Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 1 October 2020 [1]

Case C-501/19

UCMR – ADA Asociația pentru Drepturi de Autor a Compozitorilor
v
Pro Management Insolv IPURL, acting as liquidator of Asociația Culturală 'Suflet de Român'

(Request for a preliminary ruling from the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania))

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Taxable transactions – Fees for the dissemination of musical works to the public – Payment of a non-exclusive licence by the users of the works – Collective copyright management organisation which collects those fees on behalf of copyright holders)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 24(1), Article 25(a) and Article 28 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. [2]

2. The request has been made in proceedings between the Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (Union of Composers and Musicologists of Romania – Copyright Organisation, 'UCMR – ADA') and the Asociația Culturală 'Suflet de Român' ('Romanian Soul' Cultural Association, 'the cultural association'), currently in liquidation, concerning the payment of a proportion of the royalties, plus value added tax (VAT), payable by the cultural association to UCMR – ADA in respect of the communication to the public, in particular the public performance, of musical works during a show.

3. The Court is thus provided with the opportunity to clarify, in light of the VAT Directive, the obligations of the holders of copyright in musical works and those of collective management organisations where the latter collect the royalties payable in return for them issuing non-exclusive licences to use the works in question on behalf of those copyright holders and the copyright holders pay those organisations a commission for the collective management of their fees.

[1] Original language: French.

[2] OJ 2006 L 347, p. 1, 'the VAT Directive'.

4. My analysis of the transactions thereby carried out with such involvement – which is now common practice – of a collective management organisation, which itself neither holds nor transfers the copyright and is not the beneficiary of the fees collected, will lead me to propose that the Court find that the copyright holders make a supply of services within the meaning of the VAT Directive and to explain the consequences to be drawn from that fact for each of the taxable persons, according to whether the collective management organisation acts in its own name or in the name of those copyright holders.

II. Legal context

A. The VAT Directive

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

'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 24(1) of that directive reads as follows:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods.'

7. Under Article 25(a) of the Directive:

'A supply of services may consist, inter alia, in one of the following transactions:

(a) the assignment of intangible property, whether or not the subject of a document establishing title;'

8. Article 28 of the VAT Directive provides:

'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.'

B. Romanian law

1. The Tax Code

9. Article 126(1)(a) of legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 on the Tax Code)[3] of 22 December 2003, in the version thereof applicable to the dispute in the main proceedings, provides:

'For VAT purposes, transactions that satisfy the following cumulative conditions shall be taxable in Romania:

(a) transactions which, within the meaning of Articles 128 to 130, constitute or are treated as a supply of goods or a supply of services, which is covered by VAT, for consideration.'

10. Article 129 of the Tax Code, which is entitled 'Supply of services', states:

'1. A supply of services shall mean any transaction which does not constitute a supply of goods, as defined in Article 128.

2. Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

3. Supplies of services shall include transactions such as:

…

(b) the assignment of intangible property, whether or not the subject of a document establishing title, inter alia: the transfer and/or assignment of copyright, patents, licences, trade marks and other similar rights;

…

(e) intermediation services carried out by persons acting in the name and on behalf of other persons where they are involved in a supply of goods or services.

…'

[3] Official Journal, Part I, No 927/23 December 2003, 'the Tax Code'.

2. The Copyright Law

11. Article 13(f) of legea nr. 8/1996 privind dreptul de autor și drepturile conexe (Law No 8/1996 on copyright and related rights) [4] of 14 March 1996, in the version thereof applicable to the dispute in the main proceedings, provides:

'The use of a work creates, for the author, separate and exclusive economic rights which allow him to authorise or prohibit:

…

(f) the direct or indirect communication of the work to the public, by whichever means, including where it is made available to the public such that the public can have access to it from a place and at a time individually chosen by them.'

12. Title III of that law is entitled 'Management and protection of copyright and related rights'. Chapter I of that title, which concerns the 'management of the author's economic rights and related rights', contains three sections. Articles 123 to 123 [4] appear in Section I, which is entitled 'General provisions'.

13. Article 123(1) and (3) of the Law provides:

'1. Holders of copyright and related rights may exercise the rights granted to them under this Law either individually or, on the basis of an authorisation, through collective management organisations, subject to the conditions laid down in this Law.

…

3. Holders of copyright or related rights may not transfer economic rights granted under this Law to collective management organisations.'

