Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 October 2023 *

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Supply of services for consideration – Concept – Activities of a public radio and television body financed by a compulsory fee paid by persons in possession of a radio and television receiver in the terrestrial broadcasting area – Article 378(1) and point 2 of Part A of Annex X – Act of accession of the Republic of Austria – Derogation – Scope)

In Case C-249/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 16 March 2022, received at the Court on 11 April 2022, in the proceedings

BM

v

Gebühren Info Service GmbH (GIS),

interveners:

Bundesministerium für Finanzen,

Österreichischer Rundfunk,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, F. Biltgen, M. Ilešič, I. Jarukaitis and D. Gratsias (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2023,

after considering the observations submitted on behalf of:

– BM, by F. List, Rechtsanwältin, and W. List, Rechtsanwalt,

* Language of the case: German.

– Gebühren Info Service GmbH (GIS), by S. Lenzhofer, Rechtsanwalt,

– the Österreichischer Rundfunk, by T. Wenger and H. Wollmann, Rechtsanwälte,

– the Austrian Government, by A. Posch, F. Koppensteiner and B. Kuder, acting as Agents,

– the Danish Government, by J.F. Kronborg and V. Pasternak Jørgensen, acting as Agents,

– the French Government, by R. Bénard, acting as Agent,

– the European Commission, by J. Jokubauskaitė and B. Martenczuk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(c) and Article 378(1) 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'), read in conjunction with Article 151(1) and the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1; 'the Act of Accession').

2 The request has been made in proceedings between BM and Gebühren Info Service GmbH (GIS) concerning BM's application to GIS for reimbursement of value added tax (VAT) on the programme fee for the period from 1 October 2013 to 31 October 2018.

Legal context

European Union law

The Act of Accession

3 Article 151(1) of the Act of Accession provides:

'The Acts listed in Annex XV to this Act shall apply in respect of the new Member States under the conditions laid down in that Annex.'

4 Annex XV to the Act of Accession contains Part IX, entitled 'Taxation', point 2 of which is worded as follows:

'377 L 0388: Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ [1977 L 145], p. 1), as last amended by:

– *394 L 0005*: Council Directive 94/5/EC of 14 February 1994 (OJ [1994 L 60], p. 16).

Austria

…

(h) For the purposes of applying Article 28(3)(a), the Republic of Austria may tax:

…

– the transactions listed in point 7 of Annex E.

…'

The VAT Directive

5 Directive 77/388 ('the Sixth Directive') was repealed pursuant to Article 411(1) of the VAT Directive. Paragraph 2 of that article provides that references to the Sixth Directive are to be construed as references to the VAT Directive and are to be read in accordance with the correlation table in Annex XII to that directive.

6 Article 1(1) of that directive provides:

'This Directive establishes the common system of [VAT].'

7 Article 2(1)(c) of the VAT Directive provides that the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

8 According to the correlation table in Annex XII to the VAT Directive, Article 132(1)(q) of that directive corresponds to Article 13A(1)(q) of the Sixth Directive. It provides that Member States are to exempt 'the activities, other than those of a commercial nature, carried out by public radio and television bodies'.

9 Article 370 of that directive, which corresponds to Article 28(3)(a) of the Sixth Directive, provides:

'Member States which, at 1 January 1978, taxed the transactions listed in Annex X, Part A, may continue to tax those transactions.'

10 Article 378(1) of that directive, which corresponds to the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to the Act of Accession, provides:

'Austria may continue to tax the transactions listed in point (2) of Annex X, Part A.'

11 Point 2 of Part A of Annex X to the VAT Directive refers to 'the activities, other than those of a commercial nature, carried out by public radio and television bodies'. Those activities were previously referred to in point 7 of Annex E to the Sixth Directive.

Austrian law

The RGG

12 Under Paragraph 2(1) of the Bundesgesetz betreffend die Einhebung von Rundfunkgebühren (Federal Law on the levying of broadcasting fees, BGBl. I, 159/1999), in the version applicable to the dispute in the main proceedings ('the RGG'), any person who operates a broadcast receiver in a building must pay the fee provided for in Paragraph 3 of the RGG ('the broadcasting fee'). The possession of an operational broadcast receiver is deemed to be equivalent to the use of such a receiver.

