Provisional text

JUDGMENT OF THE COURT (First Chamber)

22 April 2021(*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 98(2) – Option for Member States to apply one or two reduced VAT rates to certain supplies of goods and services – Classification of a commercial activity as ‘provision of services’ – Annex III, point 12a – Implementing regulation (EU) No 282/2011 – Article 6 – Concept of ‘restaurant and catering services’ – Meals ready for immediate consumption on the vendor’s premises or in a catering area – Meals ready for immediate consumption to be taken away)

In Case C?703/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 6 June 2019, received at the Court on 24 September 2019, in the proceedings

J.K.

v

Dyrektor Izby Administracji Skarbowej w Katowicach,

intervening party:

Rzecznik Ma?ych i ?rednich Przedsi?biorców,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen (Rapporteur), 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:

– J.K., by R. Baraniewicz, doradca podatkowy, and A. Zubik, radca prawny,

– the Dyrektor Izby Administracji Skarbowej w Katowicach, by P. Selera, B. Ko?odziej and T. Wojciechowski and by M. Kowalewska,

– the Rzecznik Ma?ych i ?rednich Przedsi?biorców, by P. Chrupek and A. Zar?ba-Faracik, radcowie prawni,

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

– the European Commission, by J. Jokubauskait? and M. Siekierzy?ska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 November 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 98(2) 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 2009/47/EC of 5 May 2009 as regards reduced rates of value added tax (OJ 2009 L 116, p. 18) ('the VAT Directive'), read in conjunction with point 12a of Annex III to the VAT Directive and Article 6 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1).

2 The request has been made in proceedings between J.K. and the Dyrektor Izby Administracji Skarbowej w Katowicach (Director of the Chamber of Tax Administration in Katowice, Poland ('the tax authority'), concerning the results of a tax audit carried out in 2016, concerning the rate of value-added tax (VAT) on the sale of food and prepared meals for immediate consumption on the premises or as a takeaway, in respect of which J.K. is liable to pay that tax.

Legal context

European Union law

The VAT Directive

3 Article 96 of the VAT directive is worded as follows:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

4 Article 98 of the VAT Directive provides:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

…

3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature [set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1031/2008 of 19 September 2008 (OJ 2008 L 291, p. 1)] to establish the precise coverage of the category concerned.'

5 Annex III to that directive, headed ‘List of supplies of goods and services to which the reduced rates referred to in Article 98 may be applied’, sets out in points 1 to 12a thereof:

‘(1) Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs;

…

(12a) restaurant and catering services, it being possible to exclude the supply of (alcoholic and/or non-alcoholic) beverages.’

Implementing Regulation No 282/2011

6 Article 6 of Implementing Regulation No 282/2011 provides:

‘1. Restaurant and catering services mean services consisting of the supply of prepared or unprepared food or beverages or both, for human consumption, accompanied by sufficient support services allowing for the immediate consumption thereof. The provision of food or beverages or both is only one component of the whole in which services shall predominate. Restaurant services are the supply of such services on the premises of the supplier, and catering services are the supply of such services off the premises of the supplier.

2. The supply of prepared or unprepared food or beverages or both, whether or not including transport but without any other support services, shall not be considered restaurant or catering services within the meaning of paragraph 1.’

The CN

7 The Combined Nomenclature, set out in Annex I to Regulation No 2658/87, as amended by Regulation No 1031/2008 (‘the CN’), is based on the Harmonised Commodity Description and Coding System, drawn up by the Customs Co?operation Council, now the World Customs Organisation (WCO), and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983. That international convention, with its amending protocol of 24 June 1986, was approved on behalf of the European Economic Community, by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).

Polish law

8 The ustawa o podatku od towarów i us?ug (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2004, No 54, heading 535), in the version applicable at the material time (‘the Law on VAT’), provides in Article 126(1):

‘Goods or services which are the subject of the transactions referred to in Article 5 and which are mentioned in the classifications drawn up on the basis of the provisions relating to official statistics shall be identified by means of those classifications, if the legal provisions or implementing regulations provide statistical symbols to those goods or services.’