14. Under Article 123[1] of the Copyright Law:

'1. Collective management shall be compulsory in order to exercise the following rights:

…

(e) right of communication of musical works to the public …

…

2. In respect of the categories of rights referred to in paragraph 1, the collective management organisations shall also represent the holders of rights who have not commissioned them to do so.'

[4] Official Journal, Part I, No 60/26 March 1996, 'the Copyright Law'.

15. Article 125(2) of that law, which is included in Section II, entitled 'Collective management organisations which handle copyright and related rights', provides:

'[Collective management] organisations shall be created directly by the holders of copyright or related rights, whether natural or legal persons, and act within the limits of the authorisation granted to them and on the basis of the articles of association adopted in accordance with the procedure established by law.'

16. Article 129[1] of the Law reads as follows:

'Where collective management is compulsory, if a holder [of copyright] is not a member of any organisation, the relevant powers shall lie with the organisation in the sector which has the most members. Unrepresented right holders may claim the amounts due to them within a period of three years from the date of notification. Once that period has expired, non-distributed or unclaimed amounts shall be used in accordance with the decision of the General Meeting, excluding management fees.'

17. Chapter I of Title III of the Copyright Law contains a Section III, which is entitled 'Functioning of collective management organisations'. That section contains Articles 130 to 135.

18. Article 130(1) of that law provides:

'Collective management organisations have an obligation to:

(a) grant, in exchange for a fee, non-exclusive authorisations in the form of a non-exclusive licence to users who apply for them in writing before any use of the protected repertoire;

(b) draw up methodologies for their fields of business, including the appropriate copyright fees, which must be negotiated with users with a view to the payment of those fees, in the case of works whose method of use makes it impossible for the copyright holders to grant individual authorisation;

(c) conclude, on behalf of the right holders who have granted them an authorisation or pursuant to agreements concluded with corresponding organisations abroad, general contracts with the organisers of shows …;

…

(e) collect the amounts due from users and distribute them among the right holders …;

…'

19. Article 131[1](1) of the Law, which supplements the provisions of Article 130(1)(b), states:

'The methodology shall be negotiated by the collective management organisations with the representatives referred to in Article 131(2)(b), in accordance with the following main criteria:

(a) the category of right holders (members or non-members) and the field in which the negotiation is conducted;

…’

20. Under Article 134 of the Copyright Law:

‘1. Exercise of the collective management provided for under the authorisation shall in no way limit the economic rights of the right holders.

2. Collective management shall abide by the following rules:

(a) decisions relating to the methods and the rules for collection of royalties and other sums from users and to the distribution of those amounts among the right holders, including those relating to other more important aspects of collective management, must be taken by members at the General Meeting, in accordance with the articles of association;

(b) the commission payable by right holders who are members of a collective management organisation to cover the operating costs of that organisation … and the fee payable to the collective management organisation which is the sole collector … may not together represent more than 15% of the amounts collected annually;

(c) in the absence of an explicit decision of the General Meeting, the amounts collected by a collective management organisation may not be used for common purposes other than to cover the actual costs associated with the collection of the amounts due and their distribution among members; the General Meeting may decide that a maximum of 15% of the amounts collected may be used for common purposes and only within the limits of the field of business;

(d) the amounts collected by a collective management organisation shall be distributed individually between rights holders in proportion to the use of the repertoire of each of them no later than six months after the date of collection; rights holders may request payment of the amounts collected on a nominal basis or which do not require the submission of specific documents in order to be distributed within a period of 30 days from the date of collection;

(e) the commission payable by rights holders shall be deducted from the amounts due to each of them after calculation of the individual distribution;

…

3. Royalties paid to the collective management organisations shall not be and may not be treated as revenues of those organisations.

4. In carrying out the tasks assigned to them, in accordance with this Law, neither copyright nor related rights nor the exercise of such rights may be transferred or assigned to the collective management organisations.’

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

21. UCMR – ADA is a collective management organisation which handles the economic rights of authors in musical works. It was appointed by the Oficiul Român pentru Drepturile de Autor (Romanian Copyright Office) as the sole body responsible for collecting copyright fees for the communication to the public of such works at concerts, shows or cultural events.

22. On 16 November 2012, the cultural organisation organised an event at which musical works were performed. To that end, it had obtained from UCMR – ADA a non-exclusive licence to use those works, in return for the payment of royalties for the communication of those works to the public.

