

Case C-21/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

17 January 2020

Referring court:

Administrativen sad Sofia-grad (Bulgaria)

Date of the decision to refer:

31 December 2019

Applicant:

Balgarska natsionalna televizija

Defendant:

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' — Sofia pri Zentralno upravlenie na Natsionalnata Agentsia za Prihodite (NAP)

Subject matter of the main proceedings

The public television broadcaster's right to deduct VAT in respect of the services it offers.

Subject matter and legal basis of the reference

Interpretation of Article 2(1)(c), Article 25(c), Article 132(1)(q) and Article 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax pursuant to Article 267(1)(b) TFEU.

Questions referred

The referring court raises the following questions:

- (1) Can the supply of audiovisual media services to viewers by the public television broadcaster be regarded as a service supplied for consideration within the meaning of Article 2(1)(c) of Directive 2006/112/E[C] if it is financed by the State in the form of subsidies, with the viewers paying no fees for the broadcasting, or does it not constitute a service supplied for consideration within the meaning of that provision and not fall within the scope of that Directive?
- (2) If the answer is that the audiovisual media services provided to viewers by the public television broadcaster fall within the scope of Article 2(1)(c) of Directive 2006/112/E[C], can it then be considered that exempt supplies for the purposes of Article 132(1)(q) of the Directive are involved, and is a national regulation which exempts this activity solely on the basis of the payment from the State budget received by the public television broadcaster, regardless of whether that activity is also of a commercial nature, permissible?
- (3) Is a practice which makes a full right of input tax deduction for purchases dependent not solely on the use of the purchases (for taxable or non-taxable activity), but also on the way in which those purchases are financed, namely on the one hand from self-generated income (advertising services inter alia), and on the other hand from State subsidisation, and which grants the right to full input tax deduction only for purchases financed from self-generated income and not for those financed through State subsidies, with the delimitation thereof being required, permissible pursuant to Article 168 of Directive 2006/112/E[C]?
- (4) If it is considered that the activity of the public television broadcaster consists of taxable and exempt supplies, having regard to its mixed financing, what is the scope of the right to input tax deduction in respect of those purchases and which criteria must be applied for the determination thereof[?]

EU legislation and case-law

Article 2(1)(a), Article 25(c), Article 132(1)(q), Article 168 and Article 173(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 2006, p. 1; ‘the Directive’).

Judgment of the Court of Justice of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraphs 30 and 34.

Judgment of the Court of Justice of 22 June 2016, *Odvolačí finanční ředitelství*, C-11/15, EU:C:2016:470, paragraph 32.

National legislation

Zakon za danak varhu dobavenata stoynost (The Law on Value Added Tax, ‘the ZDDS’):

‘Article 2 The following shall be subject to value added tax:

1. any taxable supply of goods or provision of services made for consideration;

...

Article 3(1) Taxable person shall mean any person who carries out an independent economic activity, whatever the purposes and results of that activity.

...

(5) Non-taxable persons are the State, the State and municipal authorities for all activities and supplies which they carry out or provide in the exercise of State or municipal public authority, including cases in which they collect fees, contributions or duties for those activities or supplies. Excluded therefrom are:

1. the following activities or supplies:

(n) radio and television activity of a commercial nature;

(6) A taxable person who also effects or provides exempt supplies and/or supplies or services outside of the independent economic activity and a non-taxable legal person who is registered for value added tax purposes shall be taxable in relation to all services received.

...

Article 8. For the purposes of this law, a service is anything which has a value and which is distinct from goods and from money in circulation and foreign currencies which are used as a means of payment.

...

Article 42. Exempt supplies are:

2. the activity of Balgarsko natsionalno radio (Bulgarian national radio), Balgarska natsionalna televizia (Bulgarian national television) and the Balgarska telegrafna agentsia (Bulgarian news agency), for which they receive payments from the State budget.

...

Article 69(1) Where the goods and services are used for the purposes of taxable supplies carried out by a person registered for value added tax purposes, that person shall be entitled to deduct the following:

1. the tax on the goods and services which were supplied or provided or are supplied or provided thereto by the supplier or service provider, this being a person likewise registered under this law;

...

Article 73(1) The registered person shall have the right to partial input tax deduction with regard to the goods or supplies which are used both for supplies in respect of which the person has a right to input tax deduction and for supplies or activities in respect of which the person has no such right.’

