JUDGMENT OF THE COURT (Sixth Chamber)

25 April 2024 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Taxable transactions – Article 16 – Application of goods forming part of a taxable person's business assets and their transfer free of charge to another taxable person – Drying of wood and heating of asparagus fields stemming from a cogeneration plant connected to a biogas production facility – Article 74 – Taxable amount – Cost price – Limitation to costs subject to input VAT only)

In Case C-207/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 22 November 2022, received at the Court on 29 March 2023, in the proceedings

Finanzamt X

v

Y KG,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, President of the Chamber, P.G. Xuereb (Rapporteur) and A. Kumin, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Y KG, by T. Streit and A. Zawatson, Rechtsanwälte,

– the German Government, by J. Möller and N. Scheffel, acting as Agents,

– the European Commission, by F. Behre and J. Jokubauskaitė, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 16 and 74 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between the company Y KG and Finanzamt X (Tax Office X; 'the tax authority', Germany) concerning the imposition of value added tax (VAT) on free-of-charge

supplies of heat from the cogeneration plant connected to that company's biogas production facility to contractor A for the purpose of drying wood and to company B for the purpose of heating its asparagus fields.

Legal context

European Union law

3 Under Article 2(1) of the VAT Directive:

'The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…'

4 Article 14(1) of that directive is worded as follows:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

5 Article 15(1) of that directive provides:

'Electricity, gas, heat, refrigeration and the like shall be treated as tangible property.'

6 Article 16 of that same directive states:

'The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.'

7 Article 73 of the VAT Directive provides:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

8 As provided in Article 74 of that directive:

'Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.'

9 Article 78 of that directive is worded as follows:

'The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer.

For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses.'

10 Article 79 of that directive provides:

'The taxable amount shall not include the following factors:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates granted to the customer and obtained by him at the time of the supply;

(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged.'

German law

11 Paragraph 3(1b) of the Umsatzsteuergesetz (Law on turnover tax; 'the UStG') provides:

'The following shall be treated as a supply of goods for consideration:

1. the application by an undertaking of goods forming part of its business assets for purposes other than those of its business;

2. the free-of-charge transfer of goods by an undertaking to its staff for its private use, except for small gifts;

3. any other free-of-charge transfer of goods except for gifts of small value and the giving of samples for business purposes. The treatment of those goods as goods for consideration is subject to the condition that the input VAT paid on the goods or their component parts was deductible in whole or in part.'

12 Paragraph 10(4) of the UStG is worded as follows:

'The taxable amount shall be assessed as follows:

1. in the case of a transfer of goods within the meaning of Paragraph 1a(2) and Paragraph 3(1a), or in the case of supplies within the meaning of Paragraph 3(1b), on the basis of the purchase price plus incidental expenses relating to the goods or goods of the same type, or where there is no purchase price according to the cost price at the time of the transaction;

…'

13 Paragraph 8 of the Erneuerbare-Energien-Gesetz, in the version of 7 November 2006 (BGBl. 2006 I, p. 2550) (Law on renewable energy; 'the EEG'), states:

'1. For electricity generated in plants with an output of up to and including 20 megawatts and using exclusively biomass within the meaning of the legal measure referred to in subparagraph 7, the remuneration shall amount to …

…

3. The minimum remuneration referred to in the first sentence of subparagraph 1 shall be increased by EUR 0.02 per kilowatt-hour in so far as it is electricity within the meaning of Paragraph 3(4) of the [Gesetz für die Erhaltung, die Modernisierung und den Ausbau der Kraft-Wärme-Kopplung (Kraft-Wärme-Kopplungsgesetz) (Law on the maintenance, modernisation and extension of cogeneration of electricity and heat), in the 19 March 2002 version (BGBl. 2002 I, p. 1092),] and supporting

documentation … is submitted to the system operator. In the case of mass-produced cogeneration plants with an output of up to and including 2 megawatts, manufacturer documentation indicating the thermal and electrical output thereof as well as the [combined heat and power (CHP)] coefficient may be provided in place of the documentation referred to in the first sentence.'

