Provisional text

JUDGMENT OF THE COURT (Third Chamber)

21 January 2021 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c), Article 24(1) and Article 25(a) – Taxable transactions – Fees for the public performance of musical works – Article 28 – Collective copyright management organisation – Collection of those fees in its own name and on behalf of copyright holders from end users)

In Case C?501/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice, Romania), made by decision of 22 February 2019, received at the Court on 28 June 2019, in the proceedings

UCMR – ADA Asocia?ia pentru Drepturi de Autor a Compozitorilor

v

Asocia?ia Cultural? ‘Suflet de Român’, represented by its liquidator, Pro Management Insolv IPURL,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, acting as Judge of the Third Chamber, N. Wahl, F. Biltgen and L.S. Rossi, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– UCMR – ADA Asocia?ia pentru Drepturi de Autor a Compozitorilor, by A. Achim,

– the Romanian Government, initially by C.-R. Can??r, R. Ha?ieganu and A. Rot?reanu, and subsequently by E. Gane, A. Rot?reanu and R. Ha?ieganu, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 1 October 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 24(1), Article 25(a) and Article 28 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1) ('the VAT Directive').

2 The request has been made in proceedings between UCMR – ADA Asocia?ia pentru Drepturi de Autor a Compozitorilor (UCMR – ADA Association for the copyright of composers; 'UCMR-ADA') and Asocia?ia Cultural? 'Suflet de Român' (Cultural Association 'Romanian Soul'; 'the association'), currently in liquidation, concerning the taxation, for value added tax (VAT) purposes, of a payment of remuneration due from the association to UCMR-ADA in respect of the public performance of musical works in the context of a show organised by the association.

Legal context

EU law

3 Article 2(1) of the VAT Directive provides:

'The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…'

4 Article 24(1) of that directive is worded as follows:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods.'

5 Under Article 25 of the VAT Directive:

'A supply of services may consist, inter alia, in one of the following transactions:

(a) the assignment of intangible property, whether or not the subject of a document establishing title;

…'

6 Article 28 of that directive provides:

'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.'

Romanian law

The Tax Code

7 Article 126, entitled ‘Taxable transactions’, of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 on the Tax Code) of 22 December 2003 (M. Of., Part I, No 927/23 December 2003), in the version applicable to the dispute in the main proceedings (‘the Tax Code’), states:

‘1. Transactions that fulfil the following cumulative conditions shall be taxable in Romania for VAT purposes:

(a) transactions which, within the meaning of Articles 128 to 130, constitute or are treated as a supply of goods or services, which is subject to VAT, for consideration; …’

8 Article 129 of the Tax Code, entitled ‘Supply of services’, provides:

‘1. A supply of services shall mean any transaction which does not constitute a supply of goods as defined in Article 128.

2. Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

3. Supplies of services include transactions such as:

…

(b) the assignment of intangible property, whether or not the subject of a document establishing title, inter alia: the transfer and/or assignment of copyright, patents, licenses, trademarks and other similar rights;

…

(e) services performed by intermediaries acting in the name and on behalf of other persons, where they take part in a supply of goods or services.

…’

The Copyright Law

9 Article 13 of Legea nr. 8/1996 privind dreptul de autor ?i drepturile conexe (Law No 8/1996 on copyright and related rights) of 14 March 1996 (M. Of., Part I, No 60/26 March 1996), in the version applicable to the dispute in the main proceedings (‘the Copyright Law’), is worded as follows:

‘The use of a work gives rise, for the author, to distinct and exclusive economic rights which allow him to authorise or prohibit:

…

(f) the direct or indirect communication of the work to the public by any means, including making it available to the public such that the public can have access to it from a place and at a time individually chosen by them;

…’

10 Title III of that law is entitled ‘Management and protection of copyright and related rights’. Chapter I thereof, concerning ‘Management of the author’s economic rights and related rights’, contains three sections. Articles 123 to 1234 are included in Section I, entitled ‘General provisions’.

11 Under Article 123 of the Copyright Law:

‘1. Holders of copyright and related rights may exercise the rights granted to them under this Law either individually or, on the basis of an authorisation, through collective management organisations, subject to the conditions laid down in this Law.

…

3. Holders of copyright or related rights may not assign the economic rights granted under this Law to collective management organisations.’

12 Article 1231 of that law provides:

‘1. Collective management shall be mandatory for the exercise of the following rights:

…

(e) right of communication of musical works to the public …

…

2. In respect of the categories of rights referred to in paragraph 1, collective management organisations shall also represent holders of rights who have not commissioned them to do so.’