23. Following the refusal by the cultural organisation to pay the full amount of the royalties claimed by UCMR – ADA, the Tribunalul București (Regional Court, Bucharest, Romania) and the Curtea de Apel București (Court of Appeal, Bucharest, Romania) held that the claim by UCMR – ADA was well-founded. However, the court of appeal ruled that the transaction consisting in the collection of the royalties by UCMR – ADA for the communication of the musical works to the public was not subject to VAT and, therefore, deducted the amount of VAT from the amount of the remaining royalties payable by the association.

24. Before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), the referring court, UCMR – ADA submits, inter alia, that, by its decision, the court of appeal infringed the Tax Code by dismissing the application of VAT to the royalties charged to the cultural association as the user of the musical works at issue. UCMR – ADA claims that the principle of the neutrality of VAT has been infringed because that decision by the court of appeal has the effect of rendering it liable for payment of the VAT even though it is not the end user of those works.

25. The first question raised by the referring court concerns the classification, in the light of the judgment of 18 January 2017, *SAWP*,[5] of the transaction by which holders of copyright in musical works authorise the use of those works by organisers of shows. Does that transaction constitute a 'supply of services for consideration' and, more specifically, an 'assignment of intangible property' within the meaning of Article 25(a) of the VAT Directive?

26. In the event that the Court answers that question in the affirmative, the referring court asks, first, with reference to the judgment of 14 July 2011, *Henfling and Others*,[6] whether the collective management organisation, which collects royalties from the users of musical works, itself performs a supply of services within the meaning of Article 28 of the VAT Directive, which, according to the Court, creates a legal fiction of two identical supplies of services provided consecutively, even though that organisation may represent copyright holders without being commissioned to do so and manages such rights in accordance with legal obligations. Second, it wishes to know which conclusions must be drawn from that fact as regards the basis for calculation of VAT and the invoicing of VAT both by the collective management organisation and the authors when royalties are collected.

5 C-37/16, EU:C:2017:22 ('the judgment in *SAWP*').

6 C-464/10, EU:C:2011:489 ('the judgment in *Henfling and Others*'), paragraph 35, in relation to 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), and in particular Article 6(4) thereof, the wording of which is identical to that of Article 28 of the VAT Directive.

27. In those circumstances, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Do the holders of rights in musical works supply services within the meaning of Articles 24(1) and 25(a) of [the VAT Directive] to performance organisers from which collective management organisations, on the basis of an authorisation – a non-exclusive licence – receive remuneration, in their own name but on behalf of those right holders, for the public performance of musical works?

(2) If the first question is answered in the affirmative, do collective management organisations, when receiving remuneration from performance organisers for the right to perform musical works for a public audience, act as a taxable person within the meaning of Article 28 of the VAT Directive, and are they required to issue invoices including VAT to the respective performance organisers, and, when remuneration is paid to authors and other holders of copyright in musical works, are the latter, in turn, required to issue invoices including VAT to the collective management organisation?'

28. UCMR – ADA lodged written observations as did Romania, the Republic of Poland and the European Union; they also replied, within the prescribed period, to the questions to be answered in writing put by the Court. The Court decided to proceed to judgment without an oral hearing.

IV. Analysis

29. The dispute in the main proceedings concerns the liability to VAT of legal relationships concerning the communication of musical works to the public through the intermediary of a collective management organisation which handles copyright in such works.

30. This issue is of particular relevance, since the system of management of copyright or related rights on behalf of multiple holders of such rights and for their collective benefit is very old and operates in all Member States. It is presented as the most appropriate way both for authors to manage their rights, including the right to exploit their works in return for remuneration, and for users to access the works more easily. [7]

31. The referring court asks about the classification of that transaction as a 'supply of services' in which a commission agent takes part within the meaning of Article 28 of the VAT Directive.

32. It is therefore my view that, in order to answer the questions submitted by the referring court, it will be necessary to set out, having regard to the case-law of the Court, first, the conditions for classification as a 'supply of services' of a transaction falling within the scope of the exercise of one

[7] In this regard, it may be observed that interest in that system has grown through the development of new means of disseminating musical works, the scale of which greatly exceeded the capacities of authors to manage their rights individually with a view to monitoring the use of their works, in particular on non-domestic markets (see recital 2 of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72)). The significance of the tasks undertaken by organisations responsible for the collective management of copyright is likewise apparent from the adoption in Directive 2014/26 of standards common to the Member States. When the Directive was adopted, it was made clear that those organisations contribute to the achievement of the more general objective of promoting the diversity of cultural expression within the European Union (see recital 3 of that directive), that there was a need to harmonise the principles governing the organisation of the organisations with a view to ensuring that they function properly (see recitals 5 and 55 of the Directive as well as the first sentence of Article 1 thereof) and that specific provisions to strengthen their role had to be adopted in order to facilitate the Europe-wide licensing of authors' rights in musical works for online use (see recital 40 of the same directive and the second sentence of Article 1 thereof).

of the protected rights held by authors, namely the right to remuneration, as provided for in Article 2(1)(c) of the VAT Directive and clarified in Article 25(a) thereof,[8] as well as the conditions for classification as a mediation transaction concerning intangible property.

