



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 September 2024¹

Case C-573/22

**A,
B,
Foreningen C
v
Skatteministeriet**

(Request for a preliminary ruling from the Østre Landsret (High Court of Eastern Denmark, Denmark))

(Reference for a preliminary ruling – Common system of value added tax – Directive 2006/112/EC – Article 370 and point 2 of Part A of Annex X – Derogation – Scope – Activities of public radio and television bodies financed by a compulsory fee paid by owners of equipment for the reception of radio and television broadcasts)

Introduction

1. Denmark's radio and television licence fee lasted for almost a century. Introduced in 1926 as a radio licence fee, it subsequently underwent many transformations; at the time when it was finally abolished in 2022, it was referred to as the media licence (*'medielicens'*) fee.
2. That fee, however, remains controversial from at least one point of view, namely the lawfulness of charging value added tax (VAT) on it. After VAT was introduced in Denmark in 1967, it was levied on amounts paid in respect of the radio and television licence fee.
3. From the point of view of EU law, this was justified under a derogation from the common VAT rules similar to the derogation examined by the Court in the case that gave rise to the judgment in *GIS*.² In the present case, however, the question arises as to whether, in view of the changes that the Danish radio and television licence fee has undergone during its existence, the conclusions of that judgment can be fully applied to it. Indeed, those changes mean that it is not possible to apply the abovementioned judgment directly to this case, and some clarifications will be necessary as to its effects in the circumstances of the present case.

¹ Original language: Polish.

² Judgment of 26 October 2023 (C-249/22, 'the judgment in *GIS*', EU:C:2023:813).

Legislative framework

European Union law

4. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax³ 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’.

5. Article 132(1)(q) of that directive provides:

‘Member States shall exempt the following transactions:

...

(q) the activities, other than those of a commercial nature, carried out by public radio and television bodies’.

6. Article 370 of that directive provides:

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

7. Finally, Annex X to Directive 2006/112, Part A, entitled ‘Transactions which Member States may continue to tax’, lists in point 2 ‘the activities of public radio and television bodies other than those of a commercial nature’.

Danish law

8. The radio licence fee was introduced into Danish law in 1926, and in 1951 it became the radio and television licence fee. Under lov nr. 421 om radio- og fjernsynsvirksomhed (Law No 421 on Radio and Television Activities) of 15 June 1973, it was defined as a ‘fee for the use of radio and television sets’.

9. Under the Law of 27 December 1996 amending the Law on Radio and Television Activities, revenue from that fee could be used to finance not only the activities of public radio and television broadcasters, but also ‘any other media-related purposes’.

10. By way of another amendment to the Law on Radio and Television Activities, dated 20 December 2006, the audiovisual part of the licence fee was renamed the ‘media licence fee’, which was levied on any device ‘capable of receiving and playing audiovisual programmes or services broadcast to the public’.

³ OJ 2006 L 347, p. 1.

11. The licence fee started to be phased out from 2013, before being finally abolished on 1 January 2022 under the Law of 18 December 2018 amending the Law on Radio and Television Activities.

Facts, procedure and questions referred

12. A and B (individuals) and Foreningen C (a group of individuals bringing a class action) brought proceedings before the referring court against the Skatteministeriet (Ministry of Finance, Denmark) for reimbursement of the amounts they paid as VAT on the media licence fee for the years 2007–2017. Those actions are primarily based on the claim that since the media licence fee does not constitute remuneration for a supply of services for consideration within the meaning of Article 2(1)(c) of Directive 2006/112, VAT on that licence fee is charged in breach of the directive and should be reimbursed. As an ancillary argument, the applicants in the main proceedings claim that even if the collection of VAT on the media licence fee were considered legal in principle under Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, the changes to the licensing system that occurred after 1 January 1978 fundamentally altered its nature, making it impossible to invoke the standstill clause contained in that provision.

