OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 17 March 2016 (1)

Case C?11/15

Odvolací finan?ní ?editelství

v

?eský rozhlas

(Request for a preliminary ruling from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic))

(Taxation — Value added tax — Exemption from tax — Activities of non-commercial public radio and television bodies — Public service broadcasting — Financing from compulsory fees — Classification of such a supply of services)

Introduction

1. The system of value added tax (VAT) is based on a dual mechanism, that is to say the payment of output tax and the deduction of input tax. That mechanism allows that tax to be neutral from the point of view of economic operators, the financial burden being borne by consumers alone.

2. In order to guarantee that the tax authority actually receives what is owed to it, the deduction must relate only to goods and services acquired for the purposes of a taxable activity, so as to ensure that the input VAT is indeed deducted from the output VAT. If the taxable person performs both a taxed activity and an exempt activity, there are specific rules for determining what share of the input VAT is deductible. The situation becomes more complicated where the taxable person also performs an activity which falls outside the scope of the VAT system altogether, because it is not an economic activity carried on for consideration within the meaning of the provisions governing the VAT system. The present case provides an opportunity to define the scope of the Court's case-law in this sphere.

Legal context

EU law

3. Article 2(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 (2) ('the Sixth Directive') provides:

‘The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;’

4. According to Article 13A(1)(q) of that directive:

‘*Exemptions for certain activities in the public interest*

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

q) activities of public radio and television bodies other than those of a commercial nature’.

5. According to Article 17(2)(a) and (5) of the Sixth Directive:

‘2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the [VAT] which he is liable to pay:

(a) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

...

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which [VAT] is deductible, and for transactions in respect of which [VAT] is not deductible, only such proportion of the [VAT] shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.

...’

6. Article 19(1) of the Sixth Directive provides:

‘The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

– as numerator, the total amount, exclusive of [VAT], of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),

– as denominator, the total amount, exclusive of [VAT], of turnover per year attributable to transactions included in the numerator and to transactions in respect of which [VAT] is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A(1)(a).

...’

Czech law

7. The aforementioned provisions of the Sixth Directive were transposed into Czech law by Article 2(1), Article 51(1)(b), Article 72 and Article 76(1) and (2) of Law No 235/2004 on value added tax (zákon ?. 235/2004 Sb. o dani z p?idané hodnoty).

8. Law No 348/2005 on radio and television charges and amending certain laws (zákon ?. 348/2005 Sb. o rozhlasových a televizních poplatcích a o zm?n? n?kterých zákon?) ('Law No 348/2005'), in the version applicable to the dispute in the main proceedings, establishes a radio fee to be used to finance Czech public broadcasting services. According to Article 3 of that law, the radio fee is payable by any natural or legal person who owns a radio receiver or who, although not the owner of a radio receiver, possesses or uses a radio receiver on other legal grounds for at least one month. Article 7 of the same law provides that the taxable person is to pay the radio charge to the statutory radio broadcaster, either directly or through an authorised intermediary.

9. Under Czech law, the activity of broadcasting, in so far as it is financed from the radio fee, is considered to be an activity exempt from VAT.

Facts, procedure and questions referred

10. ?eský rozhlas is the Czech public broadcasting body created by law and financed, in particular, by the radio fee established under Law No 348/2005.

11. By supplementary tax returns covering the period from March to December 2006, ?eský rozhlas applied a further increase to its right to deduct VAT by excluding from the calculation of the coefficient used for deducting VAT supplies covered by the radio fees paid to it, which it had initially declared as supplies exempt from VAT and not conferring a right to deduction from VAT. In that regard, ?eský rozhlas argued that those fees did not constitute remuneration for the public broadcasting service provided.

12. The tax authorities did not accept the position thus taken by ?eský rozhlas and, by supplementary tax assessments, rejected the exclusion of those supplies from the calculation of the deductible proportion.

13. Following the rejection of its claim, ?eský rozhlas challenged the tax authorities' decisions before the M?stský soud v Praze (Municipal Court, Prague), which annulled those decisions by judgment of 6 June 2014.

14. The applicant in the main proceedings lodged an appeal on a point of law against that judgment before the referring court. It was in that context that the Nejvyšší správní soud (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Can public sector broadcasting, financed by compulsory statutory charges of the amount set by the law, on the basis of ownership of a radio receiver, possession thereof or entitlement to use it on other legal grounds, be regarded as the "provision of a service against payment" within the meaning of Article 2(1) of the Sixth … Directive …, which must be exempted from [VAT] in accordance with Article 13A(1)(q) of that directive, or is it a non-economic activity which is not subject to [VAT] at all under Article 2 of the Sixth Directive, and to which exemption from VAT in accordance with Article 13A(1)(q) of that directive does not therefore apply?'

15. The order for reference was received at the Court on 13 January 2015. Written observations were lodged by the parties to the main proceedings, the Czech, Greek and United

Kingdom Governments and the European Commission. ?eský rozhlas, the Czech and United Kingdom Governments and the Commission were represented at the hearing which took place on 17 December 2015.

Analysis

16. By the question which it has referred for a preliminary ruling, the national court asks, in essence, whether Article 2(1) of the Sixth Directive must be interpreted as meaning that the activity of a public broadcasting body financed by a compulsory fee laid down by statute and paid by anyone in possession of a radio receiver constitutes an economic activity subject to VAT under that provision. If that question is answered in the affirmative, such an activity would logically have to be exempted from VAT pursuant to Article 13A(1)(q) of the Sixth Directive.

