Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

22 November 2018*

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Scope — Taxable transactions — Supply for consideration — Distinction between non-taxable damages and interest and the taxable supply of services provided in return for 'compensation')

In Case C-295/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal), made by decision of 8 January 2017, received at the Court on 22 May 2017, in the proceedings

Applicant: MEO — Serviços de Comunicações e Multimédia SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Fifth Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Fifth Chamber, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2018,

after considering the observations submitted on behalf of

– MEO — Serviços de Comunicações e Multimédia SA, by V. Codeço, M. Machado de Almeida and R.M. Fernandes Ferreira, advogados,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and R. Campos Laires, acting as Agents,

– the Irish Government, by M. Browne, J. Quaney and by A. Joyce, acting as Agents, and by N.J. Travers, Senior Counsel, and A. Keirse, Barrister-at-Law,

– the European Commission, by L. Lozano Palacios and A. Caeiros, acting as Agents,

* Language of the case: Portuguese.

after hearing the Opinion of the Advocate General at the sitting on 7 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(c), Article 64(1), Article 66(1)(a) and Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The request has been made in proceedings between MEO — Serviços de Comunicações e Multimédia SA ('MEO') and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) concerning payment of value added tax (VAT) and compensatory interest thereon.

Legal context

European Union law

3 Under Article 2(1)(c) of the VAT Directive, 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' is subject to VAT.

4 Article 64(1) of the VAT Directive provides:

'Where it gives rise to successive statements of account or payments, the supply of goods, … or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate'.

5 The first paragraph of Article 66(1) of the VAT Directive provides:

'By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

…'

6 Article 73 of the VAT Directive is worded as follows:

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

7 Article 90 of the VAT Directive provides:

'1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

Portuguese law

8 According to Article 1(1)(a) of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code):

'The following shall be subject to value added tax:

(a) the supply of goods and the supply of services for consideration within the national territory by a taxable person acting as such.'

9 Article 16(1) of the Value Added Tax Code is worded as follows:

'Without prejudice to paragraphs 2 and 10, the taxable amount in respect of the taxable supply of goods or services shall be equivalent to the value of the consideration received or to be received from the purchaser, the customer or a third party.'

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

10 MEO, a company established in Lisbon, has as its main activity the provision, on Portuguese territory, of telecommunications services. It thereby carries out an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive and is thus liable to VAT.

11 As part of its activity, MEO concludes contracts with its customers for the supply of services in the fields of telecommunications, internet access, television and multimedia, some of which provide for minimum commitment periods, while offering its customers favourable terms, particularly in the form of lower monthly subscription fees.

12 These contracts also stipulate that, in the case of deactivation of the goods and services referred to therein before the expiry of the agreed minimum commitment period at the request of customers or for a reason which is attributable to them, MEO is entitled to compensation corresponding to the amount of the agreed monthly subscription fee multiplied by the difference between the duration of the minimum commitment period provided for in the contract and the number of months during which the service was provided.

13 According to the referring court, the amount payable by the customer to MEO in case of early termination of the services contract is therefore made up of the amount of the subscription fee that corresponds to the full amount of the minimum commitment period, even if the service is not supplied to the customer up to the end of that period.

14 It is also apparent from the order for reference that the customer is liable to pay that amount where services are deactivated before the end of the minimum commitment period, in particular if the customer fails to pay the agreed monthly subscription fee.

15 During an inspection carried out at MEO between 1 April and 20 November 2014, the tax and customs authority found that, for the tax year 2012, MEO had not paid VAT on the amount which had been invoiced to customers as a result of the early termination of services contracts, and accordingly issued notices requiring payment of VAT.

16 According to the order for reference, following the early termination by the customer of a services contract, MEO deactivates the services provided for under that contract and sends an invoice to the customer which includes the predetermined contractual damages owed to MEO and the words 'not subject to VAT'.

17 Taking the view that amounts due under the early termination of the services contracts constitutes compensation that is not subject to VAT, because it is not intended to pay for any services supplied, MEO brought an administrative appeal against those notices requiring payment of VAT; that appeal was rejected.

18 On 23 December 2015, MEO brought a further appeal against the decision to reject its administrative appeal, on which a ruling has not been given by the legal deadline.

19 On 20 May 2016, MEO brought proceedings before the referring court, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal), an action seeking to establish the unlawfulness of the acts requiring the payment of VAT.

20 The referring court considers that the amounts payable by customers to MEO for non-compliance with the minimum contractual commitment period represent, for VAT purposes, consideration for a supply of services and thus constitute remuneration.

21 According to that court, those amounts can be assimilated to remuneration because they make it possible for MEO to maintain the same level of income which it would have had if the services had not been discontinued. It held that MEO did not suffer any losses since those amounts were contractually agreed.