9 According to Article 41(1) of the Law on VAT, the standard VAT rate is 22%. Article 41(2a) thereof states:

‘The rate is 5% for the goods listed in Schedule 10 to this Law’.

10 Annex 10, point 28, to that Act mentions ‘meals and prepared dishes, with the exception of products with an alcoholic strength of more than 1.2%’, which fall under subclass 10.85.1 of the Rozporz?dzenie Rady Ministrów w sprawie Polskiej Klasyfikacji Wyrobów i Us?ug (Regulation of the Council of Ministers on the Polish Classification of Goods and Services) of 4 September 2015 (Dz. U. of 2015, item 1676) (‘the PKWiU’).

11 Paragraph 3(1)(1) of the rozporz?dzenie Ministra Finansów w sprawie towarów i us?ug dla których obni?a si? stawk? podatku od towarów i us?ug oraz warunków stosowania stawek obni?onych (Regulation of the Minister of Finance on goods and services to which the reduced VAT rate applies and the conditions for the application of reduced rates) of 23 December 2013 (Dz. U. of 2013, item 1719) is worded as follows :

‘The VAT rate specified in Article 41(1) of the [Law on VAT] shall be reduced to 8% for:

the goods and services listed in Annex I to this Regulation’.

12 Point III, item 7, of the annex to that regulation lists the following services:

‘Food and beverage services (PKWiU ex 56), except for sales of: (1) alcoholic beverages with an alcohol content in excess of 1.2%; (2) alcoholic beverages which are mixtures of beer and non-alcoholic beverages with an alcohol content in excess of 0.5%; (3) beverages prepared using a coffee or tea infusion irrespective of the percentage share of that infusion in the prepared beverage; (4) carbonated non-alcoholic beverages; (5) mineral waters; (6) other unprocessed goods taxed at the rate referred to in Article 41(1) of [the Law on VAT].’

13 According to the information provided by the referring court, under heading ex 56 of the PKWiU, entitled ‘Food and beverage services’, subclass 56.1 comprises catering and take-away food services, including, inter alia, full-service catering, self-service catering and other catering services (‘“catering services” within the meaning of heading ex 56 of the PKWiU’).

14 That court also states that, the interpretation of the provisions of the PKWiU is carried out by reference to the rozporz?dzenie Rady Ministrów w sprawie polskiej klasyfikacji dzia?alno?ci (Regulation on the Polish Classification of Activity), of 24 December 2007 (Dz. U. of 2007, No 251, item 1885), in particular, heading ex 56 thereof and the subclasses therein. That heading covers service activities related to the provision of meals for immediate consumption in restaurants, including self-service restaurants and restaurants offering take-away food, with or without seating. What is decisive is not the type of establishment providing the meals, but the fact that the meals are for immediate consumption. Subclass 56.10.A, entitled ‘Restaurants and other permanent catering establishments’, includes catering services provided to seated customers or to customers choosing their own dishes from a menu, irrespective of whether they consume them on the premises, take them away or have them delivered. That subclass includes the following activities: restaurants, cafés, fast-food restaurants, ice-cream parlours, pizzerias, take-away food outlets, restaurants or bars operating in means of transport and operated by separate entities.

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

15 The appellant in the main proceedings is the franchisee of a chain of fast-food outlets. He is engaged in the sale of prepared meals and dishes, such as sandwiches, salads, chips, ice cream, etc. Those products are served on a plastic tray with paper napkins and, for some products, plastic cutlery and/or a straw. Those meals and dishes are prepared on the premises from semi-finished

products, can be served hot or cold and are either consumed on the premises or taken away by the customers.

16 In the context of his economic activity, the appellant in the main proceedings uses a variety of sales methods. The products are sold either inside the restaurant, from the restaurant's outdoor counters or inside shopping centres in designated restaurant areas.

17 In September 2016, the tax authority carried out an audit of the VAT returns of the appellant in the main proceedings, as well as the calculation and payment of that tax for the period from 1 January to 30 June 2016.