33. Second, it will be necessary to clarify which conclusions must be drawn from the foregoing as regards the determination of the basis for calculation of liability to VAT and invoicing, in accordance with Article 220(1) of the VAT Directive.[9]

A. Consideration of the first question

34. By its first question referred for a preliminary ruling, the referring court asks, in essence, whether Article 2(1)(c) and Article 25(a) of the VAT Directive are to be interpreted as meaning that the holders of copyright in musical works provide a supply of services to organisers of shows who are authorised to communicate those works to the public in return for the payment of royalties collected by a collective management organisation, in its name, on behalf of those right holders.

35. The doubts expressed by the referring court stem from its questions about the scope of the judgment in *SAWP* on account of the criteria used by the Court to find that the holders of reproduction rights, on behalf of whom organisations collectively managing copyright and related rights had levied, in their own name, fees in respect of the sale of blank media and of recording and reproduction devices, were not making a supply of services within the meaning of the VAT Directive.[10]

36. Although such approximation with the judgment in *SAWP* appears appropriate to me in view of the Court's consideration of a question concerning the liability to VAT of a transaction relating to the exploitation of protected copyright managed by a collective organisation and of the legal reasoning adopted, the scope of the Court's chosen solution must, in my view, be limited to the specific circumstances of the case that gave rise to that judgment, on the basis of which it established two criteria.

37. The Court gave its ruling taking into account, first, the fact that the fee in question was imposed by law, which determined the amount of that fee, on producers and importers of recording and reproduction devices[11] and, second, the fact that that fee was intended to finance fair compensation for holders of reproduction rights for the harm resulting from the failure to comply with those rights.[12] However, according to the Court, 'the fair compensation does not constitute the direct consideration for any supply of services, because it is linked to the harm resulting for those rightholders from the reproduction of their protected works without their authorisation'.[13]

8 In that connection, I take the view that interpretation of Article 24(1) of the VAT Directive, which the referring court mentions in its first question referred for a preliminary ruling, appears unnecessary. See point 43 of this Opinion.

9 In the version of that directive as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1).

10 See judgment in *SAWP* (paragraph 33).

11 See judgment in *SAWP* (paragraph 28).

12 See judgment in *SAWP* (paragraphs 29 and 30).

13 See judgment in *SAWP* (paragraph 30).

38. In the present case, it is therefore crucial to note that my analysis concerns the remuneration of authors for the communication of their works to the public and not fair compensation as redress for the harm resulting from the dissemination of their works. Accordingly, although the determination and collection of that remuneration are governed by law, the applicable rules cannot, from an economic perspective which I will explain in further detail, [14] be equated with those examined by the Court in the judgment in *SAWP*.

39. In those circumstances, I propose that the Court take from that judgment simply the method of analysing the various transactions made between the copyright holders and the end user with the involvement of an organisation responsible for collecting and distributing the fees payable to authors.

40. Thus, with regard to the concept of a 'supply of services', it may be observed, first, as a preliminary point, that, in Article 24(1) of the VAT Directive, that concept is defined only by way of contrast with that of a 'supply of goods'. [15]

41. Second, as the Court made clear in the judgment in *SAWP*, prior to the question whether a supply of services can consist in an assignment of intangible property, it is necessary to assess whether such a transaction is for consideration. Under Article 2(1)(c) of the VAT Directive, for such a transaction to be covered by that directive, it must in any event be made for consideration. [16] In that connection, the Court recalled that it follows from settled case-law that a supply of services is made for consideration, within the meaning of the VAT Directive, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. [17] The Court has held that that is the case if there is a direct link between the service supplied and the consideration received, the sums paid constituting actual consideration for an identifiable service supplied in the context of such a legal relationship. [18]

42. Third, 'Article 25 of the VAT Directive sets out an indicative list of three different transactions that can be classified as supplies of services, including, in Article 25(a), one consisting in the assignment of intangible property'. [19]

43. In the present case, it is established that the transaction at issue in the main proceedings does not constitute a supply of goods within the meaning of Article 14(1) of the VAT Directive.