13 Paragraph 4(1) of the RGG provides that the broadcasting fee and all other related taxes and dues are to be collected by GIS, which is also responsible for deciding on applications for exemption in that connection.

The ORF-G

14 Paragraph 1(1) of the Bundesgesetz über den Österreichischen Rundfunk (Federal Law on the Österreichischer Rundfunk, BGBl. 379/1984), in the version applicable to the dispute in the main proceedings (BGBl. I, 55/2014) ('the ORF-G'), established a foundation governed by public law called the Österreichischer Rundfunk (Austrian Broadcasting Corporation; 'the ORF').

15 Paragraph 31 of the ORF-G, entitled 'Programme fee', provides, in subparagraphs 1, 10 and 17:

'(1) All persons are entitled to receive ORF radio and television programmes on payment of a continuous programme fee (radio fee, television fee). The amount of the programme fee is set by the Board of Trustees at the request of the Director-General. …

…

(10) The programme fee is payable irrespective of the frequency and quality of the broadcasts or their reception provided that the broadcast user (Paragraph 2(1) of the RGG) is supplied with ORF programmes by terrestrial means (analogue or DVB-T) at his or her location … The commencement and termination of the obligation to pay the programme fee and exemption from that obligation shall be governed by the provisions of federal law applicable to broadcasting fees.

…

(17) The programme fee shall be collected at the same time and in the same manner as the licence fee; any other form of payment shall not discharge the debt.'

The UStG

16 Paragraph 1(1) of the Bundesgesetz über die Besteuerung der Umsätze (Federal law on turnover tax, BGBl. 663/1994), in the version applicable to the dispute in the main proceedings ('the UStG 1994'), provides:

'The following transactions are subject to turnover tax:

1. the supply of goods and services for consideration within the national territory by a trader in the course of his or her business. Transactions are not excluded from taxation where they are carried out pursuant to statute or an order of an authority or are deemed to be carried out under statutory provisions;

…'

17 Paragraph 10 of the UStG 1994, entitled 'Tax rates', states:

'(1) The rate of tax shall be 20% of the taxable amount in respect of every taxable transaction (Paragraphs 4 and 5).

(2) The rate of tax shall be reduced to 10% for

…

5. services provided by broadcasting companies, in so far as they give rise to radio and television broadcasting fees, and other services provided by cable television companies in so far as they consist in the simultaneous, complete and unaltered transmission of national and foreign radio and television programmes made available to the public through channels in return for a continuous fee;

…'

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

18 BM is registered with GIS to use broadcasting services in an area where ORF supplies digital terrestrial programmes which can be received by means of an internal antenna.

19 On 23 October 2018, BM requested GIS to issue a decision declaring that she was entitled to reimbursement of the total amount of EUR 100.57, equal to the VAT on the programme fee which she was required to pay under Paragraph 31(1) of the ORF-G, for the period from 1 October 2013 to 31 October 2018. In support of her application, BM claimed, in essence, that the imposition of VAT on the programme fee was contrary to the VAT Directive, read in the light of the judgment of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470).

20 GIS adopted a decision rejecting BM's application. BM brought an action challenging that decision before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), which was dismissed. BM brought an appeal on a point of law ('*Revision*') against the judgment of the Bundesverwaltungsgericht (Federal Administrative Court) before the referring court.

21 The referring court states that GIS is responsible for collecting both the broadcasting fee and the programme fee. However, whereas the broadcasting fee is payable by any broadcast user who operates or has in his or her possession an operational broadcast receiving device such as a television set or a radio, regardless of the place of reception, the programme fee, which is the only one subject to VAT, is payable only if the place of reception is within the terrestrial broadcasting area for ORF programmes.

22 In that regard, the referring court notes that, in a judgment of 4 September 2008, it had held that the programme fee was payable only if the person concerned had a device enabling him or her to actually receive ORF programmes. In 2011, following that judgment, Paragraph 31(10) of the ORF-G was amended by the addition of the words 'provided that the broadcast user (Paragraph 2(1) of the RGG) is supplied with ORF programmes by terrestrial means (analogue or DVB-T) at his or her location'. It is apparent from the statement of reasons for that amendment that the possession of specific technical equipment which makes it possible to receive ORF programmes, if necessary after a minor adaptation, such as the acquisition of a digital reception module for television programmes, is decisive for the obligation to pay the programme fee. On the other hand, where the programmes can be received only by means of complex or costly measures, there is no obligation to pay that fee. It is thus possible that a broadcast user may be required to pay only the broadcasting fee, where he or she has a television or radio set which is not in an area in which ORF programmes can be received by terrestrial means.