13. The referring court regards it as indisputable that the media licence fee does not constitute remuneration for a supply of services for consideration within the meaning of Article 2(1)(c) of Directive 2006/112, in accordance with the findings of the judgment in *Český rozhlas*.⁴ However, the referring court has doubts about the applicability of Article 370 of that directive.

14. In view of the above, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 370 [of Directive 2006/112], read in conjunction with point 2 of [Part A of Annex X to the directive], to be interpreted as permitting the Member States concerned to impose VAT on a statutory media licence fee to finance the non-commercial activities of public radio and television bodies, notwithstanding the absence of a “supply of services for consideration” within the meaning of Article 2(1) of that directive?

If Question 1 is answered in the affirmative, the Court of Justice is asked to answer the following questions referred for a preliminary ruling:

(2) Is Article 370 [of Directive 2006/112], read in conjunction with point 2 of [Part A of Annex X to the directive], to be interpreted as meaning that a Member State’s option to impose VAT on a statutory media licence fee as specified in Question 1 may be maintained if, after the entry into force, on 1 January 1978, of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [⁵], the Member State has altered the licensing system from charging a licence fee for possessing radio and television equipment to charging a licence fee for possessing any device which can receive audiovisual programmes and services directly, including smartphones, computers, [and so forth]?

⁴ Judgment of 22 June 2016 (C-11/15, EU:C:2016:470).

⁵ OJ 1977 L 145, p. 1.

(3) Is Article 370 [of Directive 2006/112], read in conjunction with point 2 of [Part A of Annex X to the directive], to be interpreted as meaning that a Member State's option to impose VAT on a statutory media licence fee as specified in Question 1 may be maintained if, after the entry into force, on 1 January 1978, of [Directive 77/388], the Member State has altered the licensing system so that a smaller proportion of the licence fee resources will, at the discretion of the Minister for Culture, be used to finance (i) radio and television bodies which receive public subsidies but are not themselves public, and (ii) media and film organisations which contribute to but do not themselves carry out radio and television activities?'

15. The request for a preliminary ruling was lodged with the Court on 26 August 2022. Written observations were submitted by the applicants in the main proceedings, the Danish and French Governments, and the European Commission. Those parties were represented at the hearing held on 14 March 2024.

16. On 26 October 2023, the Court delivered the judgment in *GIS*.

Analysis

17. The referring court referred three questions to the Court in the present case.

18. By its first question, the referring court essentially seeks to determine whether Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, should be interpreted as permitting VAT to be charged on a fee intended to finance the activities of public radio and television bodies, such as the Danish media licence fee, even though that fee does not constitute remuneration for a supply of services for consideration within the meaning of Article 2(1)(c) of that directive.

19. In my opinion, the answer to that question follows directly from the judgment in *GIS*. Although the judgment in *GIS* concerns Article 378(1) of Directive 2006/112, that provision introduces a derogation for Austria that is essentially identical to the derogation contained in Article 370 of the directive, and is applicable to countries that were members of the European Community before 1 January 1978. Additionally, Article 378 of the directive concerns the activities specified in point 2 of Part A of Annex X to the directive, and therefore the same type of activity as the activity at issue in the present case. Moreover, the Danish media licence fee is a fee of the same type as the fee referred to in the operative part of the judgment in *GIS*. Therefore, the interpretation of Article 378 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, adopted in the judgment in *GIS* can be applied directly in the context of the first question referred in the present case.

20. In view of the above, and in accordance with the Court's wishes, I shall limit my considerations in this Opinion, as well as the proposed answers, to the two remaining questions referred.

Second question referred

21. By its second question, the referring court essentially seeks to determine whether Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, is to be interpreted as being applicable to the taxation of the activities of public radio and television

bodies financed by a statutory fee paid by owners of devices capable of receiving programmes broadcast by those bodies in a situation where, after 1 January 1978, the licensing system was altered so that the fee is levied not only in connection with the ownership of a radio or television set, as was originally the case, but also in connection with the ownership of any other device that can be used to receive those programmes, such as smartphones, computers, and so forth, which potentially increases the number of entities obliged to pay the fee.