44. With regard to the legal relationship existing between the copyright holder and the end user, it appears to me to follow from the Romanian legislation that that copyright holder can be classified as a 'service provider', despite the intervention of an intermediary, and that the copyright holder receives remuneration within the meaning of the settled case-law of the

[14] See points 45 to 47 of this Opinion.

[15] See judgment in *SAWP* (paragraph 20).

[16] See judgment in *SAWP* (paragraph 24).

[17] See judgments in *SAWP* (paragraph 25 and the case-law cited) and of 3 July 2019, *UniCredit Leasing* (C-242/18, EU:C:2019:558, paragraph 69 and the case-law cited).

[18] See judgment in SAWP (paragraph 26 and the case-law cited).

[19] Judgment in *SAWP* (paragraph 22).

Court.[20] It may therefore be inferred from that fact that there is reciprocal performance between the copyright holder, who makes his work available to the user, and that user, who pays a royalty to the copyright holder in order to be able to present the work to the public.

45. The referring court has clarified that copyright holders cannot assign their economic rights to organisations which are tasked, on behalf of those right holders, with the collective and mandatory management of the exercise of the right of communication to the public of musical works. It added that, before any use of the protected repertoire of musical works, users must make a written request for authorisation,[21] for a fee, in the form of a non-exclusive licence.

46. In addition, the referring court has set out that royalties are owed to the copyright holders in accordance with the 'methodologies' negotiated with users[22] by the organisation responsible for the collective management of their rights[23] and the royalties are collected and distributed between the right holders in accordance with the decisions taken by the members of the collective management organisation.[24] Even though those decisions are governed by law, the royalties collected are in proportion to the service supplied, as a flat rate or a percentage, as Romania and the Commission explained in their observations before the Court.[25]

47. It follows from the foregoing, in my opinion, that the copyright holder receives actual consideration for the authorisation to communicate his work to the public which he gives to an end user who requested it, regardless of whether the collective management organisation intervenes on behalf of an author who is not one of its members.

48. I likewise take the view that the collective management of the remuneration and its classification as a legal obligation are incapable of calling into question the fact that the author receives remuneration corresponding to the use of his work that he has approved.

49. With regard to the question whether the transaction at issue in the case in the main proceedings can be classified as the 'assignment of intangible property' within the meaning of Article 25(a) of the VAT Directive, it must be observed that, although the same question had been put in the case that gave rise to the judgment in *SAWP*, the Court held that there was no need to examine it because the transaction at issue in that case was not carried out for consideration within the meaning of Article 2(1)(c) of that directive.[26]

50. The Court did, however, state that Article 25 of the VAT Directive sets out an indicative list of three different transactions that can be classified as supplies of services, including, in Article 25(a), one consisting in the assignment of intangible property.[27]

20 See, in this regard, point 41 of this Opinion.

21 Accordingly, the case in the main proceedings, which concerns the communication of musical works to the public, also differs from that which gave rise to the judgment of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80) regarding a similar activity in so far as it consisted in playing music on the public highway. In addition, no remuneration was stipulated (see paragraphs 18 to 20 of that judgment).

22 See, as an illustration of the methods of calculating fees, inter alia, judgment of 11 December 2008, *Kanal 5 and TV 4* (C-52/07, EU:C:2008:703, paragraphs 37 to 40) on royalties which vary according to the revenue of the television broadcasting companies and the amount of music broadcast.

23 It is apparent from the documents before the Court that the collective management organisation is tasked with the collective management not only of the remuneration of authors but also of other rights held by its members. See Article 125(2) of the Copyright Law.

24 See Article 134(2)(a) of the Copyright Law.

25 The Commission referred to Article 131[1](2) of the Copyright Law.

26 See judgment in *SAWP* (paragraphs 31 and 32).

27 See judgment in *SAWP* (paragraph 22).

51. The view could therefore be taken that, in relation to liability to VAT, classification of the supply of services in the light of Article 25 of the VAT Directive is incidental as compared with that required under Article 2(1)(c).

52. However, since the Court added the clause 'even supposing that holders of reproduction rights may effect an assignment of intangible property, within the meaning of Article 25(a) of the VAT Directive' in paragraph 32 of the judgment in *SAWP*, I consider it appropriate to dispel any doubt as to the interpretation of that provision and to clarify, with regard to the transaction at issue in the case in the main proceedings, that it concerns the taxation of a supply of services consisting in an 'assignment of intangible property' within the meaning of Article 25(a) of the VAT Directive.

