Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 7 June 2018 [1]

Case C-295/17

MEO — Serviços de Comunicações e Multimédia SA
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal))

(Request for a preliminary ruling — Common system of value added tax — Scope — Taxable transactions — Supply for consideration — Distinction between non-taxable damages and taxable services against payment of an 'indemnity')

I. Introduction

1. In these proceedings, the Court is required to distinguish, under VAT law, between a payment for a (taxable and taxed) service and payment for pecuniary damage (which is a non-taxable event).

2. This situation arises from the fact that, under VAT law, not all payments of money to taxable persons are taxed, but only payments for supplies of goods or services. However, how must a case be treated under VAT law where the contractually agreed payment must be paid although all the services provided hitherto have been discontinued and consequently no further services are provided? To what does the payment relate in such a case? Can it still be referred to as consideration for a supply of goods or services?

3. The Court has already discussed a similar question in its case-law on so-called compensation payments in respect of non-use of a service in *Société thermale d'Eugénie-les-Bains* [2] and *Air France-KLM and Hop!-Bri-Air*. [3] This request for a preliminary ruling provides it with the opportunity to further develop that case-law.

II. Legal framework

A. EU law

4. The framework of EU law relevant to the case is provided by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [4] ('the VAT Directive').

1 Original language: German.

2 Judgment of 18 July 2007 (C-277/05, EU:C:2007:440).

3 Judgment of 23 December 2015, *Air France-KLM and Hop!-Brit Air* (C-250/14 and C-289/14, EU:C:2015:841).

4 OJ 2006 L 347, p. 1.

5. Article 2(1)(c) of the VAT Directive provides:

'(1) The following transactions shall be subject to VAT: …

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such; …'

6. Article 73 contains the following wording:

'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.'

B. Portuguese law

7. In Portuguese law, the provisions of the VAT Directive were transposed into the Código do Imposto sobre o Valor Acrescentado (VAT Code) by Article 1(1)(a) and Article 16(1) in the applicable version thereof.

III. Dispute in the main proceedings

8. MEO — Serviços de Comunicações e Multimédia SA ('MEO') is a limited liability company whose object is the establishment, design, construction, management and operation of telecommunications networks and infrastructures, as well as the provision of telecommunications services and services for transporting and transmitting telecommunications signals.

9. The provision of services (telecommunications, internet access, television and multimedia) by MEO requires a complex infrastructure, the setting up and maintenance of which entails a significant investment in terms of human and material resources. On the basis of the level of investment needed for the provision of the services, MEO determines a (minimum) number of contracts that must be concluded to enable its business objective to be achieved.

10. As part of its business, MEO enters into contracts with its customers for the provision of those services. Some of the contracts that MEO concludes with its customers contain a term requiring the customer to remain bound by the contract for a minimum period; in those situations certain advantageous conditions are offered, including lower monthly payments.

11. These contracts include clauses that place the customer under an obligation to pay an amount corresponding to the monthly payment multiplied by the number of months needed to complete the abovementioned minimum period (exclusive of VAT) ('the indemnity'), where, on MEO's initiative, the service is deactivated for reasons attributable to the customer before the end of the contractual tie-in period (in particular, the failure to pay the monthly payments due under the contract).

12. In situations where there is a breach of contract by the customer, MEO, as a first step, informs the customer that it is necessary to settle the amounts that are owing and warns him that, in the case of failure to pay, it will deactivate the services contracted for and charge to the customer's account the indemnity arising as a result of the breach of the term concerning the tie-in period, as provided for in the contract.

13. Following that notice, if the customer fails to pay the outstanding amounts, MEO then definitively deactivates the agreed services. MEO then charges to the customer's account the indemnity that it believes to be owing under the contract, corresponding to the 'monthly payment amount … multiplied by the number of months still needed to complete the period'.

14. Most of MEO's customers, faced with the risk of having to pay the indemnity, choose to comply with the agreed terms, remaining bound throughout the minimum subscription period. MEO charged VAT on the customer's monthly payments during the period when the contract was being properly performed and duly paid VAT to the State.

