Case C-101/24

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

Date of lodged:

7 February 2024

Referring court:

Bundesfinanzhof (Federal Finance Court, Germany)

Date of the order for reference:

23 August 2023

Defendant and appellant in the appeal on a point of law:

Finanzamt Hamburg-Altona (Hamburg-Altona Tax Office)

Applicant and respondent in the appeal on a point of law:

XYRALITY GmbH

Subject matter of the case in the main proceedings

Directive 2006/112 – Distribution of electronic services (game applications for mobile devices) via a marketplace for applications – Place of supply of services in the period before 1 January 2015 – Place of establishment of the marketplace for applications or place of establishment of the developer of the applications

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Under circumstances such as those in the main proceedings, in which a German taxable person (developer) supplied, before 1 January 2015, a service by electronic means to non-taxable persons (end customers) established within the territory of the European Union, via a marketplace for applications operated by an Irish taxable person, is Article 28 of Council

Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be applied, with the result that the Irish taxable person is treated as if it had received those services from the developer and supplied them to the end customers, because the marketplace for applications did not name the developer as the supplier of the service and show German VAT until it did so in the order confirmations issued to the end customers?

2. If the first question referred is answered in the affirmative: Is the place of supply of the fictitious service supplied by the developer to the marketplace for applications under Article 28 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in Ireland, by virtue of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, or in the Federal Republic of Germany, by virtue of Article 45 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax?

3. If, by virtue of the answers to the first and second questions referred for a preliminary ruling, the developer has not supplied any services in the Federal Republic of Germany: Is the developer subject to a tax liability for German VAT under Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, on the ground that the marketplace for applications, acting in accordance with an agreement, named the developer as the supplier of the service and showed German VAT in the order confirmations it sent by email to the end customers, even though the end customers are not entitled to deduct input VAT?

Provisions of European Union law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112 as regards the place of supply of services (Directive 2006/112), in particular Articles 28, 44, 45 and 203 of

Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112, as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation No 282/2011 as regards the place of supply of services (Implementing Regulation No 282/2011), in particular Article 9a.

National legislation cited

Umsatzsteuergesetz (German Law on Turnover Tax; 'UStG'), in particular Paragraphs 3(11) and 3a(1) and 2.

Brief summary of the facts and procedure

1 The parties are in dispute about the VAT taxation of so-called ‘in-application purchases’ effected during the years from 2012 to 2014 (the years at issue), in which Article 9a of Implementing Regulation No 282/2011 had not yet entered into force.

2 The applicant and defendant in the appeal (‘ the applicant’), a taxable person established in the Federal Republic of Germany, develops and distributes game applications for mobile devices. For distribution purposes, it uses, inter alia, an internet-based digital distribution platform for software (referred to as a ‘marketplace for applications’). The marketplace for applications was operated by Ireland-based X until 31 December 2014. During the years at issue, end customers who used mobile devices with a specific operating system were able to download the applicant’s game applications solely via the marketplace for applications.

3 During that period X entered into standardised agreements, governing the distribution of products via the marketplace for applications, with developers such as the applicant. Those agreements stipulated that the sellers of the products offered through the marketplace for applications were their developers. X was to display the products on behalf of the developers and make them available for the end customers to download and purchase. X was to receive a commission in return for providing those services. The payment transaction was to be processed via the marketplace for applications.

4 During the years at issue, various downloadable game applications were available to the end customers in the marketplace for applications. The vast majority of those games did not originate from X but rather from the designers themselves. When presented in the marketplace for applications, the name of the developer was also displayed for each game. During the years at issue, the applicant appeared in the marketplace for applications and its company name, legal form and address were displayed.

5 Although the game applications developed by the applicant could be downloaded free of charge from the marketplace for applications, it was necessary for the end customer to purchase improvements or other benefits (in-application purchases) in order to advance in the game or obtain other benefits. The end customers were able to select the desired improvements or benefits in the applicant’s game application and have them activated for a fee.

6 The in-application purchases were processed via the marketplace for applications by means of a method of payment saved there by the end customer. The applicant was not named as the supplier in the course of the purchase transaction. Only X’s logo and certain links were visible. Upon completion of the purchase process, the end customer received an order confirmation from X by email. That email contained the logo of the marketplace for applications and a statement that

purchase was transacted with the relevant developer (in this case, the applicant) in the marketplace for applications.