18 As a result of that audit, considering that all the activities of the appellant in the main proceedings should be classified as 'catering services', subject to the VAT rate of 8%, and not, as those activities had been declared, as 'supplies of prepared meals', to which the VAT rate of 5% applies, the tax authority, by decision of 21 April 2017, corrected the amount of VAT due by the appellant in the main proceedings for the reference period. That decision was confirmed by the second-instance tax authority.

19 By a judgment of 1 March 2018, the Wojewódzki S?d Administracyjny w Gliwicach (Regional Administrative Court, Gliwice, Poland) dismissed the appeal lodged by the appellant in the main proceedings against the decision of the second-instance tax authority and upheld the latter's findings.

20 The Wojewódzki S?d Administracyjny w Gliwicach (Regional Administrative Court, Gliwice) noted, as did the tax authority, that the possibility for customers to consume the purchased dish on the premises, without the need for any additional preparation, went beyond the mere provision of a dish in so far as the latter, although not requiring any additional culinary preparation on the part of the customer, nevertheless had to be heated or mixed in order to be consumed directly.

21 The judgment of the Wojewódzki S?d Administracyjny w Gliwicach (Regional Administrative Court, Gliwice) was contested by the appellant in the main proceedings before the referring court, the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland).

22 The referring court states that, in Article 5a of the Law on VAT, the Republic of Poland made use of the option provided for in Article 98(2) of the VAT Directive for Member States to reduce the rate of VAT applicable to supplies of goods and services listed in Annex III to that directive. However, the court expresses doubts as to the transposition into Polish law of Article 98 of that directive and Annex III thereto, because of the reference in that law not to the CN but to the PKWiU, which is a classification of activities for statistical purposes defining, inter alia, the scope of the concepts contained therein on the basis of the activity of specific entities and not, as is the case in relation to VAT, on the basis of the subject matter of that tax.

23 Thus, under the system established in Polish law, the reduced rate applicable to a taxable transaction is determined solely on the basis of the PKWiU heading under which it falls, so that it is irrelevant whether the transaction is classified as a 'supply of goods' or a 'supply of services'. According to that system, taxable transactions in the category of 'prepared meals and dishes', within the meaning of subclass 10.85.1 of the PKWiU, are subject to a reduced VAT rate of 5%, while those in the category of 'catering services', within the meaning of heading ex 56 of the PKWiU, are subject to a reduced VAT rate of 8%.

24 The referring court notes, however, that, in accordance with the classification method adopted, 'catering services' within the meaning of heading ex 56 of the PKWiU is a broader category than 'restaurant and catering services' within the meaning of point 12a of Annex III to the

VAT Directive.

25 As regards the concept of ‘prepared meals and dishes’, the referring court states that it should be interpreted in accordance with the Court’s case-law and questions whether the criterion based on the method of preparation of the dishes, as applied by the tax authority and the Wojewódzki S?d Administracyjny w Gliwicach (Regional Administrative Court, Gliwice), is relevant for distinguishing that concept from that of ‘restaurant service’. That court considers that it follows from the Court’s case-law that the preparation of a hot final product cannot, on its own, confer the character of a provision of services on the transaction concerned (judgment of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraphs 68 and 69).

26 However, the referring court points out that the criteria for distinguishing between supplies of goods and services in the field of the sale of food and drink were developed by the Court in the judgment of 2 May 1996, *Faaborg-Gelting Linien* (C?231/94, EU:C:1996:184), delivered before ‘restaurant and catering services’ were defined in Union law in Article 6 of Implementing Regulation No 282/2011. Therefore, according to that court, the question whether those criteria are still valid is raised.

27 Finally, the referring court emphasises the need to take account of all the sales methods used by the appellant in the main proceedings in order to distinguish between the supply of goods and the supply of services, pointing out that each of those methods has elements of both the former and the latter. The only difference, according to that court, is the extent of the infrastructure offered by the seller and the customers’ expectations as to the importance of the elements of the supply of services.

28 However, according to the referring court, whatever the sales method, the supply of services, in particular the possibility of consuming the dish or meal purchased on the premises, is only of a potential nature and depends on the customer’s choice. Because of the simplified sales system and the way in which those dishes or meals are served and packaged, it is not possible at the stage of sale to determine whether the dish or meal will be consumed on the premises or whether it is a take-away sale.