15. In the event of deactivation, on the other hand, MEO issues its customers who are in breach of contract with invoices in respect of the indemnity, without including VAT and expressly stating 'Not subject to VAT'. Only a small proportion of the amounts due for non-performance of the contract is actually paid.

16. MEO was inspected by the Unidade dos Grandes Contribuintes (Major Taxpayers Unit). This revealed that MEO had not paid VAT on the indemnities charged to its customers in 2012.

17. MEO's justification for this was that the indemnities in question were not subject to VAT. In that regard, MEO relies in particular on a legal opinion commissioned from Professor Englisch (University of Münster, Germany). It also saw no point to the charge to VAT in view of the various arrangements for recovery of the tax provided for in Article 78 of the VAT Code and it further considered that the tax authority's assessment of the VAT was improperly quantified given that VAT was already included in the amount charged.

18. The tax authority did not accept that argument, stating that the indemnities were due because the recipient of the service was liable to pay remuneration for the service provided and not as compensation for damage caused to the service provider. Those indemnities therefore fell within the concept of lost profit and, as such, were subject to VAT. The tax authority established the amount of tax to be paid and accordingly made an adjustment amounting to EUR 1 812 195.35.

19. MEO appealed that decision. The appeal was rejected by an administrative decision. On 23 December 2015 the claimant lodged a further appeal against the decision dismissing that appeal. No decision was taken on that appeal within the period laid down by law. On 20 May 2016, this was challenged by MEO before the Tribunal Arbitral Tributário (Tax Arbitration Tribunal, Portugal).

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

20. By decision of 8 January 2017, received on 22 May 2017, the Tribunal Arbitral Tributário (Tax Arbitration Tribunal) referred the following questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'(1) Must Articles 2(1)(c), 64(1), 66(a) and 73 of Directive 2006/112/EC be interpreted as meaning that a telecommunications operator (television, internet, mobile network and fixed network) is liable for value added tax as a result of charging its customers –– in a case of termination, for reasons attributable to the customer, of a contract containing an obligation to be bound by the contract for a defined term (tie-in period) before the end of that period –– a pre-determined amount, corresponding to the basic monthly amount payable by the customer under the contract,

multiplied by the number of monthly payments that are still to be made before the end of the tie-in period, the operator having, at the time when that amount is invoiced and independently of its actual payment, already ceased to provide the services, where:

(a) the contractual purpose of the amount invoiced is to deter the customer from disregarding the tie-in period which he has undertaken to observe and to make good the damage sustained by the operator as a result of the failure to complete the tie-in period –– in particular, on account of loss of the profit the operator would have obtained if the contract had continued until the end of the period, as well as on account of the agreement to charge lower tariffs, the supply of equipment or other offers, free of charge or at discounted prices, and the costs of advertising and of acquiring customers;

(b) contracts negotiated with a tie-in period entail higher remuneration for the commercial intermediaries who obtained them than contracts obtained by them without a tie-in period and that remuneration is calculated, in each case (that is, as regards contracts with or without a tie-in), on the basis of the amount set for monthly payments in the contracts obtained;

(c) the amount invoiced may be classified, under national law, as a penalty clause?

(2) Is the answer to the first question liable to change in the event that one or more of the situations described in points (a), (b) and (c) of that question does not apply?'

21. In the proceedings before the Court, MEO, the Portuguese Republic, Ireland and the European Commission submitted written observations and (with the exception of Ireland) participated at the hearing on 26 April 2018.

V. Assessment

A. Admissibility and interpretation of the questions referred

22. As the Court has already held, the Tribunal Arbitral Tributário (Tax Arbitration Tribunal) must be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU and is entitled to refer questions to the Court of Justice for a preliminary ruling.[5]

23. The Republic of Portugal's argument that the request for a preliminary ruling is inadmissible because the referring court's statements are speculative cannot be accepted. According to the settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context that that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[6]

5 Judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraphs 23 to 34).

6 Judgments of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230, paragraph 32); of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 26); of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 27); and of 22 January 2002, *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraph 19).