22 In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration)) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Articles 2(1)(c), 64(1), 66(a) and 73 of Directive 2006/112/EC be interpreted as meaning that a telecommunications operator (television, internet, mobile network and fixed network) is liable for value added tax as a result of charging its customers –– in a case of termination, for reasons attributable to the customer, of a contract containing an obligation to be bound by the contract for a defined term (tie-in period) before the end of that period –– a pre-determined amount, corresponding to the basic monthly amount payable by the customer under the contract, multiplied by the number of monthly payments that are still to be made before the end of the tie-in period, the operator having, at the time when that amount is invoiced and independently of its actual payment, already ceased to provide the services, where:

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

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

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

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

The request to have the oral procedure reopened

23 Following the delivery of the Advocate General's Opinion, MEO, by a document lodged at the Court Registry on 25 June 2018, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

24 In support of its request, MEO argued, in essence, that the Advocate General's Opinion, in particular points 41, 44, 46 and 47 thereof, was based on incorrect facts, having regard, in particular, to the amount charged by MEO to its customers in the case of early termination of the services contract.

25 In that regard, it should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 31 and the case-law cited).

26 It should also be recalled that neither the Statute of the Court of Justice of the European Union nor the Rules of Procedure make provision for the interested parties to submit observations in response to an Advocate General's Opinion (judgment of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 23 and the case-law cited). As a consequence, the fact that a party disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgments of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 24, and of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 27 and the case-law cited).

27 By its arguments concerning the elements characterising the amount invoiced in the case of early termination of the services contract by the customer, MEO seeks to respond to the Opinion of the Advocate General by questioning the description of that amount, as emerges from the order for reference, in the file before the Court and in the information provided at the hearing.

28 It is true that, pursuant to Article 83 of its Rules of Procedure, the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

29 However, the calculation of the amount invoiced by MEO for premature termination of the contract for the supply of services was described by the referring court, as is apparent from paragraph 12 above, a fact that MEO has not disputed either in its written observations or at the hearing. In addition, it should be pointed out that the finding of the facts falls within the exclusive jurisdiction of the national court. As to the classification of that amount by MEO, it is not binding on the Court in its reply to the request for a preliminary ruling.

30 In the present case, the Court, having heard the Advocate General, considers that it has all the information necessary to answer the questions referred by the national court and that, for the purposes of deciding the case in the main proceedings, all the arguments, in particular those relating to the classification of that amount, have been argued before the Court.

31 Accordingly, there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

Admissibility

32 The Portuguese Republic raises the inadmissibility of the request for a preliminary ruling, alleging the speculative and uncertain nature of the questions raised by the referring court, which, it claims, has failed to establish the facts at the origin of the main proceedings and has not determined the relevant legal framework.

33 As to those submissions, it should be recalled that, according to settled case-law, in the context of the cooperation between the Court and national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 42 and the case-law cited).

34 A reference from a national court may be refused only if it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 43 and the case-law cited).

35 In the present case, it is apparent from the order for reference that the referring court has doubts as to the interpretation and application of Article 2(1)(c) and Article 73 of the VAT Directive as regards the characterisation of the amounts collected by MEO following the termination by its customers of services contracts before the end of the agreed minimum commitment period. It should also be noted that the referring court has adequately and precisely set out the facts at the origin of the dispute in the main proceedings and the legal background of the main proceedings, from which it is apparent that the questions referred are not hypothetical.

36 It follows, first, that the interpretation of EU law which is sought in the present instance bears a definite relation to the purpose of the main proceedings and, second, that the questions submitted are not hypothetical.

37 It follows from the foregoing that the request for a preliminary ruling is admissible.

Substance

The first question

38 By the first question, the referring court asks, in essence, whether the predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its customer or for a reason attributable to the customer, which corresponds to the amount that the operator would have received for the remainder of that period, should be regarded as payment for a supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive, and, as such, be subject to VAT.

39 In that respect, a supply of services is carried out 'for consideration', within the meaning of that provision, 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 actual consideration for the service supplied to the recipient (see, to that effect, judgments of 18 July 2007, *Société thermale d'Eugénie-les-Bains*, C-277/05, EU:C:2007:440, paragraph 19 and the case-law cited, and of 23 December 2015, *Air France-KLM and Hop!Brit-Air*, C-250/14 et C-289/14, EU:C:2015:841, paragraph 22). This is the case if there is a direct link between the service supplied and the consideration received (see, to that effect, judgment of 23 December 2015, *Air France-KLM, and Hop! Brit-Air*, C-250/14 and C-289/14, EU:C:2015:841, paragraph 23 and the case-law cited).

