

Case C-411/21

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:

5 July 2021

Referring court:

Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal)

Date of the decision to refer:

10 March 2021

Appellant:

Instituto do Cinema e do Audiovisual, I.P.

Respondent:

NOWO Communications, S.A.

Subject matter of the main proceedings

Appeal against the judgment given at first instance by the Tribunal Administrativo e Fiscal de Almada (Administrative and Finance Court, Almada, Portugal; ‘the TAF, Almada’) by which that court declared the subscription fee payable by operators of subscription television services to the Instituto do Cinema e do Audiovisual (Film and Audiovisual Media Institute) for access to television programming services in the national territory to be contrary to the freedom to provide services laid down in Article 56 TFEU.

Subject matter and legal basis of the request for a preliminary ruling

Revenue from the collection of a subscription fee from subscription television service operators active in the national territory is used to finance the development, promotion and dissemination of Portuguese film and audiovisual works.

The referring court seeks clarification as to whether the fact that that financing reduces the cost of national film and audiovisual productions, and therefore favours the purchase of those productions over that of productions from other Member States, gives rise to indirect discrimination against cross-border supplies of those services, thus infringing the freedom to provide services established in Article 56 TFEU.

Questions referred for a preliminary ruling

- ‘1) Is Article 10(2) of Lei n.º 55/2012, de 6 de setembro (Law No 55/2012 of 6 September 2012), if interpreted as meaning that the fee for which it provides is to be used exclusively to finance the promotion and dissemination of Portuguese film and audiovisual works, liable to give rise to indirect discrimination against the provision of services between Member States as compared with the corresponding national provision of services, inasmuch as it makes the provision of services between Member States more difficult than the purely domestic provision of services within a Member State, thus infringing Article 56 TFEU?’
- 2) Might the answer to be given to the first question referred be altered by the fact that other Member States of the European Union operate schemes which are identical or similar to that provided for in Law No 55/2012?’

Provisions of European Union law relied on

Article 56 TFEU

Provisions of national law relied on

Lei n.º 55/2012 – Princípios de ação do Estado no quadro do fomento, desenvolvimento e proteção da arte do cinema e das atividades cinematográficas e audiovisuais (Law No 55/2012 – Principles of State action in the context of the promotion, development and protection of the art of cinema and film and audiovisual activities) (*Diário da República* n.º 173/2012, series I of 6 September 2012)

In accordance with Article 2(p) of Law No 55/2012, entitled ‘Definitions’:

‘For the purposes of the application of this Law and its implementing provisions,

- p) “operator of subscription television services” means any legal person who provides access in national territory to television programming services, via any platform, device or technology, pursuant to a contractual obligation subject to a subscription or other form of prior individual authorisation whereby the end user pays for the provision of those services, whether these are supplied individually or as part of a package comprising other electronic communications services, irrespective of the type of equipment used to

benefit from the services, and even if the overall commercial offer implies that the television service is provided free of charge’.

Article 3 of Law No 55/2012, under the heading ‘Principles and objectives’, is worded as follows:

‘1 – In the context of matters governed by this Law, the State shall be bound by the following principles:

- a) support for the creation, production, distribution, exhibition, dissemination and promotion of film and audiovisual works as tools for expressing cultural diversity, asserting national identity, promoting the language and reinforcing the image of Portugal in the world, in particular as regards the strengthening of relations with countries with Portuguese as their official language;
- b) the protection and promotion of the cinematic art and, in particular, of new talents and first works;
- c) the adoption of support measures and programmes aimed at promoting the development of the business fabric of, and the market for, film and audiovisual works in accordance with the principles of transparency and impartiality, competition, freedom of creation and expression and cultural diversity;
- d) the promotion of interaction with players in the sectors of film and audiovisual media, social media, education and telecommunications;
- e) the long-term promotion and conservation of film and audiovisual heritage through measures to ensure its preservation.