23 The referring court considers that the circumstances of the present case are different from those of the case which gave rise to the judgment of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470). First, under Austrian law, there is, by virtue of a legislative fiction, a contractual relationship under civil law between the broadcast user and the ORF.

24 Second, ORF programmes are encrypted and receiving them requires a reception module which complies with digital television standards (DVB-T, DVB-S or DVB-C), or the conclusion of a contract with a cable television operator offering ORF programmes in its package. It could thus be argued that by acquiring such equipment or concluding such a contract, broadcast users express their intention to avail themselves of their right to receive ORF programmes, which establishes a legal relationship between those users and ORF. Relying, by analogy, on the judgment of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200), the referring court takes the view that the frequency with which ORF programmes are actually watched or listened to by a broadcast user is, in that regard, irrelevant.

25 In addition, the referring court states that Austrian tax law already provided, before the accession of the Republic of Austria to the European Union, for the levying of VAT at a reduced rate on the services provided by broadcasting companies, in so far as they are subject to radio and television broadcasting fees. According to the referring court, it is apparent from the documents relating to the negotiations for the accession of the Republic of Austria to the Union that the objective of the derogation granted to the Republic of Austria under point 2(h) of Part IX of Annex XV to the Act of Accession was to authorise the Republic of Austria to maintain that tax after its accession to the Union.

26 In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Taking into account the primary law provision of Paragraph 151(1) in conjunction with Annex XV, Part IX, No 2, letter h, first subparagraph, second indent, of the Act [of Accession], must consideration such as the programme fee of [the ORF], which the public service broadcaster sets itself in order to finance its operation, be regarded as consideration within the meaning of Article 2 in conjunction with Article 378(1) of [the VAT Directive]?

(2) If Question 1 is answered in the affirmative, must the ORF programme fee referred to therein also be regarded as consideration within the meaning of [the VAT Directive] in so far as persons are obliged to pay it who, although they operate a broadcast receiver in a building which is supplied by the ORF with its terrestrial programmes, cannot receive those ORF programmes because they do not have the necessary receiver module?’

Consideration of the questions referred

27 As a preliminary point, it should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between referring courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and will enable the referring court to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (judgment of 14 September 2023, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, C-27/22, EU:C:2023:663, paragraph 79 and the case-law cited).

28 In the present case, the dispute in the main proceedings stems from an application addressed to the GIS seeking reimbursement of VAT on the ORF programme fee allegedly paid in breach of EU law and, more specifically, of the provisions of the VAT Directive. It is apparent, moreover, from the request for a preliminary ruling that, whereas, in the wording of the questions referred, the referring court focuses specifically on the concept of the supply of services effected ‘for consideration’, a concept which is expressly provided for in Article 2(1)(c) of the VAT Directive and not in Article 378(1) thereof, the referring court ultimately seeks, more generally, an answer from the Court on the compatibility of the VAT thus paid with the provisions of that directive, in particular in the light of the derogation provided for in Article 378(1), allowing the Republic of Austria to continue to tax certain transactions.

29 In those circumstances, it must be held that, by its questions, which should be examined together, the referring court asks, in essence, whether Article 2(1)(c) and Article 378(1) of the VAT Directive, read in conjunction with Article 151(1) and the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to the Act of Accession, must be interpreted as precluding the Republic of Austria from imposing VAT on a public broadcasting activity, financed by a compulsory statutory fee and paid by any person operating a broadcast receiver in a building within the terrestrial broadcasting area of the public broadcasting body concerned.

30 At the outset, it must be recalled that the VAT Directive establishes a common system of VAT based on, inter alia, a uniform definition of taxable transactions (judgment of 13 June 2018, *Gmina Wrocław*, C-665/16, EU:C:2018:431, paragraph 30 and the case-law cited).

31 Accordingly, under Article 2(1)(c) of the VAT Directive, which appears under Title I of that directive, entitled 'Subject matter and scope', the supply of services for consideration within the territory of a Member State by a taxable person acting as such are to be subject to VAT.