22. To my mind, the answer to that question must be affirmative.

23. It follows, by analogy, from the judgment in *GIS*, that the relevant provision of Directive 2006/112 authorises the Member States indicated therein, which include Denmark,⁶ to maintain in force the system of taxation of the activities of public radio and television bodies that existed on 1 January 1978, with the proviso that the conditions of that taxation should remain essentially unchanged.⁷ This does not, however, preclude the introduction of changes to that system which are limited to taking account of the technological innovations that have occurred in the meantime, without altering the event giving rise to the obligation to pay the fee to finance that activity.⁸

24. Those principles derive from the case-law of the Court, according to which, in essence, when applying the standstill clauses included in Directive 2006/112,⁹ Member States are not entitled to extend the scope of derogations from the general rules of the common VAT system but may adapt their national legislation to new circumstances.¹⁰

25. The change to the Danish media licence fee system discussed in this analysis of the second question referred consisted in extending the obligation to pay the fee, which originally applied only to owners of radio and television sets, to owners of other devices that can be used to receive radio and television programmes, such as computers, smartphones, and so forth. That change was associated with technological developments that allowed radio and television programmes to be received using devices other than dedicated receivers.

26. However, that change did not extend the scope of the derogation established by Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive. That provision allows the taxation of the activities of public radio and television bodies to remain in force. Under a system such as the Danish system of taxation, this is done by charging VAT on the statutory fee that finances the operations of those public radio and television bodies. The fee at issue in the present case, that is to say, the media licence fee, is used to finance the activities of public radio and television bodies irrespective of the number of entities obliged to pay it. Thus, from the point of view of the relevant provisions of Directive 2006/112, the situation remains unchanged, since from that point of view, it is the purpose of the revenue from the fee that is relevant rather than its source.

⁶ See point 19 of this Opinion.

⁷ The judgment in *GIS* (paragraphs 42 and 43).

⁸ See, to that effect, the judgment in *GIS* (paragraphs 45 and 47).

⁹ Or in the preceding Directive 77/388.

¹⁰ See, to that effect, judgment of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraph 31 and the case-law cited), as well as the judgment in *GIS* (paragraph 42).

27. That conclusion is not changed by the circumstance pointed out by the referring court, namely that the expansion of the category of devices giving rise to the obligation to pay the media licence fee has at the same time led to an increase in the number of entities obliged to pay the fee. Indeed, Article 370 of Directive 2006/112 does not contain any requirement that the actual tax base allowed under that provision must remain unchanged.

28. The argument raised by the applicants in the main proceedings and by the Commission that, unlike in the case of radio and television sets, the reception of radio and television programmes is not the main function of devices such as computers and smartphones is also misplaced.

29. In the judgment in *Český rozhlas*, the Court held that a fee similar to the media licence fee at issue in the present case does not constitute remuneration for the supply of services by public broadcasters, on the grounds that, inter alia, the obligation to pay is linked to the possession of a specific device irrespective of the manner in which it is actually used.¹¹ Therefore, taxation under Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, is not harmonised taxation that is an integral part of the common VAT system, but constitutes a derogation from the application of that system.¹² Thus, for taxation on that basis to be lawful, it is not necessary for there to be any connection between the manner of using the devices, the possession of which gives rise to the obligation to pay the amounts constituting the basis for the taxation, and the taxed activity, that is to say, the activity of public radio and television bodies.

30. In view of the foregoing, I propose that the answer to the second question referred for a preliminary ruling should be that Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, is to be interpreted as being applicable to the taxation of the activities of public radio and television bodies financed by a statutory fee paid by owners of devices capable of receiving programmes broadcast by those bodies in a situation where, after 1 January 1978, the licensing system was altered so that the fee is levied not only in connection with the ownership of a radio or television set, as was originally the case, but also in connection with the ownership of any other device that can be used to receive those programmes, such as smartphones, computers, and so forth, even if this potentially increases the number of entities obliged to pay that fee.

