62020CJ0406
JUDGMENT OF THE COURT (Seventh Chamber)

9 September 2021 (*1)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 98 – Option for the Member States to apply a reduced rate of VAT to certain supplies of goods and services – Annex III, point 7 – Admission to amusement parks and fairs – Principle of fiscal neutrality – Services provided through activities carried on as static or mobile fairground entertainers – Similarity – Context – Point of view of the average consumer – Expert opinion)

In Case C?406/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Finance Court, Cologne, Germany), made by decision of 25 August 2020, received at the Court on 28 August 2020, in the proceedings

Phantasialand

v

Finanzamt Brühl,

THE COURT (Seventh Chamber),

composed of A. Kumin (Rapporteur), President of the Chamber, T. von Danwitz and I. Ziemele, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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Phantasialand, by T. Ketteler-Eising and P. Peplowski, tax advisors,

–

the German Government, by R. Kanitz, J. Möller and S. Costanzo, acting as Agents,

–

the European Commission, by L. Mantl and V. Uher, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

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; ‘the VAT Directive’), read in conjunction with Annex III, point 7, to that directive.

2

The request has been made in the context of proceedings between Phantasialand and Finanzamt Brühl (Tax Office, Brühl, Germany) (‘the Tax Office’) relating to the rate of value added tax (VAT) applicable to admissions to the theme park operated by Phantasialand.

Legal context

EU law

The VAT Directive

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Article 96 of the VAT Directive states 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.’

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Article 98(1) and (2) of that directive is worded as follows:

‘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.

…’

5

Annex III to that directive contains the list of supplies of goods and services to which the reduced rates of VAT referred to in Article 98 of the directive may be applied. Point 7 of that annex covers the following services:

‘admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities.’

Implementing Regulation No 282/2011

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According to Article 32 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):

‘1. Services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events as referred to in Article 53 of [the VAT Directive] shall include the supply of services of which the essential characteristics are the granting of the right of admission to an event in exchange for a ticket or payment, including payment in the form of a subscription, a season ticket or a periodic fee.

2. Paragraph 1 shall apply in particular to:

(a)

the right of admission to shows, theatrical performances, circus performances, fairs, amusement parks, concerts, exhibitions, and other similar cultural events;

…’

German law

7

Paragraph 12 of the Umsatzsteuergesetz (Law on turnover tax), in the version applicable to the dispute in the main proceedings (‘the UStG’), provides, in subparagraph 2:

‘Tax shall be reduced to 7% in respect of the following transactions:

…

7. …

d)

circus performances, services provided through activities carried on as a fairground entertainer and turnover directly linked to the operation of zoos …’.

8

Under Paragraph 30 of the Umsatzsteuer-Durchführungsverordnung (Regulation implementing the Law on turnover tax), with regard to Paragraph 12(2)(7)(d) of the UStG, services provided through activities carried on as a fairground entertainer consist of ‘amusements, musical performances, shows or other attractions at fairs, funfairs, traditional shooting fairs or similar events’.

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

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Phantasialand operates a theme park in Germany. In return for payment of an admission fee, visitors to the theme park acquire the right to use its facilities.

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On 9 November 2015, Phantasialand applied for the turnover tax assessment it had received for 2014 to be amended, claiming that admissions to its theme park should be taxed not at the

standard rate of VAT but at the reduced rate of VAT, in accordance with Paragraph 12(2)(7)(d) of the UStG.

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The Tax Office dismissed that application, by decision of 6 January 2016, and subsequently dismissed the appeal lodged against that decision, by decision of 4 April 2017.

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Phantasialand then brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany), the referring court.

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According to Phantasialand, the fact that, under national law, a reduced rate of VAT applies to transactions carried out by mobile fairground entertainers at seasonal and temporary fairs, while those carried out by static fairground undertakings, such as those at issue in the main proceedings, are liable to VAT at the standard rate, infringes the principle of fiscal neutrality.