32 In that regard, it is settled case-law that taxable transactions presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. Thus, where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT (judgment of 22 June 2016, *Český rozhlas*, C-11/15, EU:C:2016:470, paragraph 20 and the case-law cited).

33 It follows therefrom that a supply of services is effected 'for consideration' within the meaning of Article 2(1)(c) of the VAT Directive, and hence is taxable, 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. In that context, the Court has repeatedly held that the concept of 'supply of services for consideration', within the meaning of Article 2(1)(c), presupposes the existence of a direct link between the service supplied and the consideration received (see, to that effect, judgment of 22 June 2016, *Český rozhlas*, C-11/15, EU:C:2016:470, paragraphs 21 and 22 and the case-law cited).

34 Where an activity is classified as a transaction effected 'for consideration' within the meaning of that provision, it falls, on that basis, within the scope of the VAT Directive. By contrast, an activity which is not classified as such does not fall within the scope of that directive (see, to that effect, judgment of 22 June 2016, *Český rozhlas*, C-11/15, EU:C:2016:470, paragraphs 34 and 36).

35 Although Article 132(1)(q) of the VAT Directive provides for the exemption of 'activities, other than those of a commercial nature, carried out by public radio and television bodies', that provision is nevertheless applicable only on the condition that those activities should be 'subject to VAT' within the meaning of Article 2(1) of the VAT Directive and is not to be interpreted as extending the scope of application of that directive, as defined in Article 2 (see, to that effect, judgment of 22 June 2016, *Český rozhlas*, C-11/15, EU:C:2016:470, paragraph 32).

36 However, Article 378(1) of the VAT Directive, which reflects the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to the Act of Accession, allows the Republic of Austria to derogate from those provisions by giving that Member State the option to continue to tax the transactions listed in point 2 of Part A of Annex X to that directive, which refers to the activities, other than those of a commercial nature, carried out by public radio and television bodies.

37 As the Court has already held, the retention of that derogation reflects the gradual and still partial harmonisation of national VAT legislation. The harmonisation envisaged has not yet been achieved in so far as derogating provisions, such as Article 378 of the VAT Directive, authorise the Member States to retain certain provisions of their national legislation which would, without those authorisations, be incompatible with that directive (see, by analogy, judgment of 13 March 2014, *Jetair and BTWE Travel4you*, C-599/12, EU:C:2014:144, paragraph 48 and the case-law cited).

38 That said, the option provided for in Article 378(1) of the VAT Directive is granted by way of derogation, pursuant to Article 151(1) and of the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to the Act of Accession, subject to compliance with the

conditions specific to those provisions. It is therefore appropriate to examine how far that derogation extends in order to determine whether the tax at issue in the main proceedings falls within its scope.

39 In interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part.

40 Furthermore, it is settled case-law that, where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (judgment of 7 March 2018, *Cristal Union*, C-31/17, EU:C:2018:168, paragraph 41 and the case-law cited).

41 In the present case, as regards the wording of Article 378(1) of the VAT Directive, as is apparent from paragraph 36 above, that provision, read in conjunction with point 2 of Part A of Annex X to that directive, authorises the Republic of Austria to 'continue to tax' the activities, other than those of a commercial nature, carried out by public radio and television bodies.

42 Therefore, according to the wording of that provision, the Republic of Austria is authorised only to maintain an existing system of taxation of the abovementioned activities and not to introduce new taxation of those activities (see, by analogy, judgment of 2 May 2019, *Grupa Lotos*, C-225/18, EU:C:2019:349, paragraph 31 and the case-law cited).

43 In so far as that provision refers specifically to the taxation of those activities by the Republic of Austria on the date of its accession to the European Union, the arrangements for that taxation since that date must have remained essentially unchanged in order for that taxation to continue to be covered by the derogation provided for in Article 378(1) of the VAT Directive.

44 In that regard, it is apparent from the information submitted to the Court that the national legislation providing for the programme fee was amended in 2011, with the result that, from now on, that fee must be paid provided that the broadcast user is supplied with ORF programmes by terrestrial means at his or her location, even if that person has not made the necessary minor adjustments to his or her equipment in order to be able to receive ORF digital television programmes.