53. First, a parallel may be drawn with Article 59(a) of the VAT Directive,[28] which refers, inter alia, to 'transfers and assignments of copyrights' in the category of supplies of services for the purpose of defining the place of taxable transactions.

54. Second, it could be argued that, in the judgment of 19 December 2018, *Commission* v *Austria*,[29] the Court drew a distinction, as regards liability to VAT, between, on the one hand, the remuneration from the rights of successive use and exploitation of works other than graphic and plastic works of art and, on the other hand, the royalty payable on the basis of the resale right.[30]

55. Accordingly, the Court held that the remuneration from the rights of successive use and exploitation of works other than graphic and plastic works of art is subject to VAT on the ground that that remuneration payable to their authors pays for a service carried out for consideration, within the meaning of Article 2(1) of the VAT Directive, which corresponds to making those works available repeatedly.[31]

56. Thus, the Court examined the right of exploitation of an intellectual work as an exclusive property right that may be transferred repeatedly. I therefore share the Republic of Poland's view that the concept of the 'assignment of intangible property' covers transactions in the field of intellectual property under which the right to use intangible property is assigned, such as for example transactions relating to licensing.

57. All those elements lead me to propose that the Court answer the first question referred for a preliminary ruling to the effect that Article 2(1)(c) and Article 25(a) of the VAT Directive are to be interpreted as meaning that holders of copyright in musical works supply services, consisting in an assignment of intangible property, to an end user (here: organisers of shows), who are authorised to communicate those works to the public, even though the royalties in consideration for that authorisation are collected, in its name, by a collective management organisation.

58. In the light of the answer to the first question, consideration must be given to the second question submitted by the referring court.

[28] In the version of that directive as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11).

[29] C-51/18, EU:C:2018:1035.

[30] See paragraphs 36, 52 and 56 of that judgment.

[31] See judgment of 19 December 2018, *Commission* v *Austria* (C-51/18, EU:C:2018:1035, paragraph 54, cf. paragraphs 56 and 57).

B. Consideration of the second question

59. The purpose of the second question referred for a preliminary ruling is to classify, for the purposes of liability to VAT, the legal relationships which exist between UCMR – ADA and, first, the users of the rights of communication of musical works to the public and, second, the holders of those rights whose services are supplied through its mediation.

60. The referring court asks, in essence, about the interpretation of Article 28 of the VAT Directive in the light of the criteria determined by the Court in its case-law and about the conclusions that must be drawn therefrom in terms of invoicing on account of the characteristics of the service provided by the collective management organisation at issue, namely, first, the collection of the remuneration for authors, some of whom have not given it general authorisation to manage their rights collectively, and, second, the obligations laid down by law governing the exercise of such management.

61. In order to apply the specific rules to services supplied by a commission agent who takes part in a supply of services, as set out in Article 28 of the VAT Directive, that commission agent must be subject to VAT and must act in his own name but on behalf of another. [32]

62. Furthermore, it must be pointed out that, according to case-law of the Court, that provision creates *the legal fiction of two identical supplies of services* provided consecutively. [33]

63. With regard to the status of a taxable person, I take the view that it may be stated, as the Court held in the judgment of 4 May 2017, *Commission* v *Luxembourg*, [34] that the collective management organisation is a taxable person in its own right, separate from those on whose behalf it acts, namely authors, who are also taxable persons. The transactions between the collective management organisation and those authors must therefore be regarded as transactions between taxable persons which fall within the scope of VAT. [35]

64. With regard to the role performed by UCMR – ADA, I note, first, that the first question referred for a preliminary ruling states that '*collective management organisations … receive* remuneration, *in their own name* but on behalf of … holders [of copyright in musical works], for the public performance of [those] works'. [36]

65. Second, in its request for a preliminary ruling, the referring court stated that, '*where royalties are payable to right holders in accordance with the methodologies negotiated by the collective management organisation with users*, the non-exclusive authorisation granted to a user by the collective management organisation will include the sums […] of money which *the legal person collects in its own name* but on behalf of the holders of the economic rights'. [37]

[32] See judgment in *Henfling and Others* (paragraph 38) which recalls the distinction to be made between a commission agent and an agent. The latter acts *in the name* and on behalf *of another*.

[33] See judgment in *Henfling and Others* (paragraph 35). Emphasis added. See also point 73 of this Opinion.

[34] C-274/15, EU:C:2017:333.

[35] See paragraph 82 of that judgment.