40 As regards the direct link between the service supplied to the recipient and the consideration actually received, the Court has already held, as regards the sale of air tickets that passengers have not used and for which they could not obtain repayment, that the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from the contract, irrespective of whether the customer uses this right. Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself of that right (see, to that effect, judgment of 23 December 2015, *Air France-KLM, and Hop! Brit-Air*, C-250/14 and C-289/14, EU:C:2015:841, paragraph 28).

41 Moreover, as regards the condition relating to the direct link between the consideration received and the service supplied, it must be established whether the amount due for failure to comply with the minimum commitment period, in accordance with the terms of the contracts at issue in the main proceedings, corresponds to the payment for a service, in the light of the case-law cited in paragraphs 39 and 40 of this judgment.

42 In the present case, it should be recalled that, according to the calculation method described by the referring court and referred to in paragraph 12 of this judgment, the amount payable, under those contracts, for non-compliance with the minimum commitment period consists of the subscription fee multiplied by the difference between the duration of the minimum commitment period and the number of months during which the service was supplied. Thus, the payment of the amount due for non-compliance with the minimum commitment period affords MEO, in principle, income equal to that which it would have received if the customer had not terminated the contract prematurely.

43 As regards the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraph 42 and the case-law cited).

44 Inasmuch as MEO has a right under the agreements at issue in the main proceedings, in the event of failure to observe the minimum commitment period, to payment of the same amount as it would have received as payment for services which it undertook to supply in the event that the customer had not terminated his contract, a matter which it is for the referring court to ascertain if necessary, the early termination of the contract by the customer, or its termination for a reason attributable to that customer, does not alter the economic reality of the relationship between MEO and its customer.

45 In those circumstances, it must be held that the consideration for the amount paid by the customer to MEO is constituted by the customer's right to benefit from the fulfilment, by MEO, of the obligations under the services contract, even if the customer does not wish to avail himself or cannot avail himself

of that right for a reason attributable to him. In the present case, MEO enables the customer to benefit from the service within the meaning of the case-law cited in paragraph 40 of this judgment and the cessation of that service is not imputable to it.

46 It should be added, in that regard, that if that amount were characterised as damages to make good the loss suffered by MEO, the nature of the consideration paid by the customer would be changed, depending on whether or not the customer decides to use the service in question during the period provided for in the contract.

47 Thus, a customer who benefited from services for the entire commitment period stipulated in the contract and a customer who terminated the contract before the end of that period would be treated differently for the purposes of VAT.

48 Consequently, it must be held that the amount payable for non-compliance with the minimum commitment period is payment for the services provided by MEO, regardless of whether the customer exercises the right to benefit from those services until the end of the minimum commitment period.

49 As to the requirement that the sums paid constitute actual consideration for an identifiable service, it should be noted that the service to be provided and the amount invoiced to the customer in the event of termination of the contract during the minimum commitment period are already identified at the time of conclusion of the contract.

50 Thus, the amount due for non-compliance with the minimum commitment period must be considered an integral part of the total price paid for the services, divided into monthly instalments, which amount becomes payable immediately in case of failure to pay.

51 As regards the latter condition, it is apparent from the order for reference that, in accordance with the relevant provisions of national law, the tax on that amount is payable at the time of issuance of the invoice, the situation envisaged by Article 66(1)(a) of the VAT Directive, by way of derogation, in particular, from Article 64(1) of that directive, to which the referring court expressly refers in its first question. Having regard to the considerations set out above, in particular the fact that the early termination of the contract does not change the economic reality of the relationship between MEO and its customer, it must be held that neither the early chargeability of VAT in the case of termination of the contract, nor the abovementioned provisions, have an impact on the interpretation of Article 2(1)(c) of the VAT Directive which must be adopted in the present case.

52 Consequently, the amount payable for non-compliance with the minimum commitment period constitutes consideration for a determinable supply of services.

53 It is clear from the wording of the first question, which also refers to Article 73 of the VAT Directive, that the national court has doubts as to the possible effect on the chargeability of VAT of the absence of actual recovery of the amount payable in the case of early termination of the contract.

54 According to that article, the taxable amount is to include everything which constitutes consideration obtained or to be obtained by the supplier from the customer.

55 Furthermore, given that VAT is intended to tax only the final consumer, the taxable amount of VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him (see, to that effect, judgment of 24 October 1996, *Elida Gibbs*, C-317/94, EU:C:1996:400, paragraph 19).

56 Accordingly, it must be added, for the sake of completeness and as the Advocate General observed in point 55 of her Opinion, that, where necessary, it will be for the competent national authorities to carry out, under the conditions determined by national law, an adjustment of the corresponding VAT, as provided for in Article 90 of the VAT Directive, so that the VAT is deducted from the amount actually received by the service provider from his customer.

57 In the light of the foregoing, the answer to the first question is that Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its customer, or for a reason attributable to the customer, which corresponds to the amount that the operator would have received during that period in the absence of such termination — a matter which it is for the referring court to determine — must be regarded as the remuneration for a supply of services for consideration and subject, as such, to VAT.