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The Tax Office disputes that argument and relies, in that regard, on a judgment of the Bundesfinanzhof (Federal Finance Court, Germany) of 2 August 2018, in which that court held that the different treatment, for VAT purposes, of services provided by mobile fairground entertainers and services provided by an amusement park, such as that at issue in the main proceedings, did not infringe the principle of fiscal neutrality.

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The referring court has some doubts about that interpretation.

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First of all, in so far as the Bundesfinanzhof (Federal Finance Court) invoked the itemisation of the terms ‘fairs’ and ‘amusement parks’ in Annex III, point 7 to the VAT Directive, the referring court notes that, unlike in the other language versions, there is no equivalent itemisation in the German version of Article 32 of Implementing Regulation No 282/2011, which refers only to the term ‘Freizeitparks’ (‘theme parks’). Since the usual meaning of the latter term is a reference to static fairground undertakings, the referring court considers that clarification is needed as to the definition and distinction of the concepts of ‘fairs’ and ‘amusement parks’.

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Next, the referring court notes that, in its judgment of 2 August 2018, the Bundesfinanzhof (Federal Finance Court) found that the services provided by a static fairground undertaking in the form of a theme park are dissimilar to those provided by fairground entertainers who carry on their itinerant trade at fairs, on account of the different contexts in which those supplies of services are effected.

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In that regard, the referring court infers from the case-law of the Court that, when considering the context of the services to be compared, only differences in the regulatory framework or the legal

regime governing the supplies of services in question should be taken into account.

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In the present case, the contexts of the two supplies of fairground entertainment services are not characterised by different legal frameworks. The law does not prescribe, either for fairground undertakings such as Phantasialand or for fairground entertainers at fairs, whether they must charge a single admission fee for the use of all the attractions or charge for each service individually. Moreover, rides at both theme parks and fairs are subject to the same safety standards, and the law does not prescribe, either for static fairground undertakings or for mobile fairground entertainers, when in the year they must provide their services. Therefore, it is essential to determine whether the Court's case-law, according to which differences in the context of the services can justify differences in their taxation, is applicable in circumstances such as those at issue in the main proceedings.

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Lastly, the referring court takes the view that, on the assumption that there is no difference between the context of the services provided by mobile fairground entertainers at fairs and that of the services provided by static fairground undertakings, the key criterion is, from the point of view of the average contemporary consumer, which needs are met at fairs, on the one hand, and at a theme park, on the other. Once those needs have been defined, it is then necessary to assess whether the two services meet the same needs and whether any differences influence the decision of the average consumer.

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In that regard, the referring court considers that it would be able to make that assessment only by seeking an empirical expert opinion. According to the case-law of the Bundesfinanzhof (Federal Finance Court), gathering evidence based on empirical studies into the point of view of the average consumer on two supplies of services in the context of the principle of fiscal neutrality is unnecessary, since such views represent only a 'conceptual perspective'. The referring court therefore considers that it is essential for the resolution of the dispute before it to determine whether it is entitled to gather evidence on the point of view of the average consumer, or whether such a point of view is merely a conceptual perspective, not amenable to the gathering of evidence.

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In those circumstances, the Finanzgericht Köln (Finance Court, Cologne) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1)

Can the listing of fairs and amusement parks in [Annex III, point 7] to [the VAT Directive], in conjunction with Article 98(2) thereof, be relied on as the basis for drawing a distinction in the form of the taxation of a theme park at the standard rate, even though the term "amusement park" covers both static and mobile fairground undertakings?

(2)

Is the case-law of the [Court], to the effect that different services may be dissimilar on account of their context, applicable to the provision of services by mobile fairground entertainers and by static fairground undertakings in the form of theme parks?

(3)

In the event that the second question is answered in the negative:

Does the “point of view of the average consumer”, which, in accordance with the case-law of the [Court], is an essential element of the principle of fiscal neutrality, constitute a “conceptual perspective” not amenable to the gathering of evidence based on expert opinion?’

