Case C-43/19

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:

24 January 2019

Referring court:

Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Portugal)

Date of the decision to refer:

2 January 2019

Applicant:

Vodafone Portugal — Comunicações Pessoais, SA

Defendant:

Autoridade Tributária e Aduaneira

I. Subject matter of the main proceedings

These proceedings concern the action brought by Vodafone Portugal — Comunicações Pessoais, S.A., requesting that its VAT self-assessment for the month of November 2016 be declared unlawful and partially annulled, that the decision of the Unidade dos Grandes Contribuintes (Department for Major Taxpayers) rejecting its complaint be set aside, and that it be reimbursed the amount wrongly self-assessed. The question has arisen of whether VAT should be applied to the amounts which Vodafone charges its customers for failure to comply with minimum contractual commitment periods (See the judgment of the Court of Justice in Case C-295/17, which dealt with questions having aspects in common with those in the present proceedings).

II. Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Articles 2, 9, 24, 72 and 73.

III. Provisions of national law relied on

Código do IVA (VAT Code): Articles 1(1)(a), 4(1) and 16(6).

Article 1(1)(a):

'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.'

Article 4:

'1 — Transactions effected for consideration which do not qualify as a supply, intra-Community purchase or importation of goods shall be treated as a supply of services.'

Article 16(6):

'6 — The following shall be excluded from the basis of assessment referred to in the previous paragraph:

(a) interest due on the deferred payment of consideration and amounts received, pursuant to a judicial decision, as damages for the total or partial failure to discharge obligations …'

Lei das Comunicações Eletrónicas (Lei n.° 5/2004, de 10 de fevereiro, na redação dada pela Lei n.° 15/2016, de 17 de junho) (Law on electronic communications (Law No 5 of 10 February 2004, in the version resulting from Law No 15 of 17 June 2016)): Articles 48 and 52 A

Article 48:

'Contracts

1 — Without prejudice to the legislation applicable to consumer protection, the supply of public communication networks and the supply of publicly accessible electronic communication services must be covered by a contract in which the following information must be set out clearly, exhaustively and in an easily accessible manner:

...

(g) the term of the contract and the conditions governing renewal, suspension and termination of the services and of the contract;

...

2 — Information relating to the term of the contract, including conditions governing its renewal and termination, must be clear, intelligible, appear on a durable medium and include the following particulars:

(a) any tie-in period which depends on the provision to the consumer of any kind of identified and quantified benefit related to terminal-equipment subsidies, installation and activation of the service or other promotions;

(b) any charges incurred as a result of the portability of numbers and other identifiers;

(c) any charges incurred as a result of the early termination of the contract during the tie-in period at the subscriber's request, particularly for the purpose of recovering costs associated with terminal-equipment subsidies, installation and activation of the service or other promotions;

...

11 — During the tie-in period, charges which the subscriber will be required to bear in the event of termination of the contract at the subscriber's own request shall not exceed the costs which the supplier has incurred as a result of installation of the service; the levying of payments by way of damages or compensation shall be prohibited.

12 — Charges resulting from early termination of a contract subject to a tie-in period at the subscriber's request must be proportionate to the benefit granted to the subscriber, which is identified and quantified in the contract, and may not automatically reflect the total value of the instalments outstanding on the date of termination.

13 — For the purposes of the previous paragraph, where terminal equipment has been subsidised, the charges must be calculated in accordance with the applicable legislation and, in other cases, those charges may not exceed the value of the benefit granted which, in proportion to the agreed term of the contract, the undertaking providing the service still has to recover on the date on which the early termination takes effect.'

Article 52 A

'Suspension and termination of the service provided to subscribers who are deemed to be consumers

1 — Where services are provided to subscribers who are deemed to be consumers, in the event of non-payment of the amounts indicated on the invoice, undertakings supplying public communications networks or publicly accessible electronic communications services must send a formal demand to the consumer allowing

him an additional period of 30 days to make payment, failing which the service will be suspended and the contract will possibly be terminated automatically, in accordance with paragraphs 3 and 7, respectively.

2 — The formal demand referred to in paragraph 1 above must be sent to the consumer in writing within 10 days of the due date of the invoice and it must specifically state the consequences of non-payment, in particular the suspension of the service and the automatic termination of the contract, and provide information about the options available to the consumer to prevent this.

3 — Within 10 days of the expiry of the additional period provided for in paragraph 1, undertakings supplying public communications networks or publicly accessible electronic communications services must suspend the service for a period of 30 days where, upon expiry of the abovementioned time-limit, the consumer has not made payment or has not concluded in writing with the undertaking a payment agreement for settlement of the amounts due.

4 — The service shall not be suspended where, before the date on which the suspension should start to apply, the undertaking is challenged in writing about the amounts stated on the invoice on the grounds that the debt does not exist or is not payable.