29 In those circumstances, the Naczelny S?d Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the concept of a “restaurant service” to which a reduced rate of VAT applies (Article 98(2) of the VAT Directive), read in conjunction with point (12a) of Annex III thereto and with Article 6 of … Implementing Regulation … No 282/2011 …, cover the sale of prepared dishes under conditions such as those in the main proceedings, that is to say, in a situation where:

– the seller makes available to the buyer the infrastructure which enables him or her to consume the purchased meal on the premises (separate dining space, access to toilets);

– there is no specialised waiter service;

– there is no service in the strict sense;

– the ordering process is simplified and partly automated; and

– the customer’s ability to customise the order is limited?

(2) Is the way in which the dishes are prepared, consisting in, in particular, the heating of

certain semi-finished products and the composing of prepared dishes from semi-finished products, relevant to answering the first question?

(3) In order to answer the first question, is it sufficient that the customer is potentially able to use the infrastructure offered or is it also necessary to establish that, for the average customer, this element constitutes an essential part of the service provided?'

Consideration of the questions referred

30 By its questions for a preliminary ruling, which it is appropriate to examine together, the referring court asks, in essence, whether the activity of a taxable person, consisting in the sale, in various ways, of ready-to-eat dishes and meals, falls within the category of 'restaurant and catering services' to which a reduced rate of VAT may be applied under Article 98(2) of the VAT Directive, read in conjunction with point 12a of Annex III to that directive and Article 6 of Implementing Regulation No 282/2011.

31 As a preliminary point, it should be noted that it is apparent from the reference for a preliminary ruling that the questions referred to the Court arise from the doubts which the referring court has with regard to the manner in which the Polish legislature transposed Article 98 of the VAT Directive, read in conjunction with Annex III thereto, into national law.

32 The doubts raised by that court stem, in particular, from the fact that, according to that court, 'catering services' within the meaning of heading ex 56 of the PKWiU, constitute a broader category than that listed in point 12a of Annex III to the VAT Directive.

33 It is clear from the file before the Court that heading ex 56 of the PKWiU includes both part of the services falling within the concept of 'restaurant and catering services', within the meaning of point 12a of Annex III to the VAT Directive, and part of the products falling within the concept of 'foodstuffs', within the meaning of point 1 of Annex III.

34 Consequently, first, the method of classification chosen by the Republic of Poland leads, in substance, to a situation in which different taxable transactions, falling within two distinct categories of Annex III to the VAT Directive, may be classified, at national level, in the same category and subject to the same reduced rate. Secondly, that method means that two different reduced rates of VAT may apply to the same category, listed in that Annex III, due to the fact that, at national level, the content of that category is subject to different headings of the PKWiU.

35 In that regard, it should be recalled that, under Article 96 of the VAT Directive, the same rate of VAT, namely the standard rate set by each Member State, is in principle applicable to supplies of goods and services.

36 By way of derogation from that principle, the possibility of applying reduced rates of VAT is provided for in Article 98 of that directive. To that end, Annex III to that directive lists exhaustively the categories of supplies of goods and services which may be subject to those reduced rates (see, to that effect, judgment of 19 December 2019, *Segler-Vereinigung Cuxhaven*, C?715/18, EU:C:2019:1138, paragraph 22).

37 The purpose of the option open to Member States to provide for reduced rates of VAT is to make certain goods and services considered to be particularly necessary less expensive and, consequently, more accessible to the end consumer, who ultimately bears the tax (see, to that effect, judgment of 9 March 2017, *Oxycure Belgium*, C?573/15, EU:C:2017:189, paragraph 22 and the case-law cited).

38 In accordance with the Court’s settled case-law, it is for the Member States, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, to determine more precisely which of the supplies of goods and services included in the categories of Annex III to the VAT Directive are subject to the reduced rate (judgment of 9 November 2017, *AZ*, C?499/16, EU:C:2017:846, paragraph 23 and the case-law cited).