14 Paragraph 3(4) of the Law on the maintenance, modernisation and extension of cogeneration of electricity and heat, in the 19 March 2002 version, provides:

'Electricity produced from cogeneration is the arithmetic product of useful heat and the CHP coefficient of the cogeneration plant. In the case of cogeneration plants that do not have a system for the extraction of waste heat, the entire net electricity output shall be regarded as electricity generated through cogeneration.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Y operates a plant producing biogas from biomass. The biogas produced was used in 2008 for the decentralised production of electricity and heat. The majority of the electricity generated in this way was supplied to the general electricity grid and paid for by the grid operator. The heat generated during that operation was partly reused in Y's production process.

16 Under a contract dated 29 November 2007, Y transferred 'free of charge' the majority of the heat thus produced to contractor A so that the latter could dry wood in containers and, under a contract dated 29 July 2008, to company B, which used the heat to heat its asparagus fields. Both contracts specified that the amount of the payment was to be determined on an individual basis according to the economic situation of the user of the heat without that payment being specified in the contracts themselves.

17 During 2008, in addition to the minimum feed-in fee received from the electricity grid operator, under Paragraph 8(1) of the EEG, in the amount of EUR 1 054 337.85, Y also received from that operator a rebate paid under Paragraph 8(3) of the EEG in the amount of EUR 85 070.66 in return for the supply of 6 714 247 kilowatt-hours of electricity, on the ground that it was electricity produced by cogeneration, within the meaning of Paragraph 3(4) of the Law on the maintenance, modernisation and extension of cogeneration of electricity and heat, in the 19 March 2002 version. That EUR 85 070.66 rebate was included, like the minimum fee, in the taxable amount for Y's taxable transactions, according to its VAT return.

18 Since Y did not invoice for the heat transferred to A and B, the tax authority took the view, in the context of an on-the-spot check, that that heat was applied free of charge, for the purposes of point 3 of the first sentence of Paragraph 3(1b) of the UStG, for the benefit of A and B. In the absence of a purchase price for that heat, the tax authority calculated the taxable amount for that application on the basis of the cost price of that heat, in accordance with point 1 of the first sentence of Paragraph 10(4) of the UStG.

19 In its VAT assessment of 17 November 2011, the tax authority confirmed those findings.

20 By decision of 1 August 2012, the tax authority rejected as unfounded Y's complaint lodged against that tax assessment.

21 Y brought an action against that tax assessment before the Finanzgericht (Finance Court, Germany), which upheld the action.

22 Hearing an appeal on a point of law brought by the tax authority, the Bundesfinanzhof (Federal Finance Court, Germany) set aside the judgment of the Finanzgericht (Finance Court) and referred the case back to that court. The Bundesfinanzhof (Federal Finance Court) considered that the state of the proceedings did not permit final judgment to be given, since it was not possible to assess how much tax should be applied to the disposal of goods free of charge by Y, and that it was for the Finanzgericht (Finance Court) to make the necessary findings in that regard.

23 After referral back to the Finanzgericht (Finance Court), that court upheld the action in part. It reduced the amount of VAT determined after taking the view that the VAT in respect of the disposal free of charge was to be calculated on the basis of the cost price of the heat.

24 Both Y and the tax authority brought an appeal on a point of law before the Bundesfinanzhof (Federal Finance Court), which is the referring court.

25 In the first place, that court notes that the first paragraph of Article 16 of the VAT Directive treats the application by a taxable person of goods forming part of his business assets as a supply of goods for consideration in four situations, namely an application for 'his private use' or 'for [the use] of his staff', 'disposal free of charge' or an application 'for purposes other than those of his business'. In that regard, the referring court considers that the conditions that give rise to a disposal of goods free of charge, which are apparent from the wording of the third situation of that provision, are met in the present case. It also notes that the heat disposed of free of charge had been produced by an installation the construction and operating costs of which gave Y a right to deduct input VAT. However, the referring court is uncertain whether, beyond the wording of that provision, the situation of application in the form of disposal free of charge should not be limited by an additional condition. Indeed, such a situation might also have to be aimed at preventing final consumption of goods that is not subject to VAT and such a restrictive interpretation could be inferred from the judgment of 16 September 2020, *Mitteldeutsche Hartstein-Industrie* (C-528/19, EU:C:2020:712).

26 However, if that restrictive interpretation of the first paragraph of Article 16 of the VAT Directive were to be accepted, the referring court wonders whether it should be held that there is no untaxed final consumption where the recipient of the transfer, who is a taxable person, uses the goods transferred for the purpose of carrying out an economic activity, or whether it is necessary, in addition, for that person to use those goods for the purpose of carrying out an economic activity which gives rise to a right of deduction.