Consideration of the questions referred

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By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 98 of the VAT Directive, read in conjunction with Annex III, point 7 to that directive, must be interpreted as precluding national law under which the provision of services by mobile fairground entertainers, on the one hand, and the provision of services by static fairground undertakings in the form of theme parks, on the other hand, are liable to different rates of VAT, one being a reduced rate and the other, the standard rate.

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According to Article 96 of the VAT Directive, the same rate of VAT, that is the standard rate fixed by each Member State, is applicable to supplies of goods and services. By derogation from that principle, the possibility to apply reduced rates of VAT is provided for by virtue of Article 98 thereof. Annex III to that directive lists the categories of supplies of goods and services to which the reduced rates mentioned in Article 98 may apply (judgment of 9 November 2017, AZ, C?499/16, EU:C:2017:846, paragraph 22 and the case-law cited).

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As regards the application of reduced rates of VAT, 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 the supplies of goods and services included in the categories in Annex III to the VAT Directive to which the reduced rate is to apply (judgment of 9 November 2017, AZ, C?499/16, EU:C:2017:846, paragraph 23 and the case-law cited).

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More specifically, Annex III, point 7 to the VAT Directive allows Member States to apply a reduced rate of VAT to ‘admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities’.

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The referring court asks, in that regard, whether the listing of ‘fairs’ and ‘amusement parks’ in Annex III, point 7 can be relied on in order to apply different rates of VAT, on the one hand to services provided by static fairground undertakings such as Phantasialand, and, on the other hand, to services provided by mobile fairground undertakings even though, in the referring court’s view, the concept of ‘amusement parks’ covers both categories of fairground undertakings.

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The VAT Directive does not contain any definition of ‘fairs’ or ‘amusement parks’ for the purposes

of the said Annex III, point 7 and neither does Implementing Regulation No 282/2011 provide any definition of those concepts. Moreover, neither the VAT Directive nor Implementing Regulation No 282/2011 makes any reference to the law of the Member States in that regard, meaning that those concepts constitute an autonomous concept of EU law that must be interpreted uniformly throughout the European Union (see, to that effect, judgment of 20 January 2021, Finanzamt Saarbrücken, C?288/19, EU:C:2021:32, paragraph 39 and the case-law cited).

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Therefore, first, those concepts must be interpreted in accordance with their usual meaning in everyday language and, secondly, they must be interpreted strictly given that the possibility to apply a reduced rate of VAT constitutes a derogation from the principle of the application of a standard rate (see, to that effect, judgment of 19 December 2019, Segler-Vereinigung Cuxhaven, C?715/18, EU:C:2019:1138, paragraph 25 and the case-law cited).

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With regard to the usual meaning in everyday language of the expressions ‘amusement park’ and ‘fair’, as the Commission, in essence, noted in its written observations, the expression ‘amusement park’ denotes a landscaped site containing various facilities for recreation and amusement, whereas a ‘fair’, although, in general, also possessing the same facilities, is characterised by the fact that it takes place, albeit with a certain regularity, for a temporary period.

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It should also be noted that Annex III, point 7 to the VAT Directive expressly lists both ‘fairs’ and ‘amusement parks’, meaning that a distinction must be drawn between those two concepts.

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Therefore, the concept of ‘fairs’ covers services provided by fairground entertainers who operate on a temporary basis from mobile facilities, whereas the concept of ‘amusement parks’ covers the activities carried out by static fairground undertakings of a permanent nature.

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However, the concept of ‘amusement parks’ cannot be interpreted as encompassing services provided by mobile fairground entertainers since, in that situation, the concept of ‘fairs’ would not then have its own scope of application.

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In that regard, the reference made by the referring court to Article 32 of Implementing Regulation No 282/2011, in which the expressions ‘fairs’ and ‘amusement parks’ are conveyed in the German version of that provision by a single equivalent term, ‘Freizeitparks’ (‘theme parks’), is irrelevant. Aside from the fact that the context of that provision is not the application of reduced rates of VAT, the services referred to in that Article 32 are necessarily subject to the same rules, meaning that the fact that, in the German version, no distinction is made between fairs and amusement parks is of no consequence.