Brief summary of the facts and procedure

- 1 The subject of the appeal is a notification of tax liability of 14 December 2016, which was issued by the tax authority and confirmed by decision of the Direktor na direksia ‘Obzhalvane i danachno-osiguritelna praktika’ — Sofia pri Zentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Sofia ‘Appeals and Tax and Social Insurance Practice’ Directorate within the Central Administration of the National Revenue Agency) of 27 February 2017. An action was brought against the notification confirmed by that decision, on the basis of which the proceedings at the Administrativen sad Sofia-grad (Sofia Administrative Court) were initiated.
- 2 The notification of tax liability was issued following a tax audit carried out pursuant to the ZDDS at Balgarska natsionalna televizia (Bulgarian national television, ‘BNT’). BNT was found to owe value added tax amounting to BGN 1 568 037.04 for the period from 1 September 2015 to 31 March 2016 and interest amounting to BGN 144 138.74 for the period from 15 October 2015 to 14 December 2016. This tax liability resulted from the adjustment, which took place after the tax audit, of the results declared by BNT for the tax periods mentioned, with the tax audit having recognised a partial input tax deduction for the indicated supplies in respect of which BNT had made a full input tax deduction.
- 3 BNT is a legal person, a national public provider of audiovisual media services under Article 6(3) of the Zakon za radioto i televiziata (Law on Radio and Television, ‘the ZRT’).
- 4 BNT does not receive any remuneration from the viewers for broadcasting television programmes. Its activity is financed partly by a subsidy from the state budget and by self-generated income from advertising and sponsorship inter alia pursuant to Article 70(3) of the ZRT. The subsidy from the State budget is provided for the preparation, production and broadcasting of programmes and is determined on the basis of a flat rate per programme hour fixed by the Council of Ministers.
- 5 BNT is registered pursuant to the ZDDS with effect from 28 December 1998. Until March 2015, the television broadcaster made a partial input tax deduction in respect of all of its purchases. Following an analysis in March 2015, BNT decided that the broadcasting activity was not an exempt supply to the viewers and then began to apply the direct allocation method. BNT is of the opinion that it is

entitled to the full input tax deduction in relation to the purchases used for its commercial activity. In contrast, it is entitled to the partial input tax deduction in relation to the purchases which were used at the same time for activities of a commercial nature and for activities of a not exclusively commercial nature.

- 6 In the contested notification of tax liability, the tax inspection authorities decided that BNT provided both taxable supplies, namely advertising activity, and exempt supplies, namely broadcasting of programmes, and that, in the exercise of the right to input tax deduction, it could not be clearly established whether the purchase was only connected with an exempt supply or only connected with a taxable supply. This formed the basis of the adjustment in the tax audit, with a right to partial input tax deduction being recognised for the supplies in respect of which BNT had made the full input tax deduction and the reimbursement of the tax claimed in the amount of BGN 1 568 037.04 for the period from September 2015 to February 2016 being refused.

Principal arguments of the parties in the main proceedings

- 7 The applicant considers the notification of tax liability to be unlawful.
- 8 BNT is of the opinion that the broadcasting of its programmes does not constitute a service, as there is no legal relationship between it and the viewers. There is also no remuneration, as the subsidy from the State budget does not constitute consideration for a service. BNT only performs a single activity in the area of application of value added tax, namely the sale of advertising time.
- 9 BNT considers that the provisions regarding the application of the partial input tax deduction are not applicable, since that mechanism only applies when the taxable person cannot distinguish which purchases were used for exempt supplies and which purchases were used for taxable supplies, that is to say when the principle of direct allocation cannot be applied. However, in March 2015, BNT started to apply the direct allocation method by examining, in isolation, for each purchase, whether it is used or is capable of being used for an activity of a commercial nature or for an activity which is part of the performance of the public service task.
- 10 BNT submits that the defendant is relying on a provision of the Directive that has not been transposed into national law, namely Article 25(c). However, the State and its authorities may not rely on the direct effect of provisions of that Directive and may not derive any rights from the provisions not incorporated into national law.
- 11 Furthermore, BNT maintains that, Article 42(2) of the ZDDS, which provides that the activity of BNT for which it receives payment from the State budget constitutes an exempt supply, incorrectly transposes the provisions of the Directive, since the provisions of the Directive, unlike Article 42(2), classify as exempt supplies the ‘activities, other than those of a commercial nature, carried

out by public radio and television bodies'. Therefore, in practice, the way in which the activity is financed, rather than its commercial nature, is recognised as the criterion for taxability. As a result, an activity which is subsidised but is entirely commercial in nature is wrongly treated as exempt by Bulgarian law. This puts BNT in a less favourable position than commercial media whose commercial activity is taxable and infringes the principle of fiscal neutrality, the main purpose of which is to tax supplies of the same nature in the same way.