13 Article 125(2) of the Copyright Law, contained in Section II, entitled ‘Collective management organisations which manage copyright and related rights’, states:

‘[Collective management] organisations are created directly by holders of copyright or related rights, whether natural or legal persons, and act within the limits of the authorisation granted to them and on the basis of the statute adopted according to the procedure laid down by law.’

14 Article 1291 of that law is worded as follows:

‘Where collective management is mandatory, if a [copyright] holder is not a member of any organisation, competence lies with the organisation in the sector which has the largest number of members. Unrepresented right holders may claim sums due to them within three years of the date of notification. After the expiry of that time limit, non-distributed or unclaimed sums, with the exception of management fees, shall be used in accordance with the decision of the general assembly.’

15 Within Title III, Chapter I, of the Copyright Law, Section III, entitled ‘Functioning of collective management organisations’, contains Articles 130 to 135.

16 Article 130(1) of that law provides:

‘Collective management organisations have an obligation to:

(a) grant, in exchange for a fee, non-exclusive authorisations in the form of non?exclusive licences to users who apply for them in writing before any use of the protected repertoire;

(b) draw up methodologies for their fields of activity, including appropriate copyright fees, which must be negotiated with users with a view to the payment of those fees, in the case of works whose method of use makes it impossible for right holders to grant individual authorisation;

…

(e) collect the sums due from users and to distribute them among right holders …

…’

17 Article 1311(1) of the Copyright Law, which supplements the provisions of Article 130(1)(b), states:

‘The methodology shall be negotiated by collective management organisations and representatives [of certain associations and of certain user organisations] on the basis of the following main criteria:

(a) the category of right holders, whether members or non-members, and the field in which the negotiations are conducted;

…

(d) the proportion of uses of the repertoire managed by the collective management organisation;

…

(f) the revenue obtained by users from the exercise of the activity making use of the repertoire subject to negotiations.

…’

18 Article 134 of that law provides:

‘1. The exercise of collective management provided for further to the authorisation shall not limit in any way the economic rights of the right holders.

2. Collective management shall be exercised according to the following rules:

(a) decisions concerning the methods and rules for collecting royalties and other amounts from users and the distribution of those amounts among right holders, and those concerning other more important aspects of collective management, must be adopted by members in the general assembly, in accordance with the statute;

(b) the commission payable by right holders who are members of a collective management organisation to cover the operating costs of that organisation … and the fee payable to the collective management organisation, which is the sole collecting body … may not together represent more than 15% of the amounts collected annually;

(c) in the absence of an express decision of the general assembly, the amounts collected by a collective management organisation may not be used for common purposes other than to cover the actual costs of collecting the amounts due and their distribution among members; the general assembly may decide that a maximum of 15% of the amounts collected may be used for common purposes and only within the limits of the field of activity;

(d) the amounts collected by a collective management organisation shall be distributed individually among the rights holders in proportion to the use made of their respective repertoires, no later than 6 months after the date of collection; rights holders may claim payment of amounts collected on a nominal basis or of amounts the distribution of which does not require the submission of specific documentation, within 30 days of the date of collection;

(e) the commission payable by rights holders shall be deducted from the amounts due to each of them after calculation of the individual allocation;

…

3. Royalties paid to collective management organisations is not revenue of those organisations, nor can it be treated as such.

4. In the exercise of their mandate, collective management organisations may not, under this Law, have copyright or related rights, or the exercise of those rights, transferred or assigned to them.'

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

19 UCMR-ADA is a collective management organisation handling author's economic rights in musical works, which was appointed by the Oficiul Român pentru Drepturile de Autor (Romanian Copyright Office) as the sole body responsible in Romania for collecting royalties for the public performance of such works at concerts, shows and entertainment events.

20 On 16 November 2012, the association organised a show during which musical works were performed for a public audience. For that purpose, that association had obtained from UCMR-ADA a non-exclusive licence for the public performance of those works in return for the payment of remuneration.

21 Since the association had paid only part of the remuneration claimed by UCMR-ADA, the latter was compelled to bring the matter before the courts. Although both the court of first instance and the court of appeal found that the full amount of the remuneration claimed was due from the association, the latter court considered that the transaction involving the collection of remuneration by UCMR-ADA was not subject to VAT and reduced the sum charged to the association by the amount of that tax.