24. None of this is remotely the situation in the present case. On the contrary, the question raised by the referring court is precisely the interpretation and application of Article 2(1)(c) of the VAT Directive in the case of a contractual indemnity. That question is undoubtedly admissible.

25. However, it would seem appropriate to summarise, to some degree, the very long question referred. Essentially, the referring court seeks to ascertain whether the payment of an amount of compensation to MEO by a (now former) customer must be regarded as consideration for a service within the meaning of Article 2(1)(c) of the VAT Directive.

26. This is open to doubt because the services supplied under contract were deactivated and, therefore, are no longer supplied. On the other hand, the indemnity to be paid is the same as the net consideration originally agreed for the supply of the services, in order to deter the customer from disregarding the agreed term of the contract.

27. It must therefore be determined whether the indemnity paid by the customer relates 'only' to compensation for pecuniary damage sustained by MEO or actually to a taxable and taxed service supplied by MEO to the customer.

B. Legal assessment

1. Payment of consideration for a supply or service

28. According to Article 2(1) of the VAT Directive, only certain, exhaustively listed events are subject to VAT. The two main chargeable events in that regard are stated in Article 2(1)(a) and (c) of the VAT Directive. Under that article, supplies of goods and services by a taxable person, acting as such, are subject to VAT where they are supplied for consideration. The aim of VAT as a general tax on the consumption of goods is to impose a tax on consumer capacity, which is demonstrated by consumers' expenditure of assets to procure a consumable benefit (supply of goods or services).[7]

29. It already follows *a contrario* from the wording of Article 2(1)(a) and (c) of the VAT Directive that payment of money alone (that is, the payment of consideration) does not make the recipient liable to tax, even where the recipient is a taxable person. He must have made a supply of goods or provided a service in return for the monetary payment received.[8]

30. It follows from the case-law of the Court that this can be so only if there is a direct link between the service supplied and the consideration received, the sums paid constituting genuine consideration for an identifiable service supplied in the context of a legal relationship in which performance is reciprocal.[9]

31. Payments outside such a legal relationship (which, however, must be understood broadly, as VAT is a general tax on consumption) do not lead to a taxable transaction. Therefore, a service is not supplied for consideration where, although the undertaking receives a payment, that money is paid by the payer not for a consumable benefit (that is to say, not for a supply of goods or services), but for other reasons (such as out of sympathy[10]).

7 See, for example, judgments of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraphs 20 and 23), and of 11 October 2007, *KÖGÁZ and Others* (C-283/06 and C-312/06, EU:C:2007:598, paragraph 37 – 'it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied').

8 In the same express terms, see also judgment of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 18).

9 See, to that effect, judgments of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440, paragraph 19); of 23 March 2006, *FCE Bank* (C-210/04, EU:C:2006:196, paragraph 34); of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 39); and of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 14).

10 Judgment of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 17 — 'subjective motives').

32. The same applies where the payment merely compensates the undertaking for financial damage sustained, as, for example, in the case of interest on account of late payment (pecuniary damage in the form of refinancing damage because of late payment [11]) or compensation for profit lost because of cancellation of a contract. [12] In all these cases, a payment is made not for a supply of goods or services received from the undertaking but as compensation for the financial consequences of the undertaking's failure to supply goods or services.

33. Ultimately, money is paid in these cases by way of settlement for financial damage (pecuniary damage). The expenditure of money for money is the archetype of payment for non-performance [13] ('we cannot eat money' [14]). Compensation for pecuniary damage (such as compensation for lost profit or damage caused by delay) amounts to the same thing since, in that case, too, no consumable benefit is obtained, only adequate compensation for prevention of the possibility of earning money.