2 – In the context of matters governed by this Law, the State shall pursue the following objectives:

- a) to encourage the creation, production, distribution, exhibition, dissemination and publication of national film and audiovisual works, in particular by means of support and incentive measures;
- b) to promote the quality, cultural diversity, artistic singularity and economic viability of film and audiovisual works, in particular by allocating support aimed at ensuring that the creators of such works are able to disseminate them extensively and make them profitable;
- c) to promote defence of the rights of authors and producers of film and audiovisual works, as well as of the rights of artists, performers and producers of such works;
- d) to promote Portuguese language and culture;

- e) to encourage interaction between the independent production sector and the sectors connected with the exhibition, distribution, dissemination and making available of film and audiovisual works;
- f) to encourage international co-production through the conclusion of bilateral reciprocity agreements and international conventions;
- g) to intensify cooperation with countries with Portuguese as their official language;
- h) to help strengthen the business fabric of the film and audiovisual sectors by providing incentives and other support measures, and in particular by promoting investment in small and medium-sized national firms with a view to creating value and employment;
- i) to encourage the exhibition, dissemination, promotion, popularisation and economic exploitation of national film and audiovisual works;
- j) to contribute towards the internationalisation of film and audiovisual works, as well as towards the national and international recognition of the creators, producers, performers and technical teams associated with those works;
- k) to contribute towards the development of audiences, in particular through the provision of support for film festivals, film clubs, exhibition in municipal cinemas and cultural associations for the promotion of film activity and, in particular, through the promotion of basic training in film in educational establishments;
- l) to promote the conservation of Portugal's national film and audiovisual heritage, as well as its enhancement and permanent exhibition to the public;
- m) to promote the adoption of measures to ensure access to film and audiovisual works for persons with disabilities;
- n) to contribute to the development of education in the arts and vocational training in the film and audiovisual sectors.

3 – In the context of matters governed by this Law, the State shall:

- a) draw up and publish annually a statement of priorities as to support for the film and audiovisual media industry, informed by a strategic vision of investment in film and audiovisual activities and based on financing needs and existing financial resources;
- b) ensure a rigorous and transparent implementation of the policy of support for the film and audiovisual media industry;

- c) ensure participation by industry creators and professionals, as well as by undertakings involved in film and audiovisual media activities, in the definition of priorities and the implementation of support measures;
- d) promote and contribute towards the exhibition to the public of works subsidised by the State.

4 – The State shall support European cinema with due regard for the rules of international law in force, in particular those established within the framework of the European Union (EU), the Council of Europe Convention on Cinematographic Co-Production, the UNESCO Convention on Cultural Diversity and international treaties on intellectual property.

5 – The support and measures provided for in this Law are compatible with the support and incentive schemes enshrined in the provisions of international and Community law which are binding on the Portuguese State’.

Article 8 of Law No 55/2012, which carries the heading ‘Beneficiaries’, provides as follows in paragraph 3 thereof:

‘Distributors and exhibitors may obtain support in accordance with the provisions of the Decree-Law to be adopted in implementation of this Law for the purposes of distributing and exhibiting national works, European works and lesser-known cinematographic works’.

Article 10(2) of the aforementioned Law, under the heading ‘Fees’, provides as follows:

‘Operators of subscription television services shall be subject to the payment of an annual fee of (EUR) 2 per subscription for access to television services, payable by the operators’.

Article 18(1) and (3) of Law No 55/2012, which carries the heading ‘Access to distribution, exhibition and dissemination markets’, is worded as follows:

‘1 – The State shall adopt measures to support the distribution, exhibition and promotion of cinematographic works in national and international markets, in particular by providing incentives for the exhibition of national cinematographic works – especially those that are subsidised – or European works in municipal cinemas, and by introducing measures to foster partnerships between national producers and distributors.

[...]

3 – The State shall adopt measures to support cinematographic exhibitors whose programme is mostly or usually comprised of national and European cinematographic works, including feature films, documentaries, short films and animated films and who carry on their business in alternative exhibition circuits’.

Brief presentation of the facts and the main proceedings

- 1 By letter of 9 August 2013, the Instituto do Cinema e do Audiovisual (Film and Audiovisual Media Institute) sought payment from the company NOWO Communications, S.A., formerly known as Cabovisão-Televisão por Cabo, S.A., of a sum of EUR 886 042.50 in respect of the annual fee payable by subscription television operators.
- 2 On 27 August 2013, the Instituto do Cinema e do Audiovisual issued a demand notice for the payment of EUR 886 042.50 in respect of the fee assessed as due, which was sent to the company NOWO Communications, S.A., by the Serviço de Finanças de Palmela (Tax Office, Palmela, Portugal).
- 3 On 2 October 2013, the company NOWO Communications, S.A., filed an application for reconsideration of the assessment in question, and also requested a bank guarantee in order to have the enforcement proceedings suspended.
- 4 By letter of 27 May 2014, notice was given of the decision dismissing the application for reconsideration. That decision was later challenged by way of an action before the TAF, Almada.
- 5 By judgment of 29 November 2018, the TAF, Almada upheld that action in its entirety and annulled the subscription fee assessment on the ground that it was contrary to the freedom to provide services and Article 56 TFEU.
- 6 The referring court must now rule on the appeal brought by the Instituto do Cinema e do Audiovisual against that judgment.