The second question

58 By the second question, the referring court asks, in essence, whether the conditions in paragraphs (a), (b) and (c) of the first question, namely the fact that the purpose of the lump sum is to discourage customers from not observing the minimum commitment period and to make good the damage that the operator would suffer in the event of failure to observe that period, the fact that the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum commitment period is higher than that provided for under a contract which does not stipulate such a period, or the fact that the amount invoiced is classified, under national law, as a penalty, are decisive for the classification of a predetermined amount in the services contract which the customer must pay in the event of early termination of the contract.

59 First, the referring court asks whether the objective of the lump sum, which is to discourage customers from not observing the minimum commitment period and to make good the damage sustained by the operator in case of early termination of the contract, affects the classification of that amount as consideration for a supply of services.

60 In this respect, it should be noted that the concept of 'supply of services' within the meaning of the VAT Directive must be interpreted without regard to the purpose or results of the transactions concerned (see, to that effect, judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraph 41).

61 On the other hand, as has been held in paragraph 43 above, it is essential to take into account the economic reality of the transaction at issue, which constitutes a fundamental criterion for the application of the common system of VAT (see, to that effect, the judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraphs 42, 48 and 49 and the case-law cited). As the Advocate General observed in point 46 of her Opinion, in the context of an economic approach, the amount due for non-compliance with the minimum commitment period guarantees MEO a fixed income in the form of a minimum contractual remuneration.

62 Consequently, the objective of that amount, namely to discourage customers from not observing the minimum commitment period, is not decisive for the classification of that amount, in so far as, according to the economic reality, the same amount aims to ensure that MEO, in principle, obtains the same income as it would have obtained if the contract had not been terminated before the end of the minimum commitment period for a reason attributable to the customer.

63 Secondly, the referring court asks whether the fact that the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum commitment period higher than that contained in contracts which do not stipulate such a period has an impact on the classification of the amount payable for non-compliance with the minimum commitment period.

64 For the purpose of determining whether that amount constitutes consideration for a supply of services subject to VAT, it is necessary to take into account, as is apparent from paragraphs 39 to 51 of this judgment, the file submitted to the Court, from which it is apparent that that amount was calculated by reference to the amount of the basic subscription fee, both for the period preceding the termination of the services contract and for the period from the termination of the contract until the end of the minimum commitment period.

65 Since the Court's answer to the first question does not depend in any way on the fact that the remuneration received by a commercial agent may vary according to the type of contract concluded with the customer, it is sufficient to note that a comparison between contracts laying down a minimum period of commitment and those that do not do so has no bearing on the question whether the amount payable for non-compliance with the minimum commitment period is remuneration for the supply of services at issue in the main proceedings.

66 Thirdly, the referring court also asks whether the fact that the amount invoiced for non-compliance with the minimum commitment period is categorised under national law as a penalty may have an influence on the classification of that amount as remuneration for the supply of services.

67 The Court of Justice has consistently held that the terms of a provision of EU law which makes no express reference to the law of the Member States must normally be given an autonomous and uniform interpretation (see, to that effect, judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869, paragraph 38 and the case-law cited).

68 Therefore, as the Advocate General observed in point 34 of her Opinion, it is irrelevant for the purposes of interpreting the provisions of the VAT Directive that that amount is to be regarded, under national law, as a right to a remedy in tort or a contractual penalty, or that it is characterised as a remedy, damages or remuneration.

69 The assessment of whether payment of a fee is made as consideration for a supply of services is a question of EU law which needs to be determined independently of the assessment made under national law.

70 In the light of the foregoing, the answer to the second question is that the fact that the objective of the lump sum is to discourage customers from not observing the minimum commitment period and to make good the damage that the operator suffers in the event of failure to observe that period, the fact that the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum period of employment is higher than that provided for under contracts which do not stipulate such a period, and the fact that the amount invoiced is classified under national law as a penalty, are not decisive for classifying the amount predetermined in the services contract which the customer is liable to pay in the event of its early termination.

Costs

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

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

1. **Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its customer or for a reason attributable to the customer, which corresponds to the amount that the operator would have received during that period in the absence of such termination — a matter which it is for the referring court to determine — must be regarded as the remuneration for a supply of services for consideration and subject, as such, to value added tax.**

2. **The fact that the objective of the lump sum is to discourage customers from not observing the minimum commitment period and to make good the damage that the operator suffers in the event of failure to observe that period, the fact that the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum period of commitment is higher than that provided for under contracts which do not stipulate such a period, and the fact that the amount invoiced is classified under national law as a penalty, are not decisive for classifying the amount predetermined in the services contract which the customer is liable to pay in the event of early termination.**

[Signatures]