39 In that regard, it should be noted that, under Article 98(3) of the VAT Directive, Member States may use the CN when applying reduced rates to categories which refer to supplies of goods, in order to establish the precise coverage the category concerned. However, it should be noted that use the CN is only one of several ways of establishing the precise coverage of the category concerned (see, to that effect, judgment of 9 November 2017, *AZ*, C?499/16, EU:C:2017:846, paragraph 25).

40 It follows from the foregoing that, provided that the transactions to which the reduced rate applies fall within one of the categories in Annex III to the VAT Directive and that the principle of fiscal neutrality is complied with, the national legislature is free, when defining in its domestic law the categories to which it intends to apply that reduced rate, to classify the supplies of goods and services included in the categories in Annex III to the VAT Directive in accordance with the method which it considers to be the most appropriate.

41 Subject to compliance with the conditions set out in the preceding paragraph, it is open to the national legislature to classify in the same category different taxable transactions included in separate categories of Annex III, without formally distinguishing between supplies of goods and services. Similarly, as the Advocate General pointed out in point 60 of his Opinion, it is irrelevant that the national legislature chose to use, to designate a category of its classification, terms similar to those of one of the points in Annex III to the VAT Directive, while retaining a broader scope than that of the category referred to in the point concerned, where the goods and services referred to therein are taxable at the reduced rate of VAT.

42 As the Advocate General pointed out, in substance, in point 50 of his Opinion and having regard, in particular, to the judgment of 27 February 2014, *Pro Med Logistik and Pongratz* (C?454/12 and C?455/12, EU:C:2014:111, paragraphs 43 and 44), the VAT Directive does not, moreover, preclude supplies of goods or services falling within the same category of Annex III to that directive from being subject to two different reduced rates of VAT.

43 That being so, it should be recalled that, where they choose to apply one or two reduced rates of VAT to one of the 24 categories of supplies of goods or services listed in Annex III to the VAT Directive or, where appropriate, to limit their application selectively to some of the supplies of goods or services in each of those categories, the Member States must comply with the principle of fiscal neutrality (see, to that effect, judgment of 9 March 2017, *Oxycure Belgium*, C?573/15, EU:C:2017:189, paragraph 28 and the case-law cited).

44 That principle precludes similar supplies of goods or services which are in competition with each other from being treated differently for VAT purposes (judgments of 9 March 2017, *Oxycure Belgium*, C?573/15, EU:C:2017:189, paragraph 30 and the case-law cited, and of 19 December 2019, *Segler-Vereinigung Cuxhaven*, C?715/18, EU:C:2019:1138, paragraph 36 and the case-law cited).

45 In those circumstances, as the Advocate General pointed out in point 59 of his Opinion, it is for the national court not only to ascertain whether the choice made by the national legislature to apply one or two reduced rates of VAT relates to transactions falling within one or more of the categories set out in Annex III to the VAT Directive, but also to ascertain whether the different

treatment for VAT purposes of supplies of goods or services falling within the same category of that annex complies with the principle of fiscal neutrality.

46 Since the classification of taxable transactions according to the categories in Annex III to the VAT Directive is an essential prerequisite for verifying the applicability of a reduced rate of VAT, it is for the Court to define the criteria relevant to that assessment, which is a matter for the national court.

47 In that regard, it should be noted that the VAT Directive establishes a common system of VAT based, inter alia, on a uniform definition of taxable transactions (judgments of 13 June 2018, *Polfarmex*, C?421/17, EU:C:2018:432, paragraph 27, and of 11 May 2017, *Posnania Investment*, C?36/16, EU:C:2017:361, paragraph 25 and the case-law cited).

48 In the case of a complex transaction, consisting of a series of closely linked elements and acts which objectively form a single inseparable economic transaction, it is apparent from the Court's settled case-law that, in order to determine whether that transaction is to be classified as a supply of goods or services, account must be taken of all the circumstances in which that transaction takes place in order to ascertain its characteristic and predominant elements (see, to that effect, judgment of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraph 61 and the case-law cited).