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It follows that, in accordance with Article 98 of the VAT Directive, read in conjunction with Annex III, point 7 thereto, a Member State may, in principle, apply a reduced rate of VAT to services

provided by mobile fairground entertainers whilst applying the standard rate to services provided by static fairground undertakings in the form of theme parks.

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That being the case, and as has been recalled in paragraph 25 of the present judgment, where a Member State chooses to apply selectively the reduced rate of VAT to certain goods or specific services included in Annex III to the VAT Directive, it must comply with the principle of fiscal neutrality (judgment of 27 June 2019, Belgisch Syndicaat van Chiropraxie and Others, C?597/17, EU:C:2019:544, paragraph 46 and the case-law cited).

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The principle of fiscal neutrality precludes treating similar goods or supplies of services, which are thus in competition with each other, differently for VAT purposes (judgments of 27 February 2014, Pro Med Logistik and Pongratz, C?454/12 and C?455/12, EU:C:2014:111, paragraph 52, and of 27 June 2019, Belgisch Syndicaat van Chiropraxie and Others, C?597/17, EU:C:2019:544, paragraph 47 and the case-law cited).

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According to settled case-law, in order to determine whether goods or services are similar, account must primarily be taken of the point of view of a typical consumer. Goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or the other of those goods or services (judgments of 27 February 2014, Pro Med Logistik and Pongratz, C?454/12 and C?455/12, EU:C:2014:111, paragraphs 53 and 54, and of 27 June 2019, Belgisch Syndicaat van Chiropraxie and Others, C?597/17, EU:C:2019:544, paragraph 48 and the case-law cited).

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In other words, it is necessary to determine whether the goods and services at issue are interchangeable from the point of view of an average consumer. If that is the case, the application of different VAT rates might affect the consumer’s choice which, in turn, would indicate an infringement of the principle of fiscal neutrality (see, to that effect, judgment of 9 November 2017, AZ, C?499/16, EU:C:2017:846, paragraphs 33 and 34).

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In the present case, it appears that the first condition resulting from the case-law set out in paragraph 38 of the present judgment, according to which, in order for goods or services to be considered similar, they must have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, is met. The referring court notes that the services provided, on the one hand, in the context of a fair and, on the other hand, in the context of a theme park have similar characteristics in that, in each case, the consumer makes use of fairground services. In addition, with regard to meeting needs, a high degree of convergence can be assumed given that the referring court evokes, in particular and pending further information, entertainment, leisure, personal happiness, the pursuit of adventure and opportunities for social contact.

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With respect to the examination of the second condition, according to which any differences must not have a significant influence on the decision of the average consumer to use one or the other of the goods or services in question, it is necessary to take account of differences in the characteristics of the goods or services at issue and their use which are, therefore, inherent to those goods or services. The Court having ruled that the assessment of the comparability of the services supplied does not hinge only on the comparison of individual services, it is also necessary to take into account the context in which those services are supplied (see, to that effect, judgment of 27 February 2014, Pro Med Logistik and Pongratz, C?454/12 and C?455/12, EU:C:2014:111, paragraph 55 and the case-law cited).

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In that regard, according to the Court's case-law, differences in the regulatory framework or the legal regime governing the supplies of services in question may be relevant in terms of the context in which those services are supplied (see, to that effect, judgments of 23 April 2009, TNT Post UK, C?357/07, EU:C:2009:248, paragraphs 39 and 45, and of 27 February 2014, Pro Med Logistik and Pongratz, C?454/12 and C?455/12, EU:C:2014:111, paragraphs 57 to 59). However, it cannot be deduced from that case-law that differences other than those relating to the legal context are not significant. On the contrary, it is necessary to take account of other contextual differences to the extent that they may create a distinction in the eyes of the average consumer, in terms of the satisfaction of his or her own needs (see, to that effect, judgment of 27 February 2014, Pro Med Logistik and Pongratz, C?454/12 et C?455/12, EU:C:2014:111, paragraph 56 and the case-law cited) and may, therefore, influence that consumer's decision.

