document, (i) the appellant charged and deducted as input tax in Portugal VAT on the ‘replacement

blades' which it imported, (ii) it did not record in the accounts any reverse transaction or activity in connection with the 'original' blades (the ones that were replaced), and, moreover, (iii) it engaged third parties to carry out the blade repair activities.

- 33 According to the Tax Administration, all of those activities are economic transactions which, for the purposes of VAT, must be classified as a supply of services delivered by the appellant to the Indian company under the product warranty.
- 34 Having examined all of the material before it, the referring court considers that the possibility cannot be ruled out that the Tax Administration and the judgment under appeal rightly reached the conclusion that the transactions carried out by the appellant in order to resolve for its customers the problems arising from the faulty wind turbine components may be classified for accounting purposes as a supply of services for the benefit of the Indian company rather than as forming part of a consumer relationship between those two parties, given that the appellant did not simply call upon the Indian company to repair and replace the defective products, but took a number of actions aimed at mitigating for its customers the damage arising from the manufacturing defects that had been identified. In taking those actions, it also sought to some extent to meet the need incumbent on the Indian company to repair those defective products (which is to say that those products are covered by the product warranty). Consequently, these are facts which may be included within the broad (and residual) concept of a supply of services as defined in the VAT implementing provision (Article 4 of the CIVA).
- 35 Neither can the possibility be ruled out that the judgment under appeal is right in classifying that supply of services as being for consideration, in accordance with the provisions contained in the aforementioned Circular No 49424 of the Direção de Serviços do IVA (Directorate for VAT Services). As that circular sets out, a supply of services may be regarded as free only if the amount of the repair forms part of the price of the product. In this case, however, it has been shown that, from an accounting point of view, the transaction was not recorded either by the appellant or by the Indian company as a 'discount on the price' but as an act by which the former, the appellant, (by issuing debit notes) invoiced the latter, the Indian company, for the costs connected with the transactions of replacing components (new imports) and repairing components.
- 36 Those facts, which are regarded as proved under the law applicable, must, in accordance with the aforementioned Circular (No 4), be treated as follows for tax purposes: 'in the case where work involving the repair by the recipient of parts or material not received in good condition has, for reasons of liability attributable to the supplier, given rise to a debit note issued to or a credit note issued by the latter, VAT must be charged in all circumstances'.
- 37 In essence, when concluding the contract, the parties differentiated between the product warranty and the warranty for the service of setting up the wind farm,

from the point of view of the apportionment of liability between the two of them, although it is true that no such difference exists for the wind farm developer, since the appellant, as technical manager for that project, assumes liability in full.

- 38 However, that overall framework of warranties and liabilities was ‘altered’ by the later agreement concluded between the appellant and the equipment supplier with a view to securing a prompt solution to the problem identified in connection with the wind turbine blades. The solution found — a contract under which the appellant (instead of ‘making a claim’ to have the components replaced) undertook to repair the blades and to import new components — adds a number of ‘services’ to what was a simple obligation to guarantee products. The classification of those ‘services’ for VAT purposes raises the questions which are set out here, in particular whether Article 2(1) of the VAT Directive (Council Directive 77/388/EEC of 17 May 1977) allows transactions such as those at issue under the agreement concluded between the undertakings concerned to be classified as supplies of goods and services effected free of charge (as a mere recovery of costs) inasmuch as they amount to the performance of a product warranty.
- 39 Accordingly, notwithstanding the foregoing, the referring court, after examining all of the material before it, concludes that neither the [national] legislation (the relevant articles of the CIVA), nor the VAT Directive (Council Directive 77/388/EEC of 17 May 1977, in the version in force at the time when the facts arose), nor the case-law of the Court of Justice of the European Union provide an unequivocal or clear answer to the questions raised here.
- 40 In that connection, the referring court considers that, although the courts of the Member States have jurisdiction to apply EU law, jurisdiction to interpret ‘the acts adopted by the institutions, bodies, offices or agencies of the Union’ lies with the Court of Justice of the European Union, in accordance with point (b) of the first paragraph of Article 267 TFEU. Moreover, as the third paragraph of Article 267 TFEU goes on to say, ‘where any such question [on the interpretation of the acts adopted by the institutions of the Union] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court’.
- 41 Thus, in so far as it has doubts as to the interpretation of Article 2 of Council Directive 77/388/EEC of 17 May 1977, the referring court considers that, before making its decision, it must submit a request for a preliminary ruling to the Court of Justice of the European Union.