49 The Court has also made it clear that the predominant element must be determined from the point of view of the average consumer and having regard, in the context of an overall assessment, to the importance, not merely quantitative, but qualitative, of the elements of the supply of services compared to those of a supply of goods (see, to that effect, judgment of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraph 62).

50 In that regard, since the marketing of goods is always accompanied by a minimum provision of services, such as the display of the goods on shelves or the issue of an invoice, only those services which are distinct from those which necessarily accompany the marketing of goods may be taken into account for the purpose of assessing the share which the supply of services occupies in the totality of a complex transaction which also involves the supply of goods (judgment of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraph 63 and the case-law cited)

51 The Court has held, in particular, that a catering transaction is characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate and that that transaction must therefore be regarded as a 'supply of services' within the meaning of Article 6(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), now Article 24 of the VAT Directive. The situation is different, however, where the transaction concerns take-away food and is not accompanied by services intended to enhance consumption on the premises in an appropriate setting (see, to that effect, judgment of 2 May 1996, *Faaborg-Gelting Linien*, C?231/94, EU:C:1996:184, paragraph 14, and of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraph 64 and the case-law cited).

52 Therefore, with regard to catering transactions carried out on board *ferry boats*, the Court has held that the supply of prepared food and drink ready for immediate consumption is the result of a series of services ranging from the cooking of those dishes to their physical delivery in a receptacle and that that supply is accompanied by the provision to the customer of an infrastructure comprising both a catering room with support facilities, such as a cloakroom, and furniture and crockery. Where appropriate, the natural persons whose professional activity

consists in carrying out those catering transactions are required to lay the table, to advise the customer and provide him with explanations about the food or drinks offered, to serve those products at the table and, lastly, to clear the tables after consumption (see, to that effect, *Faaborg-Gelting Linien*, C?231/94, EU:C:1996:184, paragraph 13).

53 Still with regard to the elements of the supply of services which characterise catering transactions and, in particular, the infrastructure made available to the customer, the Court specified that, however, when the supply of food is accompanied only by the provision of rudimentary facilities, namely simple consumption counters, without any possibility of sitting down, allowing only a limited number of customers to consume on the premises and in the open air, which requires only negligible human intervention, those elements constitute only minimal support services which are not such as to alter the predominant character of the main service, namely that of a supply of goods (see, to that effect, judgment of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraph 70).

54 As regards the preparation of products, it follows from the Court's case-law that the fact that the supply of prepared food presupposes cooking or reheating, which constitutes the supply of services, must be taken into account in the overall assessment of the transaction concerned for the purposes of its classification as a supply of goods or services. However, since the preparation of the hot end product is limited, in essence, to basic standard actions, which, in most cases, are done not in response to an order from a particular customer but in continuous or regular fashion according to the demand generally foreseeable, it does not constitute the predominant element of the transaction in question, and cannot in itself characterise that transaction as a supply of services (see, to that effect, judgment of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraphs 67 and 68).

55 Furthermore, as the referring court points out, the Union legislature has also intervened, with a view to ensuring the uniform application of the VAT system, to clarify the criterion for classifying transactions as restaurant or catering services by means of Implementing Regulation No 282/2011, which has been applicable, by virtue of Article 65 thereof, since 1 July 2011.

56 Article 6(1) of Implementing Regulation No 282/2011 provides that 'restaurant and catering services mean services consisting of the supply of prepared or unprepared food or beverages or both, for human consumption, accompanied by sufficient support services allowing for the immediate consumption thereof', that 'the provision of food or beverages or both is only one component of the whole in which services shall predominate' and that 'restaurant services are the supply of such services on the premises of the supplier, and catering services are the supply of such services off the premises of the supplier'.

57 Article 6(2) of that implementing regulation states that 'the supply of prepared or unprepared food or beverages or both, whether or not including transport but without any other support services, shall not be considered restaurant or catering services within the meaning of paragraph 1'.