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Since the assessment of the similarity of the fairground services provided by a theme park, on the one hand, and by a fair, on the other hand, is ultimately a matter for the national court to determine (see, to that effect, judgment of 9 November 2017, AZ, C?499/16, EU:C:2017:846, paragraph 31), the fact that, in the present case, one of the services is, in principle, available permanently while the other is only available for a few days or weeks per year, must be regarded as relevant to that assessment. For a consumer deciding whether to visit a theme park or a fair, the fact that the latter is held for a limited period only may be an important, or indeed decisive, factor.

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Furthermore, as pointed out by the German Government, fairs often have their roots in local traditions and provide a wide-ranging cultural offering. They may also play an important social role in terms of cultural heritage. Such factors may also influence the average consumer's decision, which is a matter for the referring court to determine.

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In addition, although the referring court states that, in Germany, the context for services provided, on the one hand, at a theme park and, on the other hand, at a fair, is not characterised by different regulatory regimes, it is clear from the written observations of the German Government that mobile fairground undertakings and static fairground undertakings are not subject to the same national legal framework, in that a permit to hold a fair entails various 'market privileges' resulting in a fixed-term exemption from certain legal requirements that would normally apply, for example in relation to opening hours. This is another area where it is for the referring court to determine whether such

differences, in so far as they are found to exist, have an influence on the average consumer’s decision.

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Moreover, as to the question of whether, in this situation, the national court is entitled to seek an empirical expert opinion on the point of view of the average consumer or whether that point of view is merely a ‘conceptual perspective’ not amenable to the gathering of evidence, it must be noted that the national court is, in general, capable of appraising the point of view of the average consumer through its own knowledge (see, to that effect, judgments of 16 July 1998, Gut Springenheide and Tusky, C?210/96, EU:C:1998:369, paragraphs 31 and 32, and of 28 January 1999, Sektkellerei Kessler, C?303/97, EU:C:1999:35, paragraph 36).

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However, EU law does not preclude a national court which is experiencing particular difficulty in that appraisal from seeking, under the conditions laid down by its national law, an expert opinion as guidance for its judgment (see, to that effect, judgments of 16 July 1998, Gut Springenheide and Tusky, C?210/96, EU:C:1998:369, paragraphs 35 and 36, and of 28 January 1999, Sektkellerei Kessler, C?303/97, EU:C:1999:35, paragraph 37).

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In the light of all of the foregoing considerations, the answer to the questions referred for a preliminary ruling is that Article 98 of the VAT Directive, read in conjunction with Annex III, point 7 to that directive, must be interpreted as not precluding national law under which the provision of services by mobile fairground entertainers, on the one hand, and the provision of services by static fairground undertakings in the form of theme parks, on the other hand, are liable to different rates of VAT, one being a reduced rate and the other, the standard rate, subject to compliance with the principle of fiscal neutrality. EU law does not preclude the referring court, if it experiences particular difficulty in verifying compliance with the principle of fiscal neutrality, from seeking, under the conditions laid down by its national law, an expert opinion as guidance for its judgment.

Costs

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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 (Seventh Chamber) hereby rules:

Article 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Annex III, point 7 to that directive, must be interpreted as not precluding national law under which the provision of services by mobile fairground entertainers, on the one hand, and the provision of services by static fairground undertakings in the form of theme parks, on the other hand, are liable to different rates of value added tax, one being a reduced rate and the other, the standard rate, subject to compliance with the principle of fiscal neutrality. EU law does not preclude the referring court, if it experiences particular difficulty in verifying compliance with the principle of fiscal neutrality, from seeking, under the conditions laid down by its national

law, an expert opinion as guidance for its judgment.

[Signatures]

(*1) Language of the case: German.