45 It is apparent from the information provided by the referring court that that legislative amendment merely took account of technological innovations which had occurred in the meantime, without altering the event giving rise to the obligation to pay the programme fee in relation to what it was on the date of the Republic of Austria's accession to the European Union.

46 As regards the objective pursued by Article 378(1) of the VAT Directive, as is apparent from Annex XII to that directive, that provision is intended to implement the derogation granted to the Republic of Austria under Article 151(1) of the Act of Accession, read in conjunction with the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to that act. However, it is apparent from the documentation relating to the negotiations prior to the accession of the Republic of Austria to the European Union, relied on by GIS, ORF, the Republic of Austria and the European Commission, that the Republic of Austria had applied for a derogation allowing it to continue to impose VAT on the activities, other than those of a commercial nature, carried out by public radio and television bodies and that the Member States of the Union approved that request.

47 The factors mentioned in paragraphs 41 to 46 of the present judgment lead to Article 378(1) of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, being interpreted as meaning that that provision allows the Republic of Austria to continue to subject the programme fee to VAT.

48 Such an interpretation is, moreover, the only one capable of retaining the effectiveness of that provision, in accordance with the case-law cited in paragraph 40 of the present judgment.

49 It is apparent from the order for reference that, on the date of its accession to the European Union, the Republic of Austria imposed VAT on the activities, other than those of a commercial nature, carried out by the public radio and television body by levying that tax on the programme fee. Thus, in so far as Article 378(1) of the VAT Directive authorises the Republic of Austria only to 'continue to tax' such activities and not to introduce new taxation, to interpret that provision as not authorising the levying of VAT on the programme fee would render that provision meaningless.

50 The judgment of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470, paragraph 32), in which the Court held that Article 13(A)(1)(q) of the Sixth Directive, which is drafted in identical terms to Article 132(1)(q) of the VAT Directive, provides for the exemption of 'the activities, other than those of a commercial nature, carried out by public radio and television bodies', cannot lead to a different assessment unless those activities are 'subject to VAT', in accordance with Article 2 of the Sixth Directive, which corresponds to Article 2 of the VAT Directive and, therefore, Article 13(A)(1)(q) of the Sixth Directive cannot be interpreted in such a way as to extend the scope of the Sixth Directive.

51 It is sufficient to point out, in that regard, that, in the case which gave rise to the judgment of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470), the Court did not have to interpret a derogating provision such as, in the present case, Article 378(1) of the VAT Directive. It is in the nature of such a provision to introduce exceptions to the scope of the rules of which it forms part. The taxation permitted by that provision is not harmonised taxation which forms an integral part of the VAT system as arranged by the VAT Directive. On the contrary, the option provided for in the VAT directive allows the Republic of Austria to maintain its legislation on the taxation of the services concerned, without the differences which may result between it and other Member States being contrary to EU law (see, by analogy, judgments of 7 December 2006, *Eurodental*, C-240/05, EU:C:2006:763, paragraph 52 and the case-law cited, and of 13 March 2014, *Jetair and BTWE Travel4you*, C-599/12, EU:C:2014:144, paragraphs 46 and 50).

52 In the light of all the foregoing considerations, the answer to the questions referred is that Article 2(1)(c) and Article 378(1) of the VAT Directive, read in conjunction with Article 151(1) and the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to the Act of Accession, must be interpreted as not precluding the Republic of Austria from imposing VAT on a public broadcasting activity, financed by a compulsory statutory fee and paid by any person operating a broadcast receiver in a building within the terrestrial broadcasting area of the public broadcasting body concerned, irrespective of whether the public broadcasting activity concerned is covered by the concept of a 'supply of services for consideration' within the meaning of Article 2(1)(c) of the VAT Directive.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

Article 2(1)(c) and Article 378(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 151(1) and the second indent of the first subparagraph of point 2(h) of Part IX of Annex XV to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded

must be interpreted as not precluding the Republic of Austria from imposing value added tax on a public broadcasting activity, financed by a compulsory statutory fee and paid by any person operating a broadcast receiver in a building within the terrestrial broadcasting area of the public broadcasting body concerned, irrespective of whether the public broadcasting activity concerned is covered by the concept of a 'supply of services for consideration' within the meaning of Article 2(1)(c) of Directive 2006/112.

[Signatures]