Third question referred

31. By its third question, the referring court essentially seeks to determine whether Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, is to be interpreted as being applicable to the taxation of the activities of public radio and television bodies financed by a statutory fee paid by owners of devices capable of receiving programmes broadcast by those bodies in a situation where, after 1 January 1978, the licensing system was altered so that a small portion of the revenue from that fee may be used to finance the activities of entities other than public radio and television broadcasters.

32. According to the information contained in the request for a preliminary ruling, in the years 2007–2017 a small portion of media licence fee revenue (not exceeding 5%) was used to finance entities other than public radio and television broadcasters. Those entities included, in particular, one radio broadcaster, which, although it is a private entity, has a public service remit,

¹¹ Judgment of 22 June 2016 (C-11/15, EU:C:2016:470, paragraphs 26 and 28).

¹² See, by analogy, the judgment in *GIS* (paragraph 51).

is subject to similar legal restrictions as public broadcasters, and is largely financed by revenue from the media licence fee; the Danske Filminstitut (Danish Film Institute), whose role is to financially support film production in cooperation with public radio and television broadcasters; and also a film school for children and young people run by a foundation whose founders include, among others, public radio and television broadcasters.

33. It is in this context that the third question should be analysed, as the media licence fee was finally abolished on 1 January 2022, and thus it will not be possible to allocate the revenues from the fee for purposes other than those indicated above. Therefore, this is not an abstract evaluation of the provisions of Danish law on the media licence fee, but an evaluation of those provisions in the light of their actual application during the period covered by the dispute in the main proceedings.

34. Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, allows the Member States indicated therein to continue to tax the activities, other than those of a commercial nature, carried out by public radio and television bodies. The origin of that provision, as discussed in detail by the referring court in its request for a preliminary ruling, indicates that its purpose is to allow the taxation of the activities of radio and television bodies financed by a statutory fee such as a media licence fee by those Member States which, prior to the entry into force of Directive 77/388, regarded such activities as taxable, even though they were not performed for consideration.

35. The provision should be interpreted in the light of that purpose and in a manner that ensures its effectiveness.¹³ On this interpretation it must, in my opinion, be recognised that the notion of ‘activities, other than those of a commercial nature, carried out by public radio and television bodies’ within the meaning of the relevant provision of Directive 2006/112 is identical to the notion of activities financed by a statutory fee such as the media licence fee at issue in the present case. Indeed, the essence of the derogation provided for in that provision is to allow Member States to charge VAT on such a fee.¹⁴

36. From that point of view, the fact that a small portion of the revenue from the media licence fee was used to finance, first, a broadcaster which, albeit in the form of a private entity, had a remit similar to that of public broadcasters and was largely financed from that revenue, and, secondly, entities which, although they are not broadcasters, contribute in other ways to fulfilling the remit of public radio and television bodies and are organisationally and functionally linked to those bodies, does not alter the national regulation in question in a manner that would be contrary to the purpose of Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive.

37. Nor does that interpretation contradict the literal wording of the relevant provision of Directive 2006/112. While that provision allows the activities of public radio and television bodies to be taxed, it does not specify the activities in question. In particular, it does not restrict those activities to broadcasting only and does not use the term ‘broadcasters’, but ‘bodies’. Accordingly, in my opinion, there is nothing to prevent other activities, such as film production or educational activities, from being included in the scope of that provision, so long as those activities fall within the remit of public radio and television bodies and are financed by a statutory fee such as the media licence fee at issue in the present case.

¹³ See, by analogy, the judgment in *GIS* (paragraphs 46 to 49).

¹⁴ See, to that effect, the judgment in *GIS* (paragraph 47).