Main arguments of the parties in the main proceedings

- 7 The Instituto do Cinema e do Audiovisual ('the appellant') submits that the subscription fee is compatible with EU law and does not therefore infringe the provisions of Article 56 TFEU.
- 8 It argues that, since the contested fee relates exclusively to access to television programme services provided in national territory and is payable by all operators of subscription television services active within that territory, all aspects of the activity of providing subscription television services are confined to the national territory.
- 9 The TAF, Almada, however, took the view in the judgment under appeal that the assessment of the fee payable constitutes a restriction of the freedom to provide services not of the company NOWO Communications, S.A. ('the respondent') but of service providers connected with cinematographic and audiovisual production abroad.

- 10 The appellant submits that, even if the view is taken that the respondent may legitimately claim that the subscription fee is unlawful on the ground of alleged indirect discrimination against suppliers of services effected by other entities not party to the dispute, it has not been demonstrated that there is any restriction on the freedom to provide those services in this regard either.
- 11 According to the appellant, it is wrong to assume that the subscription fee is meant to be used exclusively to finance the promotion and dissemination of Portuguese cinematographic works when, in actual fact, Law No 55/2012 and the subsequent implementing legislation also provide for support for the production, distribution, exhibition, promotion and dissemination of European works.
- 12 Even if the view is taken that the revenue raised is essentially used to finance national works, it could not be concluded, on the basis of an analysis of that legal framework alone, that the earmarking of that revenue has or is capable of having the effect of making it more difficult for services to be provided between Member States.
- 13 Such a restriction could be found to exist only if it could be concluded that the earmarking of that revenue favours the purchase of Portuguese cinematographic and audiovisual works to the detriment of European works and makes the provision of services between Member States more difficult than the purely domestic provision of services within a Member State. According to the appellant, however, since there is no proof whatsoever that television service operators are inclined to favour the purchase of national works to the detriment of European works solely on account of the financing and support which national works receive, that conclusion is not in any way based on a detailed and exhaustive functional analysis, which is clearly absent from the documents before this court and has not been provided by the respondent.
- 14 Nor has it been demonstrated that the earmarking of [revenue from] the charge in question impairs access to the market for ‘foreign works’ by impeding intra-Community trade, given that, in order for there to be a restriction of the freedom to provide services, the earmarking of [revenue from] the fee concerned would have to be capable, where appropriate, of significantly impairing or discouraging the provision of cross-border services relating to ‘foreign works’. There is therefore no restriction on the free movement of services relating to European works that would be capable of precluding, hindering or rendering less attractive the activities of such service providers established in other Member States.
- 15 Furthermore, in so far as it is directed at services provided in national territory by operators of subscription television services, the contested fee does not objectively affect any ‘foreign productions’ or any providers of services connected with the production of European cinematographic and audiovisual content.
- 16 According to the appellant, other Member States, in particular Germany, France, Poland and the Czech Republic, charge fees for subscription television services

which are similar to that at issue in the main proceedings. However, the judgment under appeal declared the support granted to the national cinematographic and audiovisual industry to be unlawful, completely disregarding the support measures from which those activities benefit in most Member States.

- 17 Furthermore, in 2008, the European Commission approved several film support schemes, including the Hungarian support scheme for the film industry, a scheme of tax incentives for film production in Italy and the support schemes for filmmaking in Finland and Germany. In this sense, there is a real incentive in the European Union for Member States to engage in audiovisual production which contributes towards the diversity and richness of European culture.
- 18 Moreover, according to the appellant, the judgment under appeal should have analysed whether the support for film and audiovisual production in question constitutes a State aid measure within the meaning of Article 107 TFEU. If that support does indeed constitute State aid, it is important to take into account the fact that the European Commission and the Court of Justice in its case-law do not rule out aid schemes for film and television production which are financed from parafiscal charges, and that there is a specific possibility of derogation from the general principle of incompatibility in the case of aid granted by Member States to promote culture, provided that this does not affect trading conditions and competition in the European Union in a manner contrary to the common interest.
- 19 In addition, the appellant states, in so far as concerns any potential obligation to notify the Commission and obtain the corresponding authorisation, that it follows from Commission Regulation (EU) No 651/2014 of 16 June 2014 that aid for culture and heritage conservation is compatible with the internal market and is not subject to any obligation to give prior notice to the Commission.
- 20 The respondent submits that Article 3 of Law No 55/2012 bears out the finding that the support granted by the appellant to its beneficiaries has the ultimate purpose of promoting national cinematographic and audiovisual works, the Portuguese language and national identity. For that reason, by financing activities that will benefit only national service providers, the subscription fee constitutes a restriction on the freedom to provide services in the European Union, since it favours the purchase of Portuguese film and audiovisual works to the detriment of those from other Member States.
- 21 Thus, according to the respondent, the subscription fee indirectly discriminates against operators of subscription television services that include foreign film and audiovisual works in their offer while remaining subject to the obligation to finance Portuguese production, just as it discriminates against homegrown film and audiovisual production in the other Member States.
- 22 Furthermore, the respondent submits, the aforementioned restriction is not justified on grounds of public policy, public health or public security or on any other legitimate grounds relating to the configuration and protection of the