22 In its appeal in cassation brought before the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice, Romania), UCMR-ADA argues that the court of appeal infringed the Tax Code as well as the principle of VAT neutrality, as its decision has the effect of making UCMR-ADA, and not the association, bear the VAT burden, even though UCMR-ADA is not the end user of the works at issue.

23 As the referring court has doubts as to the interpretation of the VAT Directive, it asks, in the first place, whether a transaction by which holders of copyright in musical works authorise performance organisers to use such works can be classified as a 'supply of services for consideration' within the meaning of that directive. In that regard, although the referring court is

aware of the fact that the case in the main proceedings concerns different economic rights and different categories of right holders to those at issue in the case which gave rise to the judgment of 18 January 2017, *SAWP* (C?37/16, EU:C:2017:22), it raises the issue of the application *mutatis mutandis* in the present case of the line of reasoning followed by the Court in that judgment.

24 If the transaction is to be regarded as a supply of services for consideration, the referring court asks, in the second place, referring to the judgment of 14 July 2011, *Henfling and Others* (C?464/10, EU:C:2011:489), whether a collective management organisation, in collecting remuneration from users, acts as a taxable person within the meaning of Article 28 of the VAT Directive. Where appropriate, it wishes to know the consequences thereof with regard to the obligation to issue invoices including VAT both on the part of that collective management organisation and on the part of copyright holders.

25 In those circumstances, the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do the holders of rights in musical works supply services within the meaning of Articles 24(1) and 25(a) of the VAT Directive to performance organisers from which collective management organisations, on the basis of an authorisation – a non-exclusive licence – receive remuneration, in their own name but on behalf of those right holders, for the public performance of musical works?

(2) If the first question is answered in the affirmative, do collective management organisations, when receiving remuneration from performance organisers for the right to perform musical works for a public audience, act as a taxable person within the meaning of Article 28 of the VAT Directive, and are they required to issue invoices including VAT to the respective performance organisers, and, when remuneration is paid to authors and other holders of copyright in musical works, are the latter, in turn, required to issue invoices including VAT to the collective management organisation?’

Procedure before the Court

26 The hearing, which had initially been set for 27 May 2020, was cancelled on account of the health crisis, and the questions which had been put for an oral response were converted into questions for a written response. The parties answered those questions within the prescribed period.

Consideration of the questions referred

The first question

27 By its first question, the referring court asks, in essence, whether Article 2(1)(c), Article 24(1) and Article 25(a) of the VAT Directive are to be interpreted as meaning that a holder of copyright in musical works supplies services for consideration to the end user, a performance organiser, where that organiser obtains a non-exclusive licence authorising it to perform those works for a public audience in return for the payment of remuneration collected by an appointed collective management organisation which acts in its own name but on behalf of that copyright holder.

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

29 Under Article 24(1) of that directive, any transaction which does not constitute a supply of

goods must be considered to be a supply of services. Article 25 of the VAT Directive sets out an indicative list of three different transactions that can be classified as a ‘supply of services’, including, in Article 25(a), one consisting in the assignment of intangible property.

30 Prior to examining whether a supply of services, such as that at issue in the main proceedings, can constitute an assignment of intangible property within the meaning of that provision, it should be assessed whether such a transaction is carried out for consideration. As is apparent from paragraph 28 of the present judgment, under Article 2(1)(c) of the VAT Directive, in order for such a supply of services to be covered by the latter, it must in any event be made for consideration (see, to that effect, judgment of 18 January 2017, *SAWP*, C?37/16, EU:C:2017:22, paragraph 24).

31 In accordance with settled case-law, a supply of services is made for consideration, within the meaning of the VAT Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received, the sums paid constituting actual consideration for an identifiable service supplied in the context of a legal relationship pursuant to which there is reciprocal performance (see, inter alia, judgments of 18 January 2017, *SAWP*, C?37/16, EU:C:2017:22, paragraphs 25 and 26, and of 11 June 2020, *Vodafone Portugal*, C?43/19, EU:C:2020:465, paragraph 31 and the case-law cited).

32 According to the information provided by the referring court, the national legislation applicable in the case in the main proceedings establishes mandatory collective management for the exercise of the right to perform musical works for a public audience, inter alia, during shows. That collective management implies, in particular, that a sole collective management organisation appointed is obliged to grant a non-exclusive licence for the public performance of the work in question to users who apply for such a licence, such as performance organisers. In collecting the remuneration due to copyright holders in consideration for that authorisation, that organisation acts in its name but on behalf of those copyright holders, irrespective of whether or not the latter are members of the organisation.