7 The applicant initially regarded itself as the supplier to the end customers. It therefore declared German VAT for end customers based in the European Union, on the ground that the place of supply was, pursuant to Article 3a(1) of the UStG and Article 45 of Directive 2006/112, its place of establishment, and paid the German VAT to the defendant and to the appellant in the appeal on a point of law, namely the Finanzamt (Tax Office) ('the FA').

8 On 29 January 2016, the applicant submitted corrected VAT returns for the years at issue. It was now of the opinion that this was a case in which services were commissioned (Paragraph 3(11) of the UStG, Article 28 of Directive 2006/112). It had provided its services to X, and X had provided the services to the end customers. Under Paragraph 3a(2) of the UStG and Article 44 of Directive 2006/112, the place of supply of its services to X was in Ireland.

9 The FA took the view that X was merely to be regarded as an intermediary. It is true that the respective purchase process took place via the marketplace for applications. However, the end customers were made aware of the terms of use at each individual step of the in-application purchase. X had thus clearly informed the end customers in the course of each purchase that the transactions were being executed on behalf a third party and that X was merely collecting the amount owed. The FA therefore issued VAT assessments in which the corrections made by the applicant had not been not taken into account.

10 The Finanzgericht (Finance Court) ('the FG') upheld the action brought by the applicant. It considered that the appellant's transactions were not taxable in Germany because the recipient of its services was X. According to Paragraph 3a(2) of the UStG and Article 44 of Directive 2006/112, the place of supply was in Ireland.

11 The FA's appeal on a point of law (*Revision*) to the referring court is directed against the judgment of the Finanzgericht (Fiscal Court).

Brief summary of the basis for the reference

On the first question referred

12 According to the case-law of the Court of Justice of the European Union ('the Court'), the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction have to be identified, unless the contractual terms do not wholly reflect the economic and commercial reality of the transactions (see judgments in *Newey* of 20 June 2013 – C-653/11, EU:C:2013:409, paragraph 43 et seq.; *Budimex* of 2 May 2019 – C-224/18, EU:C:2019:347, paragraph 28 et seq.; see also the judgment in *Suzlon Wind Energy Portugal* of 24 February 2022 – C-605/20,

EU:C:2022:116, paragraph 58). Similarly, the question as to whether the taxable person acted in its own name but on behalf of another must, in particular, be examined on the basis of the contractual relations between the parties (see judgment in *Henfling and Others* of 14 July 2011 – C-464/10, EU:C:2011:489, paragraph 42; *Fenix International* of 28 February 2023 – C-695/20, EU:C:2023:127, paragraph 72 et seq.).

13 If the referring court were to uphold the judgement of the FG, it would be departing from the legal classification assigned to the transactions by X and the Irish tax authorities. That would result in the (potentially final) non-taxation of the transactions.

14 It is true that the tax authorities of a Member State are not precluded from being able, unilaterally, to subject transactions to VAT treatment different from that under which they have already been taxed in another Member State (see judgment in *KrakVet Marek Batko* of 18 June 2020 – C-276/18, EU:C:2020:485, paragraph 53). However, when interpreting the relevant provisions of EU and national law, courts of a Member State that find that the same transaction has been the object of a different tax treatment for the purposes of VAT in another Member State have an obligation – if there is no judicial remedy under national law against their decisions – to refer a request for a preliminary ruling to the Court (judgment in *Marcandi* of 5 July 2018 – C-544/16, EU:C:2018:540, operative part no. 3 and paragraph 63 et seqq.; *KrakVet Marek Batko* of 18 June 2020 – C-276/18, EU:C:2020:485, paragraph 51).

15 According to the FA's submissions, such a situation arises in the present case. The FG took the view that X had provided the services to the end customers and that the applicant had provided its services to X. On the other hand, as is apparent from the factual findings of the FG and the invoices issued to the end customers, X assumed that it had provided a service to the applicant and that the applicant had provided its service directly to the end customers. This means that for the period prior to 1 January 2015, there is a risk that transactions processed via X's marketplace for applications will not be taxed. They would not be taxed in Ireland because Ireland considers there to be a right of taxation in the developer's county of establishment (here: Germany). In Germany, they would not be taxed if the Chamber were to uphold the view of the FG, which found that Ireland had a right of taxation.