- 12 The expert report shows which activities of BNT are of a commercial nature and therefore the television broadcaster is entitled to the full input tax deduction for purchases directly relating thereto.
- 13 Finally, BNT contests the defendant's position that BNT is entitled to the full input tax deduction in respect of the goods and services purchased for its economic activity only if the purchase is financed entirely by advertising revenue or by other revenue derived from a commercial activity. The practice of the tax administration, which creates additional conditions for the assertion of rights enshrined in law, is contrary to the law and the case-law of the Court of Justice.
- 14 The defendant does not consider the notification of tax liability to be unlawful or contrary to EU law.
- 15 The conclusion of the tax authorities that BNT must make a partial input tax deduction pursuant to Article 73 of the ZDDS in respect of received supplies of goods and services which were used for both taxable and exempt supplies is well founded. The claim of the inspected person for a full input tax deduction in respect of the purchase of rights to broadcast programmes is unfounded, since that person has not proved that the purchases were financed entirely by advertising revenue and not by State subsidies. The State subsidies received, which, in the view of the defendant, constitute an exempt supply within the meaning of Article 42(2) of the ZDDS, exceeded the revenue obtained from taxable supplies many times over.
- 16 Since BNT has not accounted for the purchases individually according to the way in which they are financed, there is, according to the defendant, no possibility of distinguishing purchases financed by State subsidies from those financed by revenue from advertising services. It is precisely for this reason that the notification of tax liability lawfully recognises only the right to a partial input tax deduction in respect of the purchases made of broadcasting rights.
- 17 Since BNT has not proved that, in the course of preparing, producing and broadcasting a programme, it only used funds deriving from the sale of advertising time and not from State subsidies, BNT was only entitled to the partial input tax deduction for purchases of goods or services which were used for subsequent taxable supplies.

Brief summary of the basis for the reference

- 18 The referring court points out that the dispute between the parties is focused on whether the activity of BNT as a public service provider to which specific tasks are assigned by the ZRT is excluded from the scope of the ZDDS (as the applicant claims) or constitutes a supply made for consideration but exempt within the meaning of the ZDDS (as the defendant submits). The parties are also in dispute as to whether the provision of Article 73 ZDDS, which provides for the right to a partial input tax deduction, is applicable to all supplies received because the purchases have not been distinguished according to the way in which they were financed (according to the defendant) or whether the full input tax deduction is to be recognised for supplies to be used for commercial activities which generate revenue, while a partial input tax deduction is to be recognised for purchases which do not entirely serve that commercial activity (according to the applicant).
- 19 The referring court refers to the case-law of Bulgarian courts on an earlier notification of tax liability for BNT under the ZDDS, which endorsed the defendant's position in the present case concerning the refusal of a full input tax deduction and the recognition of only a partial input tax deduction, and according to which the provisions whose interpretation is sought in the present case are clear and do not give rise to any doubt.
- 20 By judgment of 23 April 2018, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria; 'the VAS') found that, despite its specific tasks as a public service provider under the ZRT, the activity of BNT fell within the scope of the ZDDS and was subject to value added tax. Pursuant to Article 25(c) of the Directive, the term 'services' also covered the performance of services by operation of law. Even though the cited provision was not transposed into Bulgarian law, the VAS considered that the principle of the direct effect of the Directive applied. In that sense, the fact that a taxable person carries out an activity consisting in the performance of tasks imposed and regulated by law in order to achieve an objective in the general interest does not mean that that activity does not qualify as the supply of a service under the ZDDS.
- 21 According to the VAS, the legal relationship between the provider of the service and the recipients thereof is based on the obligations to provide services in the general interest delegated by law to the relevant provider.
- 22 With reference to paragraphs 30 and 34 of the judgment of the Court of Justice in Case C-151/13, the VAS decided that there was a direct link between the supplies made by BNT to viewers and the State's consideration received in the form of subsidies. The VAS took the view that it was not necessary for the consideration for the service to be provided directly by the recipients of the service; it could also be provided by a third person or, as in this case, by the State.
- 23 The VAS did not consider the judgment in Case C-11/15 to be comparable, since the case before the VAS concerned State subsidies directly linked to the provision

of services performed by BNT as a public service provider and the amount of which was determined in advance according to clearly defined criteria.