[36] Emphasis added.

[37] Emphasis added. See, by way of comparison, judgment of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraphs 29 and 38) on the resale by a distributor of phonecards in its own name and on its own behalf.

66. Third, the referring court has stated that authors of musical works hold the economic right to authorise or prohibit the communication of the works to the public, whether directly or indirectly, and that that right cannot be assigned to the collective copyright management organisation.

67. Therefore, as the Court held in the judgment in *Henfling and Others*,[38] although it is for the referring court to inquire inter alia as to the nature of the contractual obligations of the trader concerned towards its customers, the proper working of the common VAT system nonetheless requires that court to check *specifically so as to establish whether, in the light of all the facts of the case*, that trader was in fact acting in its own name when supplying its services.[39]

68. In the present case, the referring court should therefore determine the specific circumstances under which the collective management organisation acted, whether for one of its members or not, since no such distinction is laid down in the law providing for its mediation. In that connection, I infer from the written responses to the questions put by the Court that an authorisation for the purposes of civil law is not to be confused with the authorisation given by some authors within the meaning of the Copyright Law.[40] Although the latter does confer the status of member of the collective management organisation, it has no bearing on the relationship between the collective management organisation and the end user in relation to the collection of the royalties payable to the copyright holders in consideration for the use of their musical works for the purpose of their communication to the public.

69. It is for that reason that, with a view to providing an answer of use to the referring court, guidance based on the information submitted to the Court could be provided to the referring court[41] in the light of various criteria, including those listed by the Court in the judgment in *Henfling and Others*.[42]

70. Thus, account could be taken of the mention of the name of the collective management organisation on the documents provided to users when the licence to communicate works to the public is issued as well as the agreement of those users, in accordance with the conditions of use of the licence, to be subject to the regulations of the collective management organisation.

71. Personally, I take the view that the information provided to the Court confirms that, when collecting from the users of musical works the royalties payable to the copyright holders in consideration for the licences granted to them, UCMR – ADA acts not as the agent of the copyright holders, whether or not they are members of that collective management organisation, but in its own name on behalf of those right holders.

72. Since the conditions for application of Article 28 of the VAT Directive appear to me to be met, the conclusions to be drawn from that fact must be explained, with reference to the principles set out by the Court inter alia in the judgment of 4 May 2017, *Commission* v *Luxembourg*.[43]

73. Thus, first, the Court held that, under the legal fiction of two identical supplies of services provided consecutively, which was created by Article 28 of the VAT Directive, 'the operator, who takes part in the supply of services and constitutes the commission agent, is considered to have,

[38] According to my research, this is the only judgment with which the case in the main proceedings may be compared.

[39] See judgment in *Henfling and Others* (paragraphs 40 and 42).

[40] See, in particular, Article 125(2) of that law, cited in point 15 of this Opinion.

[41] Cf. judgment in *Henfling and Others* (paragraph 41).

[42] See paragraph 43 of that judgment.

[43] C-274/15, EU:C:2017:333.

firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself'.[44] Second, the Court found that, 'since Article 28 of [the VAT Directive] comes under Title IV of that directive, entitled 'Taxable transactions', the two supplies of services concerned fall within the scope of VAT. It follows that, if the supply of services in which an operator takes part is subject to VAT, the legal relationship between that operator and the operator on behalf of whom it acts is also subject to VAT'.[45]

74. By way of illustration, it may be stated that, in the case of a 'relationship between an undertaking operating the business of taking bets and an economic operator who takes part in collecting bets in his own name, but on behalf of that undertaking',[46] the Court decided that 'a legal relationship is brought about not directly between the better and the undertaking on behalf of which the operator involved acts, but between that operator and the better, on the one hand, and between that operator and that undertaking, on the other'.[47] However, the respective roles of service provider and payer are notionally inversed for the purposes of VAT.[48]

75. As for the specific consequences of such an interpretation, a question which is raised by the referring court, I share the consistent views communicated to the Court by the interested parties, namely that the collective management organisation collects from the end user amounts corresponding to the royalty due to the author concerned plus its commission,[49] which includes VAT. Since that organisation acts in its own name, the basis for its liability to VAT is, in my view, in accordance with the general principle set out in Article 73 of the VAT Directive, all the amounts collected from the end user in consideration for the assignment of copyright,[50] exclusive of VAT. As Romania and the Republic of Poland point out, in order to collect the royalties payable for the use of musical works, the collective management organisation must issue an invoice in its name for the entertainment organiser.