16 The order confirmations issued by X, which included a statement explaining that the purchase was transacted with the respective developer (in this case, the applicant) in the marketplace for applications and which showed German VAT, militate in favour of a finding that it should be assumed, in line with the view taken by Ireland and X, that the services were supplied to the end customers by the applicant (and that a situation contemplated in Article 3(11) of the UStG and Article 28 of Directive 2006/112 is not present) (on the significance of the invoice in this context, see judgment in *Fenix International* of 28 February 2023 – C-695/20, EU:C:2023:127, paragraphs 75 to 77). That was also the initial

assumption made by the applicant. From the legislative history of Article 9a of Implementing Regulation No 282/2011 and the objective pursued by the new legislation (see, in that regard, the judgment in *Fenix International* of 28 February 2023 – C-695/20, EU:C:2023:127, paragraph 15 et seqq., and paragraph 52 et seqq.) it could also be concluded that the VAT classification applied by the marketplace for applications, and contractually agreed with the developers, should remain applicable in respect of periods prior to its entry into force.

17 However, the fact that Article 9a of Implementing Regulation No 282/2011 gives specific expression to the normative content of Article 28 of Directive 2006/112, as interpreted by the Court (see judgment in *Fenix International* of 28 February 2023 – C-695/20, EU:C:2023:127, paragraph 86), suggests that the principles laid down therein could apply also to the applicant's transactions that were effected during the years at issue (see, in general, judgments in *Welmory* of 16 October 2014 – C-605/12, EU:C:2014:2298, paragraph 45 et seq.; and *Leichenich* of 15 November 2012 – C-532/11, EU:C:2012:720, paragraph 32). The non-binding guidelines resulting from the 93rd meeting of the VAT Committee of 1 July 2011 (Document C – taxud.c.1(2012) 1410604-1410604–709) could lend further support to that proposition. The FG found that the actions at the time of conclusion of the contract militated in favour of a finding that X had been acting in its own name, that the content of the order confirmations was also insufficiently clear and, furthermore, that the order confirmations were sent only after the transaction had been completed. In the light of the 2011 Guidelines, it may therefore be possible to find that X did not name the developers as the providers of the electronic services in a sufficiently clear manner at the time of concluding the contract, and that it was therefore X who had provided the services to the end customers.

The second question referred

18 By its second question, the referring court seeks clarification of the legal consequences arising from Article 28 of Directive 2006/112.

19 If the first question referred is answered to the effect that X is the service provider, this constitutes a case in which services are commissioned under both national law and EU law. The relevant German provision (Paragraph 3(11) of the UStG) is based on Article 28 of Directive 2006/112. That provision provides that where taxable persons acting in their own name but on behalf of another person take part in a supply of services, they are to be deemed to have received and supplied those services themselves. They are therefore regarded as the taxable persons vis-à-vis the end customer (see judgment in *Valstybine mokesčių inspekcija* of 16 September 2020 – C-312/19, EU:C:2020:711, paragraph 49 and 52).

20 Those provisions apply to all categories of services (see judgment in *Fenix International* of 28 February 2023 – C-695/20, EU:C:2023:127, paragraph 54). They require that there be a mandate under which the commission agent acts, on behalf of the principal, in the provision of services, which entails the conclusion,

between the commission agent and the principal, of an agreement concerning the granting of the mandate concerned (judgment in *Gmina L.* of 30 March 2023 – C-616/21, EU:C:2023:280, paragraph 32). That mandate was granted under the agreements entered into between X and the applicant.

21 The legal consequence of applying Paragraph 3(11) of the UStG and Article 28 of Directive 2006/112 is the legal fiction of two identical supplies of services provided consecutively (see judgment in *Commission* v *Luxembourg* of 4 May 2017 – C-274/15, EU:C:2017:333, paragraph 86).

22 The operator, who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself (judgment in *UCMR – ADA* of 21 January 2021 – C-501/19, EU:C:2021:50, paragraph 43; *Fenix International* of 28 February 2023 – C-695/20, EU:C:2023:127, paragraph 54); it is deemed to be the supplier of the services (judgment in *Fenix International* of 28 February 2023 – C-695/20, EU:C:2023:127, paragraph 55).