27 In the second place, the referring court considers that, in so far as the purpose of Article 74 of the VAT Directive is to give concrete expression to the constituent elements of the application referred to in the first paragraph of Article 16 of that directive, it is necessary to take into account, in the interpretation of Article 74, the objective pursued by Article 16 of that directive, namely that the taxable person should not benefit from any undue advantage over a final consumer. If that objective were to be transposed to Article 74 of that directive, it might follow that, when determining the cost price of the goods transferred free of charge, only the costs that have been subject to VAT would have to be taken into account. Thus, since the costs not subject to input VAT would have to be excluded by a taxable person who produces goods from the calculation of the cost price of those goods, that taxable person would not enjoy an unjustified advantage by comparison with a final consumer who produces goods.

28 In the third place, the referring court is uncertain whether the cost price includes only direct production or generation costs of the goods disposed of free of charge, or whether it also includes indirect costs such as financing costs. Nevertheless, that court is of the view that the difficulties which would arise if indirect costs were taken into account in the cost price preclude that latter option. Accordingly, the objective of achieving a simple assessment of the value of the applications is an argument against taking such costs into account.

29 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) If a taxable person makes heat from its company available to another taxable person for the latter's economic operations free of charge (in this case: allocation of heat from the cogeneration plant of an electricity provider for the benefit of an agricultural company for the purpose of heating asparagus fields), is this to be regarded as an "application by a taxable person of goods forming part of his business assets" in the form of a "disposal free of charge" within the meaning of Article 16 of the VAT Directive?

Is the answer to this question dependent on whether the taxable person receiving the heat uses it for purposes that would entitle that person to a deduction of input tax?

(2) In the case of an application of goods (within the meaning of Article 16 of the VAT Directive), is the cost price within the meaning of Article 74 of the VAT Directive to be calculated solely on the basis of those costs that are subject to input tax?

(3) Does the cost price include only direct production or generation costs, or does it also include only indirectly attributable costs such as financing costs?'

The first question

30 By its first question, the referring court asks, in essence, whether the first paragraph of Article 16 of the VAT Directive must be interpreted as meaning that the transfer free of charge of the heat produced by a taxable person to other taxable persons for the purposes of their economic activities constitutes an application by that first taxable person of goods forming part of his business assets in the form of a disposal free of charge, within the meaning of that provision, that is to be treated as a supply of goods for consideration, and whether or not the fact that those other taxable persons use that heat for transactions giving them a right to deduct VAT is relevant in that regard.

31 In accordance with the case-law of the Court, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context and the objectives and purpose pursued by the act of which it forms part (judgment of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 21 and the case-law cited).

32 Under the third situation set out in the first paragraph of Article 16 of the VAT Directive, the application by a taxable person of goods forming part of his business assets in the form of a disposal free of charge, where the VAT on those goods or the component parts thereof was wholly or partly deductible, is to be treated as a supply of goods for consideration.

33 It follows from the wording of the first paragraph of Article 16 of that directive that, in such a situation, the application by a taxable person of goods forming part of his business assets is treated as a supply of goods for consideration where, first, it gives rise to a disposal free of charge and, second, the VAT on the goods to which it relates or the component parts thereof was wholly or partly deductible to the benefit of that taxable person.

34 By contrast, it does not follow from the examination of the wording of that provision that there was an additional condition connected with the tax status of the recipient of that transfer which takes account of the fact that that recipient used the goods thus transferred for transactions giving rise to a right to deduct VAT.

35 In the present case, it is apparent from the information set out in the request for a preliminary ruling, first, that Y, a company subject to VAT, applied heat forming part of its business assets, which is tangible property in accordance with Article 15(1) of the VAT Directive, that it had produced in the course of its business. In addition, it also follows from that information that that heat was transferred free of charge by Y to A and to B in order for them to carry out their economic activities.

36 Second, the referring court noted that, in view of the fact that the supplies for consideration of the electricity produced by Y's cogeneration installation had been subject to VAT, Y had been entitled to deduct all the input VAT for that installation, which had also produced the heat transferred free of charge to A and to B.