38. Nor does the provision of Directive 2006/112 in question determine the legal form or ownership structure of those bodies. As the Danish Government rightly notes, in the analogous case of the exemption regulated by Article 132(1)(a) of that directive, the Court allowed an interpretation of the concept of ‘public postal services’ based on the public nature of the services offered by those providers rather than on their formal classification as bodies governed by public law or under public ownership.¹⁵ In my opinion, a similar approach can be taken in the present case, in which, as the referring court points out, some of the tasks of public radio and television bodies have been entrusted to a private radio broadcaster, which, however, is financed by revenue from the media licence fee.

39. In view of the foregoing, I propose that the answer to the third question referred for a preliminary ruling should be that Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive, is to be interpreted as being applicable to the taxation of the activities of public radio and television bodies financed by a statutory fee paid by owners of devices capable of receiving programmes broadcast by those bodies in a situation where, after 1 January 1978, the licensing system was altered so that a small portion of the revenue from that fee may be used to finance the activities of entities other than public radio and television broadcasters.

40. However, in the event that the Court does not accept my proposed answer to the third question referred, which I admit is less obvious than the answers to the first two questions, the possible incompatibility of the Danish system of taxation of the activities of public radio and television bodies with Directive 2006/112 would, in my opinion, only concern the VAT charged on that part of the media licence fee that is intended to finance entities other than public radio and television broadcasters. The rest of the system, however, remains in compliance with the directive, as is clear from the answers which in my opinion should be given to the first and second questions referred, since it is not difficult to calculate the proportion of VAT charged on the media licence fee that is related to the portion of that fee intended to finance entities other than public radio and television broadcasters. Therefore, I see no reason why the possible non-compliance of that part of VAT with Directive 2006/112 would result in the non-compliance of the entire system with that directive.

Conclusions

41. In the light of all the foregoing considerations, I propose that the Court’s answers to the second and third questions referred for a preliminary ruling by the Østre Landsret (High Court of Eastern Denmark, Denmark) should be as follows:

- (1) Article 370 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with point 2 of Part A of Annex X to that directive,

¹⁵ See judgment of 16 October 2019, *Winterhoff and Eisenbeis* (C-4/18 and C-5/18, EU:C:2019:860, paragraph 50 and the case-law cited). It is true that in some language versions (particularly the English and French ones) the literal wording of Article 132(1)(a) of Directive 2006/112 may suggest that it is referring to postal services rather than to postal service providers. However, the Court has long since clarified (on the basis of the relevant provision of Directive 77/388) that the term should be understood as referring to the organisations in question (judgment of 11 July 1985, *Commission v Germany*, 107/84, EU:C:1985:332, paragraph 11). Moreover, other language versions of Article 132(1)(a) of that directive, in particular the Polish (*‘poczta państwowa’*) and German (*‘öffentliche Posteinrichtungen’*) ones, clearly indicate the public-law nature of the entity covered by the exemption, which did not prevent the Court from adopting a more flexible interpretation. Therefore, the analogy with point 2 of Part A of Annex X to that directive is, in my opinion, justified.

must be interpreted as being applicable to the taxation of the activities of public radio and television bodies financed by a statutory fee paid by owners of devices capable of receiving programmes broadcast by those bodies in a situation where, after 1 January 1978, the licensing system was altered so that the fee is levied not only in connection with the ownership of a radio or television set, as was originally the case, but also in connection with the ownership of any other device that can be used to receive those programmes, such as smartphones, computers, and so forth, even if this potentially increases the number of entities obliged to pay that fee.

- (2) Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive,

must be interpreted as being applicable to the taxation of the activities of public radio and television bodies financed by a statutory fee paid by owners of devices capable of receiving programmes broadcast by those bodies in a situation where, after 1 January 1978, the licensing system was altered so that a small portion of the revenue from that fee may be used to finance the activities of entities other than public radio and television broadcasters.