23 If the supply of a service in which an operator takes part is subject to VAT, the legal relationship between that operator and the operator on behalf of whom it acts is also subject to VAT (see judgment in *Commission* v *Luxembourg* of 4 May 2017 – C-274/15, EU:C:2017:333, paragraph 87).

24 If the service in which the commission agent takes part is exempt from VAT, that exemption applies likewise to the legal relationship between the principal and the commission agent (see judgment in *Henfling and Others* of 14 July 2011 – C-464/10, EU:C:2011:489, paragraph 36).

25 However, the commission agent should not be treated completely equally to an authorised representative. The principle of neutrality is not violated in view of the fact that EU law lays down different rules for services supplied by a commission agent acting in his own name but on behalf of another, and services supplied by an agent acting in the name of and on behalf of another (see judgment in *Henfling and Others* of 14 July 2011 – C-464/10, EU:C:2011:489, paragraph 38).

26 The extent of that fiction is disputed.

27 Firstly, it is conceivable that the legal relationship between the commission agent and the principal on whose behalf the commission agent is acting, should be treated in exactly the same way for VAT purposes as the service in which the commission agent takes part. The fiction of Article 28 of Directive 2006/112 would be extended to the entire service, that is to say that both services (that supplied by the principal to the commission agent and that supplied by the commission agent to the end customer) would be treated in the same way as if the principal provided the service directly to the end customer.

28 The fact that the subject of the provision is a legal fiction and an additional fictitious transaction would not, from that perspective, alter the VAT result could lend support to that proposition. Direct and indirect supplies of services would be treated equally. The taxation of a service would not depend on the distribution channel. Not only would the tax revenue continue to accrue to the Member State to which it would accrue under the provisions of EU law in the case of a direct supply of services, but the amount would also be the same as for a direct supply of services. At the same time, possible circumventions or abuses would be prevented.

29 In the present case, if the services were being provided directly, the place of supply of the applicant's services would be in Germany. A tax exemption is not applicable. The standard VAT rate applies. According to that point of view, the same would apply to the applicant's fictitious supply of the service to X.

30 Secondly, it is conceivable that the place of supply of the service in which the commission agent takes part would, at least, also determine the place of supply of the service between the principal and the commission agent. The fiction would extend at least to the place of supply. That could be justified, for example, on the basis that the place of supply of the service provided by the applicant to X must also be determined in accordance with Article 45 of Directive 2006/112, even though X is a taxable person, because the services in which X takes part are services supplied electronically to non-taxable persons to whom Article 45 of Directive 2006/112 applies.

31 The place of the applicant's fictitious supply of the service to X would also be in Germany if that viewpoint were to be adopted.

32 Lastly, it is conceivable that the place of supply of the service in which the commission agent takes part, and the place of supply of the service between the principal and the commission agent should be determined separately, in accordance with Articles 44 and 45 of Directive 2006/112. Paragraph 38 of the judgment in *Henfling and Others* of 14 July 2011 – C-464/10, EU:C:2011:489, and the Opinion of Advocate General Jääskinen in *Lebara* of 8 December 2011 – C-520/10, EU:C:2011:818, paragraphs 50 and 71, may lend support to that proposition. A fictitious supply of services by the principal to the commission agent would mean that the place of supply would always be shifted, by application of Articles 44 and 45 of Directive 2006/112, to the place where the commission agent is established, unless a special rule on the place of supply applies. As a result of that fiction, the business supply service provided by the commission agent to the principal (which, by itself, is provided at the place where the principal is established, by virtue of Article 44 of Directive 2006/112) would, paradoxically, have the effect of shifting the place of supply of all services away from the principal. The referring court has doubts as to whether that corresponds to the commercial and economic reality of the commission for services.

33 In the case at issue, that viewpoint would mean that, under Article 44 of Directive 2006/112, the place of supply of the fictitious service provided by the applicant to

X was in Ireland, as X is a taxable person who received the fictitious supply of services from the applicant for the purposes of its business. By virtue of Article 45 of Directive 2006/112, the place of supply of the services rendered by X to the end customers would also be in Ireland.

The third question referred

34 The third question referred for a preliminary ruling seeks to ascertain the effects of the fact that X, with the consent of the applicant, sent order confirmations by email, in which it was stated that purchases had been made from the applicant in the marketplace for applications and in which the gross price and the German VAT included therein were specified.