37 As regards the objectives of the first paragraph of Article 16 of the VAT Directive and the context of that provision, it is apparent from the case-law of the Court that Article 16 of the VAT Directive seeks to ensure equal treatment between, on the one hand, a taxable person who applies goods for his own private use or for that of his staff and, on the other hand, a final consumer who acquires goods of the same type. Thus, the taxation of the applications referred to in the first paragraph of Article 16 of that directive is intended to avoid situations of untaxed final consumption (see, to that effect, as regards Article 5(6) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), corresponding to Article 16 of the VAT Directive, judgment

of 16 September 2020, *Mitteldeutsche Hartstein-Industrie*, C-528/19, EU:C:2020:712, paragraph 59 and the case-law cited).

38 To that end, under that provision certain transactions for which no real consideration is received by the taxable person are treated as supplies of goods effected for consideration and subject to VAT (see, to that effect, concerning Article 5(6) of the Sixth Directive 77/388, judgment of 16 September 2020, *EMI Group*, C-581/19, EU:C:2020:712, paragraph 60 and the case-law cited).

39 In order to avoid situations in which final consumption is untaxed, the disposal free of charge of the goods applied must be subject to subsequent taxation, irrespective of the recipient.

40 Furthermore, the Court has already held that the second paragraph of Article 16 of the VAT Directive constitutes an exception to the rule that the taxation of the applications referred to in the first paragraph of Article 16 of that directive is designed to prevent situations in which final consumption is untaxed, since it nevertheless exempts from taxation the application of goods for business use as samples or as gifts of small value (see, to that effect, concerning Article 5(6) of the Sixth Directive 77/388, judgment of 30 September 2010, *EMI Group*, C-581/08, EU:C:2010:559, paragraph 19 and the case-law cited).

41 Consequently, the wording of the second paragraph of Article 16 of the VAT Directive is to be interpreted strictly, in such a way that the purpose of the first paragraph of Article 16 is not undermined. Thus, the objective of that exception cannot consist in an exemption from VAT in respect of goods which lead to final consumption other than where that final consumption is inherent in the promotion of goods by samples (see, to that effect, judgment of 30 September 2010, *EMI Group*, C-581/08, EU:C:2010:559, paragraphs 20 and 25).

42 It follows that the imposition of VAT on the application of goods disposed of free of charge, referred to in the first paragraph of Article 16 of the VAT Directive, has no exception other than that relating to transactions consisting of the giving of gifts of small value and samples coming within the scope of the second paragraph of Article 16 of the VAT Directive.

43 In the present case, the heat applied and disposed of cannot be regarded as a gift of small value or a sample within the meaning of the second paragraph of Article 16 of that directive.

44 It should be added that it is apparent from the second paragraph of Article 16 of the VAT Directive that that provision does not draw any distinction on the basis of the tax status of the recipient of samples and that, consequently, that status is not relevant for the purposes of applying that provision (see, to that effect, concerning the second sentence of Article 5(6) of the Sixth Directive 77/388, judgment of 30 September 2010, *EMI Group*, C-581/08, EU:C:2010:559, paragraph 51 and 52).

45 Moreover, the interpretation of the first paragraph of Article 16 of the VAT Directive, put forward both by the referring court and by the European Commission in its written observations, to the effect that account should be taken of the tax status of the recipient of the goods applied and disposed of free of charge, would be likely to create practical difficulties, inasmuch as a taxable person who applies and disposes of goods free of charge would be obliged to carry out investigations in order to verify that status.

46 Lastly, it is true that the Court ruled, in paragraph 68 of the judgment of 16 September 2020, *Mitteldeutsche Hartstein-Industrie* (C-528/19, EU:C:2020:712), relied on by Y in particular, that works carried out, for the benefit of a municipality, for the extension of a municipal road open to the public but used, in connection with its economic activity, by the taxable person which carried out those works free of charge, as well as by the public, do not constitute a transaction which must be treated as a supply of goods made for consideration within the meaning of Article 5(6) of the Sixth Directive 77/388 (corresponding to Article 16 of the VAT Directive).

47 However, first, those works benefited the taxable person making the disposal and had a direct and immediate link with its overall economic activity and, second, the cost of the input services received and linked to those works formed part of the cost elements of that taxable person’s output transactions. By contrast, there is nothing to suggest that the heat applied and disposed of free of charge by Y was also used by Y.