34. It is of no importance, on the other hand, how the national law regards the indemnity. It is irrelevant from the point of view of VAT law (as the Commission and Portugal emphasised at the hearing) whether it is to be regarded as compensation for a claim in tort or a contractual penalty, or as damages, compensation or consideration. Assessing whether payment of consideration for a supply has been made is a question of EU law which must be decided independently of any assessment made on the basis of national law. [15]

2. The Court's case-law on similar 'indemnities'

35. In the case of so-called indemnities, compensation payments or damages, it must therefore always be determined why and for what purpose the money is paid in order to be able to assess whether a supply is effected for consideration within the meaning of Article 2(1)(a) and (c) of the VAT Directive.

36. In *Société thermale d'Eugénie-les-Bains*, the Court ruled on a fixed cancellation charge paid as compensation for the loss suffered by the hotelier as a result of customer default ('a deposit'). Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes. [16] Since, on the one hand, the deposit paid does not constitute the fee collected by a hotelier by way of genuine consideration for the supply of an independent and identifiable service to his client and, on the other hand, the retention of that deposit, following the client's cancellation, is intended to offset the consequences of the non-performance of the contract, it must be held that neither the payment of the deposit, nor the retention of that deposit, is covered by Article 2(1)(c) of the VAT Directive. [17]

11 Judgment of 1 July 1982, *BAZ Bausystem* (222/81, EU:C:1982:256, paragraph 8).

12 Judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440, paragraph 35).

13 From the point of view of VAT law, money is only the means of procuring a consumable benefit (consumer good), not a consumable benefit as such. The only exception to this is in the case of acquisition of collector coins, where it is no longer the nominal value but the value to the collector which is the primary consideration.

14 The long version of this is described as a Cree Indian proverb and reads: 'Only when the last tree has been cut down, the last fish been caught, and the last stream poisoned, will you realise we cannot eat money'.

15 On the autonomous interpretation of EU concepts, see in particular judgment of 28 July 2011, *Nordea Pankki Suomi* (C-350/10, EU:C:2011:532, paragraph 22); of 14 December 2006, *VDP Dental Laboratory* (C-401/05, EU:C:2006:792, paragraph 26); and of 4 May 2006, *Abbey National* (C-169/04, EU:C:2006:289, paragraph 38).

16 Judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440, paragraph 32); see also, to that effect, in relation to default interest, judgment of 1 July 1982, *BAZ Bausystem* (222/81, EU:C:1982:256 paragraphs 8 to11).

17 See expressly judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440, paragraph 35).

37. In *Air France-KLM and Hop!Brit-Air*, on the other hand, the Court held that an airline company cannot claim that the price paid by a 'no-show' passenger and retained by the company constitutes a contractual indemnity that, since it seeks to compensate only for a harm suffered by the company, is not subject to VAT (by this the Court meant non-taxable). [18]

38. The Court's reasoning in that regard was essentially that, first, the price paid by a 'no-show' passenger corresponded to the full price to be paid. Secondly, where the passenger has paid the price of the ticket and the company confirms that a seat is reserved for him, the sale is final and definitive. Moreover, it should be noted that airline companies reserve the right to resell the unused service to another passenger, without being required to reimburse the price to the first passenger. It follows therefrom that the grant of compensation, in the absence of harm, would be unjustified. [19] It must therefore be held that the sum retained by the airline companies is not intended to compensate for possible harm suffered by them as a result of a passenger's 'no-show', but constitutes remuneration, even where the passenger did not benefit from the transport. [20]

39. The situation in the present case falls between the situations in those two cases. On the one hand, it is common ground that services were no longer supplied to the customer in breach of contract after its connection was deactivated by MEO. MEO, in particular, emphasises this. On the other hand, the amount of money to be paid is just as high as the net remuneration for the services originally agreed in the contract. This is emphasised in particular by the Commission, Ireland and Portugal.

40. However, unlike in the two abovementioned cases, services were supplied to the customer for appropriate consideration in the present case whereby termination of the contract gives rise to further costs (provided for in the contract). In that regard, it is however (contrary to the view expressed by MEO) irrelevant that the contract has now been terminated. Even payments made after the termination of the contract can still be connected with previous services to be supplied under contract.