33 It is apparent from that information that, in a situation such as that at issue in the main proceedings, the copyright holder supplies services for consideration to the performance organiser, notwithstanding the involvement of the collective management organisation.

34 First, in such a case, there is a legal relationship pursuant to which there is reciprocal performance in that, by authorising the public performance of a musical work, the holder of copyright in that work grants use of that work to a user. That user, in turn, supplies services to that holder by fulfilling its obligation to pay the remuneration for the use of the requested work to the collective management organisation. The latter acts in those circumstances on behalf of copyright holders.

35 The fact that use of the protected work is granted at the express request of the user, who, in turn, pays the fee due, confirms, in a situation such as that in the main proceedings, not only that there is a legal relationship pursuant to which there is reciprocal performance between the service provider/holder and the recipient/user, but at the same time it allows a direct link to be established between the service supplied and the actual consideration received.

36 Secondly, it must be stated that, in a situation such as that at issue in the main proceedings, the remuneration paid by the user constitutes the actual consideration for the service supplied in the context of that legal relationship. In that regard, it is apparent from the information provided by

the referring court that, although the amount due to copyright holders by a collective management organisation is ultimately determined on the basis of methodologies laid down by national law, it is intended to remunerate the service supplied.

37 That conclusion is not invalidated by the fact that the fee in question is collected by the collective management organisation, since it acts on behalf of copyright holders, nor is it called in question by the fact that collective management of the royalties is a legal obligation, as the Advocate General notes in point 48 of his Opinion, or by the fact that the collective management organisation acts both for authors who are its members and for those who are not its members, since its method of management does not vary according to the category of copyright holders.

38 A situation such as that at issue in the main proceedings can thus be distinguished from that which gave rise to the judgment of 18 January 2017, *SAWP* (C?37/16, EU:C:2017:22), in two respects. First, there is a legal relationship pursuant to which there is reciprocal performance by right holders and an end user of the protected work. Secondly, a direct link can be established between the supply of a service and a value given in return, as the remuneration to be paid by the end user constitutes the actual consideration for the identifiable service supplied by the copyright holder, whereas the Court of Justice held, in paragraphs 28 to 30 of the judgment referred to above, that the fees in question, owed by certain producers and importers by virtue of the national legislation which also determined the amount thereof, were intended to finance fair compensation for the rights holders in question.

39 Now that it has been established that the transaction at issue in the main proceedings constitutes a supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive, it is not necessary to determine whether it is covered by the concept of ‘assignment of intangible property’ within the meaning of Article 25(a) of that directive, as the list of supplies of services referred to in Article 25 thereof is not exhaustive.

40 It follows from all of the foregoing that Article 2(1)(c) of the VAT Directive must be interpreted as meaning that a holder of copyright in musical works supplies services for consideration to the end user, a performance organiser, where the latter is authorised, by a non-exclusive licence, to perform those works for a public audience in return for the payment of remuneration collected by an appointed collective management organisation which acts in its own name but on behalf of that copyright holder.

The second question

41 By its second question, the referring court asks, in essence, whether Article 28 of the VAT Directive is to be interpreted as meaning that a collective management organisation which collects, in its own name but on behalf of holders of copyright in musical works, royalties due to them in consideration for the authorisation for the public performance of their protected works, acts as a ‘taxable person’ within the meaning of that provision and is therefore deemed to have received the services in question from those rights holders before providing them to the end user itself. The referring court also asks whether, in such a case, (i) the collective management organisation must issue invoices in its own name to the end user containing the royalties collected from it, including VAT, and, (ii) whether the copyright holders are, in turn, required to issue to the collective management organisation invoices including VAT for the services supplied in respect of the royalties received.

42 As regards the first part of that question, it must be recalled that, where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed, under Article 28 of the VAT Directive, to have received and supplied those services himself.

43 Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and 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 of 4 May 2017, *Commission* v *Luxembourg*, C?274/15, EU:C:2017:333, paragraph 86 and the case-law cited).