58 Thus, it follows from the wording of Article 6 of that implementing regulation that, for the purposes of classifying a taxable transaction as 'restaurant and catering services', the Union legislature wished to attach decisive importance not to the method of preparation of the foodstuffs or their delivery, but to the supply of support services accompanying the supply of the prepared foodstuffs, such services having to be sufficient for the immediate consumption of those foodstuffs and predominant in relation to the supply thereof.

59 It therefore follows from the definition of 'restaurant and catering services' set out in Article 6 of Implementing Regulation No 282/2011, read in the light of the case-law referred to in

paragraphs 52 to 54 of the present judgment, that the decisive criteria for assessing whether the services accompanying the supply of prepared food may be regarded as ‘sufficient support services’ relate to the level of services offered to the consumer.

60 In that regard, the Court takes account, inter alia, of factors such as the presence of waiters, the existence of a service consisting, in particular, in the transmission of orders to the kitchen, the subsequent presentation of the dishes and their service to the customers at the table, the existence of enclosed rooms at an appropriate temperature specially dedicated to the consumption of food, or the presence of cloakrooms and toilets and the provision of crockery, furniture and cutlery (see, to that effect, judgment of 10 March 2011, *Bog and Others*, C?497/09, C?499/09, C?501/09 and C?502/09, EU:C:2011:135, paragraph 69).

61 That being said, as the Advocate General pointed out in point 92 of his Opinion, the application of those criteria must be combined with consideration of the consumer’s choice to benefit from services related to the supply of food or drink, which will be presumed on the basis of the method of sale of the meal for immediate consumption.

62 As was pointed out in paragraph 49 of the present judgment, in the case of complex services, the predominant element of a transaction must be determined on the basis of the consumer’s point of view. Where the latter chooses not to benefit from the material and human resources made available by the taxable person, those resources are not decisive for the consumer. Therefore, in that case, it must be concluded that no support services accompany the supply of food or drink and that the transaction in question must be qualified as a supply of goods.

63 It is for the national court to determine, in the light of the criteria set out in paragraph 60 of the present judgment, whether or not the various sales systems set up by the taxable person fall within the concept of ‘restaurant or catering services’.

64 In that regard, first, it should be borne in mind that the fact that the transactions concerned fall within the concept of ‘restaurant or catering services’ or that of ‘foodstuffs’, within the meaning of Annex III to the VAT Directive, may not affect the choice of the reduced rate of VAT applicable by the Member State. As stated in paragraph 41 of the present judgment, each Member State is free to classify in the same category and to tax at the same reduced rate of VAT different taxable transactions included in different categories of that annex, without formally distinguishing between supplies of goods and services.

65 Secondly, if different reduced rates of VAT apply to supplies of goods and services or to part of them, as the European Commission pointed out in its written observations, it is for the taxable person to keep adequate accounts and, in particular, to retain copies of all the invoices which he has issued justifying the application of those rates (see, by analogy, judgment of 21 November 2018, *Fontana*, C?648/16, EU:C:2018:932, paragraph 31).

66 In the light of all the foregoing considerations, the answer to the questions referred is that Article 98(2) of the VAT Directive, read in conjunction with point 12a of Annex III thereto, and Article 6 of Implementing Regulation No 282/2011 must be interpreted as meaning that the concept of ‘restaurant and catering services’ includes the supply of food accompanied by sufficient support services intended to enable the immediate consumption of that food by the end customer, which is a matter for the national court to determine. Where the end customer chooses not to benefit from the material and human resources made available by the taxable person to accompany the consumption of the food supplied, it must be concluded that no support services accompany the supply of that food.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (First Chamber) hereby rules:

Article 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/47/EC of 5 May 2009, read in conjunction with point 12a of Annex III to that directive and Article 6 of Council Regulation (EU) No 282/2011 of 15 March 2011 implementing Directive 2006/112, must be interpreted as meaning that the concept of 'restaurant and catering services' includes the supply of food accompanied by sufficient support services intended to enable the immediate consumption of that food by the end customer, which is a matter for the national court to determine. Where the end customer chooses not to benefit from the material and human resources made available by the taxable person to accompany the consumption of the food supplied, it must be concluded that no support services accompany the supply of that food.

[Signatures]

* Language of the case: Polish.