national tax system, in particular those relating to the coherence of the tax system, the need to preserve a fair distribution of tax sovereignty between States or the combating of tax evasion.

- 23 As regards proportionality, the respondent states that the fee at issue is not an appropriate instrument for attaining the objective pursued and that there are other measures available which are less harmful to the freedom to provide services and the cross-border trade in film works and audiovisual content. Furthermore, the subscription fee is also disproportionate in the strict sense, since it greatly exceeds the potential benefits of national film and audiovisual activity. Those benefits would be exactly the same if the funds were raised from general taxation, without imposing a selective charge on operators of subscription television services.
- 24 The respondent further submits that the similar schemes in other Member States cannot be compared with the one at issue in the main proceedings, whether from the point of view of the nature of the fee, the basis of its assessment or even the method by which it is calculated.
- 25 Lastly, the respondent contends, in concluding the grounds of its appeal by relying on the rules on State aid, the appellant recognises that the national legislation does indeed seek to favour national cinematographic and audiovisual activities.

Brief presentation of the grounds for the request for a preliminary ruling

- 26 In the first place, the referring court seeks clarification as to whether, in this case, there are cross-border factors which justify the respondent's right, in the light of the activities which it pursues, to rely on the provisions of the TFEU relating to the freedom to provide services.
- 27 If the answer is in the affirmative, it is necessary to determine, first, whether the contested fee is in itself incompatible with EU law and, secondly, whether that incompatibility must be examined from the point of view of the earmarking of the revenue from subscription fee for promoting and protecting the art of film and national cinematographic and audiovisual activities.
- 28 From the decision of the TAF, Almada, with which the referring court agrees, it is apparent that the former court found that the earmarking of the revenue from the subscription fee reduces the cost of national production by comparison with foreign production and thus gives rise to indirect discrimination against the cross-border provision of those services, since that revenue is exclusively intended to finance the promotion and dissemination of Portuguese works.
- 29 In that decision, reproduced in part by the referring court, the lower court pointed out that television operators finance the producers of such works by means of a transfer of private resources. Since the subscription fee is payable irrespective of the profits made by operators, its autonomous nature vis-à-vis the exhibition fee is explained by the business model employed by those operators.

- 30 Given that the services provided by those operators are obtained by subscription, such television channels often choose not to exhibit commercial advertising, with the result that the exhibition fee also provided for in Law No 55/2012 does not apply to them. Thus, whereas the exhibition fee is calculated on an *ad valorem* basis, the subscription fee relates only to the number of subscribers each operator has.
- 31 It follows that the taxable basis of the subscription fee is completely unrelated to the actual benefit from the national film and audiovisual production which that fee is intended to finance. The actual benefit of national content is not called into question, and not even operators that market foreign television services, whether on a principal or exclusive basis, are excluded from payment. The fee is based on the principle that operators benefit to a greater or lesser extent from content which is produced nationally and which the State subsidises.
- 32 The referring court also refers, from a teleological point of view, to the explanatory memorandum to Proposta de Lei n.º 69/XII (Draft Law No 69/XII), which gave rise to Law No 55/2012, which provides that the purpose of the fee in question is to establish for the Portuguese film and audiovisual industry a support scheme with a robust revenue basis.
- 33 In so far as the answers to the question referred are not obvious and there are serious doubts as to whether the interpretation of Article 10(2) of Law 55/2012 infringes Article 56 TFEU, the Supremo Tribunal Administrativo (Supreme Administrative Court) has decided to make a request for a preliminary ruling to the CJEU.