44 In the present case, it is apparent from the order for reference, first, that collective management is mandatory for the exercise of the right to perform musical works for a public audience, inter alia, during shows. In those circumstances, an appointed collective management organisation also represents right holders who have not granted it a mandate and who are therefore not members of that organisation. Secondly, the exclusive economic rights of copyright holders that enable them to authorise or prohibit, inter alia, the public performance of a work may not be assigned to collective management organisations. Thirdly, under the applicable national legislation, a collective management organisation is obliged, first, to grant non-exclusive licences to users who apply for such licences and, secondly, to draw up methodologies, negotiated with users, with a view to the payment of appropriate remuneration in the case of works whose method of use makes it impossible for right holders to grant individual authorisation. Fourthly, where remuneration is due to holders in accordance with those methodologies, the authorisation granted to a user by a collective management organisation will include the amounts that the latter collects in its own name but on behalf of copyright holders.

45 It follows from all those factors taken together that, in a situation such as that at issue in the main proceedings, the collective management organisation, by granting licences to users of protected works and by collecting remuneration in consideration for the use thereof in its own name but on behalf of copyright holders, takes part in the supply of services by the holder in question to the user, namely the performance organiser. Therefore, that organisation must be considered to have, firstly, received the services in question from the holders before providing, secondly, those services to the end users itself.

46 Consequently, in circumstances such as those in the main proceedings, the collective management organisation must be considered to have acted as a commission agent within the meaning of Article 28 of the VAT Directive.

47 The fact that a collective management organisation also represents copyright holders who have not granted it an authorisation does not contradict that conclusion, as neither the supply of services at issue nor the manner in which it is carried out varies according to the category of right holders concerned.

48 It is apparent from the information provided both by the referring court and by the Romanian Government that, in the mandatory collective management system at issue in the case in the main proceedings, the applicable law makes no distinction between members and non-members of a collective management organisation as regards the granting of licences, the collection of remuneration, the distribution of that remuneration and the commission due to the collective management organisation.

49 As regards the second part of that question, concerning the consequences of the application

of Article 28 of the VAT Directive with regard to invoicing, it should be borne in mind that, given that that provision forms part of Title IV, entitled ‘Taxable transactions’, of that directive, supplies of services provided consecutively are subject to VAT. It follows that, if the supply of services 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, to that effect, judgment of 19 December 2019, *Am?r??ti Land Investment*, C?707/18, EU:C:2019:1136, paragraph 38).

50 Thus, where a collective management organisation, acting as a taxable person, carries out, in its own name but on behalf of copyright holders, a transaction consisting in the grant of non-exclusive licences to performance organisers for the purpose of performing musical works for a public audience, in return for remuneration, that organisation carries out a transaction that is subject to VAT in the same way as the copyright holders supply a taxable service when receiving remuneration from the collective management organisation.

51 In such a situation, and for the purpose of observing the principle of fiscal neutrality, the taxable collective management organisation is required to issue in its name to the end user an invoice documenting the collection of royalties due from that user, including VAT. Next, after receiving the royalties transferred by that organisation, the copyright holders are required, if they are taxable persons, to issue an invoice to the organisation documenting the remuneration received and the VAT to which that remuneration is subject.

52 It follows from the foregoing that Article 28 of the VAT Directive must be interpreted as meaning that a collective management organisation which collects, in its own name but on behalf of holders of copyright in musical works, royalties due to them in consideration for the authorisation for the public performance of their protected works, acts as a ‘taxable person’ within the meaning of that provision and is therefore deemed to have received the services in question from those rights holders before providing them to the end user itself. In such a case, that organisation is required to issue invoices in its own name to the end user containing the royalties collected from the latter, including VAT. The copyright holders are, in turn, required to issue to the collective management organisation invoices including VAT for the services supplied in respect of the royalties received.

Costs

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

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

1. **Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/88/EU of 7 December 2010, must be interpreted as meaning that a holder of copyright in musical works supplies services for consideration to the end user, a performance organiser, where the latter is authorised, by a non-exclusive licence, to perform those works for a public audience in return for the payment of remuneration collected by an appointed collective management organisation which acts in its own name but on behalf of that copyright holder.**

2. **Article 28 of Directive 2006/112, as amended by Directive 2010/88, must be interpreted as meaning that a collective management organisation which collects, in its own name but on behalf of holders of copyright in musical works, royalties due to them in consideration for the authorisation for the public performance of their protected works, acts as a ‘taxable person’ within the meaning of that provision and is therefore deemed to have received the services in question from those rights holders before providing them to the end user itself. In such a case, that organisation is required to issue invoices in its own name to the end**

user containing the royalties collected from the latter, including value added tax (VAT). The copyright holders are, in turn, required to issue to the collective management organisation invoices including VAT for the services supplied in respect of the royalties received.

[Signatures]

* Language of the case: Romanian.