- 24 The VAS considered the complaint that Article 42(2) of the ZDDS did not correctly transpose Article 132(1)(q) of the Directive to be unfounded, since the provision that the activity of BNT for which payments are made from the State budget should be treated as an exempt supply achieves the objective of the Directive, which is to treat as exempt supplies only the non-commercial activities carried out by public radio and television bodies.
- 25 The VAS decided that BNT was entitled to a full input tax deduction only if it could prove that certain purchases it made, which were intended for its commercial activity, were financed entirely by advertising or other revenues related to the broadcasting activity and not by the State subsidies received. In that sense, the VAS stressed that the funds generated by the sale of advertising time had to cover the expenditure for the purchase of programme products, namely films inter alia, which were broadcast in one of the BNT programmes, and that BNT did not carry out detailed analytical accounting of which part of the television broadcaster's expenditure was borne by the State subsidies and which part was borne by the sale of advertising time.
- 26 The referring court notes that the facts underlying the judgment in Case C-11/15 are actually somewhat different, since Czech Radio collected fees from listeners, whereas BNT, as a public television broadcaster, receives subsidies from the State budget, a fact which was not the subject of the examination in the aforementioned case. In contrast to Case C-151/13, there is no link in the main proceedings as clear as that between the 'lump sum' at issue there and the services provided.
- 27 For that reason, the referring court considers it essential for the purpose of ruling in the main proceedings to ascertain whether the broadcasting of programmes by the national public television broadcaster (BNT) constitutes, by virtue of its State subsidisation, a service 'supplied for consideration' within the meaning of Article 2(1)(c) of the Directive, but exempt from value added tax within the meaning of Article 132(1)(q) of the Directive, or whether that type of activity does not constitute a taxable supply falling within the scope of the Directive.
- 28 In that regard, it is sufficient to note, first, that, although the provision of Article 132(1)(q) provides an exemption for '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 of the Directive and, second, that it is not to be interpreted as extending the scope of application of that Directive, as defined in Article 2 (in accordance with the reasoning in paragraph 32 of the judgment of the Court of Justice in Case C-11/15).
- 29 It is equally important in the light of the interpretation of Article 2(1)(c) and Article 132(1)(q) of the Directive to clarify whether the activity of the public

television broadcaster in relation to the provision of audiovisual services to viewers is an exempt provision of a service within the meaning of the ZDDS, whether the subsidies paid to the national television body from the State budget constitute consideration and, accordingly, whether, despite its specific tasks as a public service provider in connection with that activity, BNT falls within the scope of the ZDDS and is subject to value added tax.

- 30 The referring court emphasises that the determination of whether the television broadcasting activity of BNT, namely audiovisual media services, the recipients of which are all Bulgarian citizens, constitutes the provision of a service under the ZDDS helps to clarify whether that activity must be taken into account in the examination of the input tax deduction right in respect of the taxable supplies of which the applicant is the recipient. If it is assumed that the activity of the public television broadcaster is mixed in nature and includes both exempt supplies (broadcasting of television programmes) and taxable supplies (commercial advertising), the referring court wonders whether it must be assumed that only the part of the value added tax paid on supplies received which can be regarded as connected with the commercial activity of the public television broadcaster is subject to deduction. The referring court also wishes to know what criteria would have to be applied in order to determine the input tax deduction right if the mixed nature of the activities of the public television broadcaster were to be confirmed.
- 31 Finally, the referring court points out that, despite the national case-law cited, it has doubts as to the scope of the provisions of Articles 2, 132 and 168 of the Directive in relation to the activity of BNT, and considers the interpretation of those provisions to be necessary in order to be able to rule on the pending action.