5 — Where the service is suspended under this article, the provisions of paragraphs 3 and 4 of the previous article shall apply.

6 — A consumer may succeed in having the suspension lifted by settling the amounts due or concluding a written payment agreement with the undertaking supplying public communications networks or publicly accessible electronic communications services, in which case that undertaking must restore the service provided with immediate effect or, where that is not technically possible, within five working days of the date of payment or, as the case may be, of conclusion of the payment agreement.

7 — The contract shall be terminated automatically upon conclusion of the 30-day suspension period if the consumer has not settled in full the amounts due or concluded a written payment agreement.

8 — Termination of the contract as referred to in the previous paragraph shall be deemed to be without prejudice to the collection of a payment by way of damages or compensation for the termination of the contract during the tie-in period, in accordance with and subject to the limits set out in Decree-Law No 56 of 1 June 2010.

9 — Where the consumer has received advance written notice within the period stipulated in Article 52(5), non-payment of any sum agreed in a payment agreement must result in the termination of the contract and the stipulations of the previous paragraph shall apply.

10 — Failure by an undertaking supplying public communications networks or publicly accessible electronic communications services to comply with this article, in particular by continuing to provide the service contrary to paragraph 3 or by issuing an invoice after the time when it should have suspended the service, shall result in the non-liability of the consumer to pay the consideration due for the service provided and the obligation to defray the procedural costs incurred in collecting the debt.

11 — The previous paragraph shall not apply to invoices issued after suspension of the service which relate to services actually provided before the suspension or to statutory payments provided for in the event of early termination of the contract.

12 — Where the service is suspended for a reason other than the non-payment of invoices, Article 52(1) shall apply.'

IV. Succinct presentation of the facts and procedure in the main proceedings

1 The object of VODAFONE PORTUGAL — COMUNICAÇÕES PESSOAIS, S.A. ('Vodafone') is the supply of electronic communications services, in particular electronic communications, fixed telephony and wireless internet access.

2 In the context of its business activities, Vodafone concludes with its customers various contracts for the supply of electronic communications, internet access and television services.

3 Customers may conclude those contracts for an indefinite term.

4 In certain cases, such contracts can include special promotions subject to requirements and conditions tying in customers for a predetermined minimum period.

5 In those cases, customers commit in advance to maintain a contractual relationship with Vodafone and to use the services and goods supplied by that company for a minimum period of time in exchange for benefitting from more advantageous conditions, usually related to the price payable for the contracted services.

6 The minimum commitment or tie-in period, as a condition for accessing more advantageous contractual terms, is essential in order to ensure that Vodafone is able to recover some of the investment made in equipment and infrastructure.

7 For Vodafone, the minimum period enables it to recover the various investments made, in particular in respect of:

(i) global infrastructure, which includes networks, equipment and installations;

(ii) acquisition of customers, which includes commercial and marketing campaigns and the payment of commission to associated undertakings which deal with the acquisition of customers;

(iii) activation of the contracted service, including home and office installation;

(iv) the award of special benefits to customers, including discounts and free services;

(v) costs of purchasing equipment.

8 If a customer were tied in for only one or two months from the date of conclusion of the contract, the costs of purchasing equipment and installing and activating the service would not be covered by the amount of the consideration which Vodafone receives.

9 Failure to comply with the minimum commitment or tie-in period results in the payment by customers of the amounts provided for in the respective service contracts, the aim of which is to deter such customers from failing to comply.

10 In August 2016, Vodafone began to calculate the amount payable by customers in cases of non-compliance with the minimum commitment period on the basis of the benefits granted to the customer concerned at the start of the contract for which, on the date of termination of the contract, Vodafone had not been compensated in the context of supplying the service.

11 Payment of that amount must be made only in the event of non-compliance by the customer and its purpose is to ensure that Vodafone recovers part of the investment made, in particular through the provision of more advantageous commercial conditions.

12 Customer contracts identify and quantify the benefits granted to customers when the contract is entered into and stipulate a minimum tie-in period, the amount payable in the event of non-compliance being calculated on the basis of those benefits and in proportion to the completed part of the tie-in period.

13 The amount payable may not exceed the costs incurred by Vodafone for the purposes of installing the service.

14 Vodafone did not calculate VAT on the amounts it received from its customers in respect of non-compliance with the minimum contractual commitment period, although it began to do so following a tax inspection concerning the 2012 tax year, in which it was issued with an additional VAT assessment in relation to such amounts received from its customers.

15 On 6 January 2017, Vodafone filed its periodic VAT return for November 2016, paying the State the amount of EUR 620 132.79 in respect of VAT, which was calculated by applying rates of 18%, 22% and 23% to the sums received for non-

compliance with the minimum contractual commitment period, totalling EUR 2 705 527.08.