41. Moreover, compensation for pecuniary damage equivalent to the profit lost should normally be lower than the agreed net price, as a profit margin equivalent to the agreed (net) consideration is highly unlikely. Generally, the provision of a service gives rise to certain costs which are not incurred where the service is not provided. In that regard, no maintenance and administrative costs, for example, are incurred in respect of customers 'in breach of contract'. In such a case, it is scarcely possible to speak of consolidation of the compensation into a lump sum (as MEO did at the hearing). From that point of view, it is highly questionable (as the Commission and Portugal submitted at the hearing) how a customer who used the service for 24 months and a customer who could only use it for, for example, 18 months because it was deactivated are to spend the same amount but be treated differently under VAT law.

3. Possibilities for a solution in the specific case

42. Against this background, there are, in my opinion, only two conceivable solutions. Either the indemnity relates to the profit lost by MEO and offsets the pecuniary damage suffered by MEO, in which case it must be regarded as a non-taxable event.

43. Or the compensation payment must be regarded economically as part of a total price for the supply of specific services by MEO that is merely divided into monthly parts for the purposes of the payment method adopted (as a form of instalment payment) and, in the event of breach of the obligation to pay, becomes payable immediately in the amount still outstanding.

18 Judgment of 23 December 2015, *Air France-KLM and Hop!-Brit Air* (C-250/14 and C-289/14, EU:C:2015:841, paragraph 29).

19 Judgment of 23 December 2015, *Air France-KLM and Hop!-Brit Air* (C-250/14 and C-289/14, EU:C:2015:841, paragraphs 32 and 33).

20 Judgment of 23 December 2015, *Air France-KLM and Hop!-Brit Air* (C-250/14 and C-289/14, EU:C:2015:841, paragraph 34).

44. Like the Commission, Portugal and Ireland, I consider the latter approach to be the correct one. First, the nature of the damage for which compensation is consolidated into a lump sum remains questionable when the supposed damage amounts to the same as the price for supplying the service. Second, when such a contract is concluded, the amount that MEO receives during the minimum contractual period remains fixed, irrespective of the actual duration of the service provision. However, (as the Commission rightly pointed out at the hearing) there is then no damage arising from early termination. MEO receives the same (net) amount as it would have done if the contract had been fulfilled. As the Court has already held, a 'grant of compensation, in the absence of harm, would be unjustified'. [21]

45. This finding is also supported by an economic consideration of MEO's contractual arrangement. The Court itself recognises the importance of the economic reality in VAT law. [22]

46. Such an economic consideration establishes (as suggested by the Commission, Portugal and Ireland) the existence of a type of fixed price in the form of a contractually agreed minimum remuneration. Under VAT law, it makes no difference in that regard whether a customer pays EUR 100 per month over a minimum period of 24 months for an internet connection and must continue to pay the EUR 100 if he pulls out before the contract period has expired (total amount EUR 2 400). The same result would apply if he pays EUR 2 400 immediately and is entitled to use the internet connection for up to 24 months, unless he changes premises. In both cases, the contractual amount (EUR 2 400) relates to a specific service (internet connection), only the extent of which is uncertain. In fact, the latter would also apply in respect of any other lump-sum price.

47. In the present case, only the temporal extent of use is uncertain, not the consideration for the services. As a result, under contracts with a minimum contractual period, MEO always receives at least the same amount, irrespective of the length of time over which the services are actually supplied.

48. In that respect, the 'indemnity' must be regarded, in economic terms, as merely the last of the previous monthly payments. Like the previous payments, it is payment for the services previously supplied.