35 The referring court has considered whether the applicant was liable under Article 203 of Directive 2006/112 for the VAT listed in its name and with its consent, on the ground that the order confirmations that X sent by email could constitute invoices for the purposes of that article. X's authorisation to issue invoices on behalf of the applicant is based on the agreements concluded between them. X was to receive only a commission. The end customers had also consented to electronic transmission of the order confirmations.

36 However, a tax liability on the part of the applicant under Article 203 of Directive 2006/112 and based on the order confirmations issued by X on behalf of the applicant may be precluded by the Court's judgment of 8 December 2022 in *Finanzamt Österreich* (VAT wrongly invoiced to end customers) – C-378/21, EU:C:2022:968.

37 The transactions at issue in the present case are transactions which were not executed in favour of taxable persons for the purposes of their businesses. The judgment of 8 December 2022 in *Finanzamt Österreich* (VAT wrongly invoiced to end customers) – C-378/21, EU:C:2022:968, could be construed as meaning that there is thus no tax liability under Article 203 of Directive 2006/112. The Court had previously clarified that the issue was the risk of loss of tax revenue which the right to deduct input tax might entail (see judgments in *Stadeco* of 18 June 2009 – C-566/07, EU:C:2009:380, paragraph 28; *Stroy trans* of 31 January 2013 – C-642/11, EU:C:2013:54, paragraph 32; *LVK – 56* of 31 January 2013 – C-643/11, EU:C:2013:55, paragraph 36; and *Rusedespred* of 11 April 2013 – C-138/12, EU:C:2013:233, paragraph 24; *EN.SA.* of 8 May 2019 – C-712/17, EU:C:2019:374, paragraph 32; *P.* (fuel cards) of 18 March 2021 – C-48/20, EU:C:2021:215, paragraph 27; see also the judgment in *Terracult* of 2 July 2020 – C-835/18, EU:C:2020:520, paragraph 29 and the case-law cited therein).

38 Although the recipients of the services are not taxable persons, there could be a risk of loss of tax revenue in the present case, which Article 203 of Directive 2006/112 seeks to avoid. The requirement for an invoice also serves to facilitate monitoring of payment of the tax debt, to ensure correct collection of the tax and

to avoid fraud (see judgments in *Langhorst* of 17 September 1997 – C-141/96, EU:C:1997:417, paragraphs 17 and 20; *Barlis 06 – Investimentos Imobiliarios e Turisticos* of 15 September 2016 – C-516/14, EU:C:2016:690, paragraph 27; *Geissel* v *Butin* of 15 November 2017 – C-374/16 and C-375/16, EU:C:2017:867, paragraph 41, as well as recital 46 of Directive 2006/112). In any event, if several taxable persons are involved in the supply of the service, both the authorised allocation for accounting purposes by the principal (applicant) of a service to the (from the principal's point of view) wrong supplier and the authorised allocation for accounting purposes by the principal of a service to the (from the principal's point of view) wrong tax creditor would jeopardise the EU's tax revenues, even in cases where the customer is not entitled to deduct input VAT. There is a risk that the transactions will not ultimately be taxed because Ireland assumes that Germany has a right of taxation, which is consistent with the order confirmations, whereas the FG took the view that Ireland has a right to tax X, which contradicts them.

39 In the present case, that situation was brought about by the applicant. At first, it authorised the marketplace for applications to name it as the supplier in the order confirmations, which is permissible in itself (Article 220(1) of Directive 2006/112), but then subsequently put forward the contrary view in its submissions to the FA, that is to say that the operator of the marketplace for applications was the supplier (and that it was not liable for the VAT shown in its name). It thus behaving in a contradictory manner. If it considers that X is the supplier of the service, it cannot authorise X to name it as the supplier. The applicant's contradictory behaviour could justify a finding that it is liable for VAT under Article 203 of Directive 2006/112.

40 The risk of loss of tax revenue inherent in the order confirmations can be eliminated. That could be achieved if, for example, the applicant were to furnish proof that the marketplace for applications has fulfilled its tax obligations arising in connection with the transactions which are, in the applicant's opinion, attributable to it. A subsequent elimination of the tax would then depend on the issuance of corrected order confirmations to the end customers, in which the marketplace for applications (in this case: X) names itself as the supplier of the services and shows Irish VAT (paying it to the Irish tax authorities).