76. As for the author, who received from the collective management organisation the amount paid by the end user equating to the royalties, after deduction of the commission due to that organisation, including VAT, he is, in my view, taxable on that basis exclusive of VAT. In practice, as Romania, the Republic of Poland and the Commission make clear in their written observations, this should entail the submission of an invoice by the author to the collective management organisation covering the royalties which it has collected[51] and the VAT to which they are subject.

77. That proportion of VAT must be deductible from the taxable base of the collective management organisation, in accordance with Article 168 of the VAT Directive. Thus, that organisation has to repay only the amount corresponding to the proportion of VAT payable on its commission by the author.

44 Judgment of 4 May 2017, *Commission* v *Luxembourg* (C-274/15, EU:C:2017:333, paragraph 86 and the case-law cited).

45 Judgment of 4 May 2017, *Commission* v *Luxembourg* (C-274/15, EU:C:2017:333, paragraph 87 and the case-law cited). See also judgment of 19 December 2019, *Amăraşti Land Investment* (C-707/18, EU:C:2019:1136, paragraph 38).

46 Judgment in *Henfling and Others* (paragraph 27).

47 Judgment in *Henfling and Others* (paragraph 33).

48 Judgment in *Henfling and Others* (paragraph 35).

49 This is the commission due on collection of royalties and deducted from the amount of those royalties. See Article 134(2)(b) and (e) of the Copyright Law, cited in point 20 of this Opinion. See, in this regard, judgment of 24 November 2011, *Circul Globus Bucureşti* (C-283/10, EU:C:2011:772, paragraph 20).

50 I would point out that, in the present case, the words 'assignment of rights' covers the transactions falling within the scope of the exercise of the protected right of representation.

51 See footnote 49.

78. However, I am of the view that an invoice should not be issued in respect of that commission by the collective management organisation to the author, since that commission is not taxed as such, on account of the legal fiction applied on the basis of Article 28 of the VAT Directive.

79. In those circumstances, the principle of fiscal neutrality, which is an essential principle in VAT matters, appears to me to be entirely observed, since that tax is borne by the end user, [52] who has paid it to the collective management organisation on the transaction as a whole, and the VAT is repaid respectively by that organisation and by the author.

80. If that were not the case, that is to say, if the collective management organisation were to act in the name of the copyright holders, the amount collected in consideration for the mediation transaction alone would constitute the taxable amount for that organisation.

81. In such circumstances, this is a taxable transaction like any supply of services, in accordance with Article 2(1)(c) of the VAT Directive. The copyright holder must then repay the VAT collected by the collective management organisation from an end user. He deducts the VAT payable to that organisation in respect of the mediation transaction for which that organisation has invoiced him.

82. In the light of all those factors, it is my view that the question put by the referring court may be answered to the effect that Article 28 of the VAT Directive is to be interpreted as meaning that, provided that a collective management organisation takes part, in its own name but on behalf of holders of copyright in musical works, in the collection of the royalties due to those right holders in consideration for the authorisation to use their works for a public audience, those right holders are regarded as providing that service to the collective management organisation and that organisation is regarded as providing the same service to the end user. In such a situation, the collective management organisation issues invoices in its name to the end user which list all the amounts collected from that end user, including VAT. The copyright holders should issue invoices including VAT for the service provided in connection with those royalties to the collective management organisation for the purpose of deducting that tax.

V. Conclusion

83. In the light of the foregoing considerations, I propose that the questions referred for a preliminary ruling by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) should be answered as follows:

(1) Article 2(1)(c) and Article 25(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax are to be interpreted as meaning that holders of copyright in musical works supply services, consisting in an assignment of intangible property, to an end user (here: organisers of shows), who are authorised to communicate those works to the public, even though the royalties in consideration for that authorisation are collected, in its name, by a collective management organisation.

(2) Article 28 of Directive 2006/112 is to be interpreted as meaning that, provided that a collective management organisation takes part, in its own name but on behalf of holders of copyright in musical works, in the collection of the royalties due to those right holders in consideration for the authorisation to use their works for a public audience, those right holders are regarded as

[52] See, inter alia, judgment of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraphs 23 to 25).

providing that service to the collective management organisation and that organisation is regarded as providing the same service to the end user. In such a situation, the collective management organisation issues invoices in its name to the end user which list all the amounts collected from that end user, including VAT. The copyright holders should issue invoices including VAT for the service provided in connection with those royalties to the collective management organisation for the purpose of deducting that tax.