49. Such an economic consideration is also consistent with the spirit and purpose of the clause, which, according to the referring court, is to deter customers from discontinuing payment of their monthly 'instalments'. The immediate payment of all outstanding 'instalments' of a lump-sum price definitely has that effect. It is therefore a form of contractual penalty that relates not to the amount, but to the due date of the (remaining) price (consideration within the meaning of Article 2(1)(c) of the VAT Directive). Because the customer is 'in breach of contract', he must immediately pay the outstanding amount in full instead of in instalments relating to prior use of the services. However, as Portugal has rightly emphasised, the method of payment (immediate or extending over several months) cannot alter the nature of the service.

50. The same applies to differences in remuneration for commercial intermediaries. The assessment of the supply relationship between MEO and its customers under VAT law cannot depend on the contractual arrangement of MEO's relationship to third parties. The higher commission indicates only that contracts with a minimum contractual period probably result in a higher profit for MEO because they guarantee a certain minimum price for the services to be supplied and, in that regard, confirms the abovementioned economic consideration of the situation.

51. Therefore, a service was provided for consideration within the meaning of Article 2(1)(c) of the VAT Directive.

21 Judgment of 23 December 2015, *Air France-KLM and Hop!-Brit Air* (C-250/14 and C-289/14, EU:C:2015:841, paragraph 34).

22 Judgment of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraphs 48 and 49); see also Opinion of Advocate General Jääskinen in *Saudaçor* (C-174/14, EU:C:2015:430, point 55).

4. Calculation and amount of VAT

52. As it is clear from the order for reference that, in most cases, the indemnity under consideration here is not paid and that the tax authorities have evidently added VAT to the outstanding indemnity, it seems appropriate to give the referring court some useful guidance on two points.

53. First, the VAT due must always be calculated on the basis of the amounts (in this case, the indemnity) agreed or received. This follows from the clear wording of Article 73 und Article 78(a) of the VAT Directive. According to those articles, the taxable amount is the whole amount obtained or to be obtained by the supplier, except for the VAT itself.

54. Second, the Court has repeatedly held that taxable undertakings act 'only' as tax collectors for the State,[23] because VAT is an indirect tax on consumption that must be borne by the final consumer.[24] Consequently, the Court has also repeatedly held that 'the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him'.[25] If the final consumer does not pay the trader, the trader therefore does not substantively owe any VAT.

55. Therefore, the trader's tax liability must necessarily[26] be corrected in accordance with Article 90 of the VAT Directive where it is established with reasonable certainty that no further payment will be made by its contract partner. When such reasonable certainty can be assumed is a question of fact that the national court must assess while respecting, on the one hand, the fundamental rights of the taxable person and the principle of proportionality and, on the other hand, the interest of the State in effective taxation.

VI. Conclusion

56. In light of the foregoing, I propose that the Court's answer to the request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) should be as follows:

1. Article 2(1)(c) of Directive 2006/112/EC must be interpreted as meaning that the payment of a pre-determined amount in the case of early termination of a contract is liable to value added tax if it is to be regarded as consideration for the services already supplied and is not merely compensation for pecuniary damage sustained.

2. For the purposes of that interpretation, it is irrelevant that the commercial intermediary who negotiates such contracts with a tie-in period receives higher remuneration than for contracts without a tie-in period. It is also irrelevant that the amount may be regarded, under national law, as a contractual penalty.

23 Judgments of 20 October 1993, *Balocchi* (C-10/92, EU:C:1993:846, paragraph 25), and of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21); see also my Opinion in *Di Maura* (C-246/16, EU:C:2017:440, point 21).

24 Judgments of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19), and of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34), and order of 9 December 2011, *Connoisseur Belgium* (C-69/11, not published, EU:C:2011:825, paragraph 21).

25 Judgment of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19); similarly the judgments of 15 October 2002, *Commission* v *Germany* (C-427/98, EU:C:2002:581, paragraph 30), and of 16 January 2003, *Yorkshire Co-operatives* (C-398/99, EU:C:2003:20, paragraph 19); likewise the Opinion of Advocate General Léger in *MyTravel* (C-291/03, EU:C:2005:283, point 69).

26 Judgment of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 20 et seq.) and my Opinion in *Di Maura* (C-246/16, EU:C:2017:440, point 27).