16 Despite having self-assessed the VAT corresponding to those amounts, Vodafone believes that they are not taxable.

17 On 13 October 2017, Vodafone filed a complaint challenging that VAT self-assessment, disputing in part its lawfulness as regards the liability to VAT of the amounts referred to above.

18 The complaint was dealt with by the Department for Major Taxpayers.

19 On 8 January 2018, Vodafone was informed of the decision expressly rejecting its complaint.

20 The standard contracts which Vodafone concludes with its customers include 'commitment periods' linked to certain special conditions and stipulate the charges due in the event of early termination of the contract.

21 In 2012, Vodafone failed to calculate VAT on the sums it received from its customers for non-fulfilment of the tie-in period, as a result of which the Department for Major Taxpayers commenced an inspection regarding the 2012 tax year and issued additional VAT assessment notices in relation to the compensation collected for non-fulfilment of the contractual commitment period.

22 Vodafone brought an action disputing those VAT assessments for the 2012 tax year.

V. Succinct presentation of the reasoning in the request for a preliminary ruling

The issue arising in the present proceedings is, essentially, whether VAT should be levied on the sums which Vodafone receives from its customers for non-compliance with the tie-in periods, which are calculated in accordance with the contractual provisions.

In the decision on the complaint, the Autoridade Tributária e Aduaneira (the Tax and Customs Authority) understood, in summary, that '*the damages concerned are intended to compensate for the loss of profits and are derived from the fulfilment of obligations entered into under service contracts, such that they constitute consideration for transactions liable to VAT*' and that '*as regards their classification for the purposes of the VAT Code, the damages [at issue] constitute consideration for the provision of taxable and non-exempt services*'.

Vodafone submits, in particular, that the tie-in clause included in the contracts concluded by Vodafone Portugal is a penalty clause similar to a 'liquidated damages clause', and that, in order to be able to conclude that the damages are

liable to VAT, it is necessary to establish that the transaction is for consideration and that a synallagmatic relationship exists between the service provided and the amount paid. Once the contract between the customer and Vodafone is terminated, the contractual compensation is not paid in return for the supply of services. Moreover, since such compensation does not constitute consideration for any transaction and is intended to make good the damage, it is not liable to VAT since there is no underlying supply of goods or services. The amount which Vodafone receives is not consideration for services supplied to the customer, in view of the fact that payment of that amount occurs after termination of the contract and is solely and exclusively intended to cover damage caused by non-compliance and the early termination of the contract.

The Tax and Customs Authority submits, in particular, that contracts with a tie-in period concluded by Vodafone and made available to its customers do not, as such, contain any penalty clauses in the legal sense of that term. Even if there were a penalty clause, the amount stipulated would in any event be liable to VAT, given that it constitutes compensation for loss of profits relating solely and exclusively to the costs incurred in providing services at the start of the contract, which, on the date of termination, have still not been collected. In the event of non-compliance with the tie-in period, Vodafone charges it customers a specific sum commensurate with the installation costs, discounts and benefits, which constitute services provided at the start of the contract. The release of one of the parties from the contract is in return for payment of the amount concerned, which is liable to VAT.

VI. Questions referred for a preliminary ruling

(1) Must Articles 2(1)(c), 9, 24, 72 and 73 of Council Directive 2006/112/EC of 28 November 2006 be construed as meaning that the levying by an electronic communications operator on its former customers (to whom it granted promotional benefits in the form of free-of-charge installation, service activation, portability or equipment, or the application of special rates, in exchange for a commitment by customers to observe a tie-in period, which those customers have not fulfilled for reasons attributable to themselves) of an amount which, as required by law, must not exceed the costs incurred by the supplier undertaking for the installation of the service and must be proportionate to the benefit granted to the customer, that benefit being identified and quantified as such in the contract concluded, and therefore may not automatically reflect the total value of the instalments outstanding on the date of termination, constitutes a supply of services liable to VAT?

(2) In the light of the provisions cited above, does the fact that the amounts concerned are payable following termination of the contract, when the operator no longer supplies services to the customer, and the fact that no specific act of consumption has occurred since the contract was terminated, preclude the classification of such amounts as consideration for the supply of services?

(3) In the light of the provisions cited above, is it impossible for the amount concerned to be treated as consideration for the supply of services because the operator and its former customers specified in advance, as required by law, in a standard-form contract, the formula for calculating the amount which former customers must pay if they fail to comply with the tie-in period provided for in the service contract?

(4) In the light of the provisions cited above, is it impossible for the amount concerned to be treated as consideration for the supply of services when the amount at issue does not reflect the amount which the operator would have received during the remainder of the tie-in period if the contract had not been terminated?