48 In the light of all the foregoing considerations, the answer to the first question is that the first paragraph of Article 16 of the VAT Directive must be interpreted as meaning that the transfer free of charge of heat produced by a taxable person to other taxable persons for the purposes of their economic activities constitutes an application, by that first taxable person, of goods forming part of his business assets in the form of a disposal free of charge, within the meaning of that provision, that is to be treated as a supply of goods for consideration, and whether or not those other taxable persons use that heat for purposes giving them a right to deduct VAT is irrelevant in that regard.

The second and third questions

49 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 74 of the VAT Directive must be interpreted as meaning that the cost price, within the meaning of that provision, includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, and whether only the costs subject to input VAT must be included in the calculation of that price.

50 Pursuant to Article 74 of the VAT Directive, where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18 of that directive, the taxable amount is to be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.

51 First of all, it should be borne in mind that the Court has already stated that Article 74 of the VAT Directive constitutes a derogation from the general rule laid down in Article 73 of that directive (judgment of 8 May 2013, *Marinov*, C-142/12, EU:C:2013:292, paragraph 31). In addition, it follows from Article 74 of the VAT directive that it is only in the absence of a purchase price for the goods or similar goods that the taxable amount will be the ‘cost price’ (see, to that effect, concerning Article 11A(1)(b) of the Sixth Directive 77/388, corresponding to Article 74 of the VAT Directive, judgment of 28 April 2016, *Het Oudeland Beheer*, C-128/14, EU:C:2016:306, paragraph 38).

52 The Court has also stated that the term ‘purchase price, determined at the time of allocation’, for the purposes of Article 74 of the VAT Directive, refers to the residual value of the goods at the time of allocation. In respect of an application of a good also covered by that provision, the Court has held that the taxable amount was the value of the good in question, determined at the time of the application, and which corresponds to the market price for a similar good, account being taken of the costs of transforming that good (judgment of 8 May 2013, *Marinov*, C-142/12, EU:C:2013:292, paragraph 32 and the case-law cited).

53 In that regard, the referring court stated that it was impossible to determine a purchase price in the present case, since A and B are not connected to a network which would enable them to receive heat from third parties in return for payment, that being a matter for that court to verify.

54 The Court has also held that, unlike the criterion of cost price, the criterion of the purchase price of similar goods enables the tax authority to base its calculation on the market price of that type of goods at the time the good at issue was applied, without having to examine in detail which components of the value gave rise to those prices (see, to that effect, judgment of 23 April 2015, *Property Development Company*, C-16/14, EU:C:2015:265, paragraph 40).

55 Thus, it is for the tax authority to determine the cost price in the light of all the relevant factors and that determination involves a detailed examination of the value elements that indicate that price, which must be determined at the time the application was made.

56 Next, as regards the elements to be taken into account for that purpose, it should be noted that it is in no way apparent from the wording of Article 74 of the VAT Directive that the cost price should be based solely on the direct manufacturing or production costs or on the costs which have been subject to input VAT.

57 Furthermore, Article 79 of the VAT Directive, which lists the items not to be included in the taxable amount, does not refer to indirect costs such as financing expenses.

58 Lastly, in so far as, as is apparent from the case-law cited in paragraph 51 above, it is only in the absence of a purchase price for the goods or similar goods that the taxable amount is the cost price, it must be held that that cost price should be as close as possible to the purchase price and include, consequently, both direct production and manufacturing costs and indirect costs such as financing costs, whether or not those costs have been subject to input VAT.

59 In the light of all the foregoing considerations, the answer to the second and third questions is that Article 74 of the VAT Directive must be interpreted as meaning that the cost price, within the meaning of that provision, includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, whether or not those costs have been subject to input VAT.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **The first paragraph of Article 16 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**

   must be interpreted as meaning that the transfer free of charge of heat produced by a taxable person to other taxable persons for the purposes of their economic activities constitutes an application, by that first taxable person, of goods forming part of his business assets in the form of a disposal free of charge, within the meaning of that provision, that is to be treated as a supply of goods for consideration, and whether or not those other taxable persons use that heat for purposes giving them a right to deduct value added tax is irrelevant in that regard.

2. **Article 74 of Directive 2006/112**

   must be interpreted as meaning that the cost price, within the meaning of that provision, includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, whether or not those costs have been subject to input value added tax.

[Signatures]

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* Language of the case: German.