17. However, it must be borne in mind that this question has been raised in the course of a dispute between ?eský rozhlas, on the one hand, and the tax authorities, on the other, the subject-matter of which is the right to deduct input VAT on goods and services which ?eský rozhlas purchases in connection with its activities. If it is to give a useful answer to the question referred, the Court cannot disregard this fact.

18. It is therefore appropriate to look first at the concept of an activity carried on ‘for consideration’ within the meaning of Article 2(1) of the Sixth Directive. I shall begin, however, with a number of preliminary remarks on the doubts expressed by ?eský rozhlas in its written observations with respect to the relevance of the question referred to the outcome of the dispute in the main proceedings.

The relevance of the question referred for a preliminary ruling

19. ?eský rozhlas states in its written observations that the dispute in the main proceedings is concerned only with the nature of the radio fee. In its submission, it falls to be ascertained whether that fee can be classified as remuneration for the services provided by ?eský rozhlas in its capacity as a public broadcasting body, which question the judgment forming the subject of the appeal on a point of law in the main proceedings has answered in the negative. According to ?eský rozhlas, however, the referring court, influenced in this regard by the arguments put forward by the applicant in the main proceedings, has distorted the issue by asking the Court to determine whether public broadcasting per se constitutes an activity falling within the scope of the VAT system. In the view of ?eský rozhla, that question is not relevant because public broadcasting can also be financed by means other than the radio charge.

20. I do not share the doubts expressed by ?eský rozhlas. Clearly, it is for the national legal system of each Member State to organise the financing of public broadcasting activities and a fee such as the Czech radio fee may not cover the full cost of that activity. However, the wording of the question, which refers to ‘public sector broadcasting funded by compulsory statutory charges’, necessarily means that it is concerned with the activity of public broadcasting *in so far as* it is financed by the radio fee.

21. That said, in order to answer the question as to whether such an activity must be regarded as a supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive, an analysis of the nature of the radio fee will be essential. It will after all be necessary to determine whether that fee may be classified as remuneration for the services provided by ?eský rozhlas. Confining the consideration of the case to that analysis alone, however, as ?eský rozhlas appears to wish, would be insufficient because the dispute in the main proceedings is actually concerned not with the nature of the radio fee per se but with the extent of ?eský rozhlas’s right to deduct input VAT. The wording of the question referred for a preliminary ruling is therefore, in my

view, entirely relevant.

The concept of an activity carried on 'for consideration'

22. The criteria for defining the extent to which an activity is carried on for consideration are set out in the Court's settled case-law. (3) According to that case-law, a supply of services is effected for consideration within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the service provider and the recipient pursuant to which there is reciprocal performance, the remuneration received by the service provider constituting the value actually given in return for the service supplied to the recipient. There must therefore be a direct link between the service supplied and the value given in return. (4) Thus, where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services in question are therefore not subject to VAT. (5)

23. Therefore I must now analyse, in light of those criteria, the nature of the activity of broadcasting in so far as it is financed from a fee such as the radio fee at issue in the main proceedings.

The relationship between ?eský rozhlas and the persons liable to pay the radio fee

24. An analysis of the situation from the point of view of the relationship between ?eský rozhlas and the persons liable to pay the radio fee leads to the inevitable conclusion, in my opinion, that the activity performed by ?eský rozhlas, in so far as it is financed by the radio fee, does not meet the criteria necessary in order for it to be regarded as an activity falling within the scope of VAT.

25. After all, there is no getting away from the fact that the necessary direct legal relationship is lacking here. On the one hand, the activity performed by ?eský rozhlas is organised according to statute and its pursuit depends neither on the identity of the listeners nor on their actual number. It is a public broadcasting activity and is therefore characterised by two essential features. First, access to broadcasts is free. Secondly, since, as we have said, the activity in question benefits from public financing, the content of the programmes broadcast is not dictated by considerations of economic profitability.

26. On the other hand, from the point of view of the person liable, the obligation to pay the radio fee is also completely independent of the actual use made of the public broadcasting services. The obligation to pay the radio fee is a statutory one the event triggering which is not the fact of listening to public radio but the possession of a radio receiver. In so far as private broadcasters may also exist alongside public radio, possession of a radio receiver in no way equates to use of public broadcasting services. On the other hand, the fact of not listening to public radio does not warrant exemption from the obligation to pay the radio fee. Similarly, the ability to listen to public radio is not conditional on payment of that fee, since public broadcasting is freely accessible. Persons who fail to pay the fee are, at most, at risk of possible administrative penalties.

27. To my mind, the fact that a radio receiver can be used for purposes other than listening to public radio programmes necessarily rules out the proposition that the acquisition of such a receiver reflects an intention to use the public broadcasting services for which the radio fee is the price payable. The obligation to pay that fee is a statutory one which, while indeed linked to possession of a radio receiver, nonetheless remains completely independent of the use or otherwise of public broadcasting services.

28. Thus, the obligation to pay the radio fee does not create any legal relationship between the person liable to pay it and the public broadcaster because, first, the event triggering that obligation lies not in the use of the services supplied by the broadcaster in question but in the possession of

a radio receiver and, secondly, access to those services is not subject to payment of that fee.

29. It follows that, from the point of view of the person liable to pay it, the radio fee is not a value given in return for the public broadcaster's services.

The relationship between ?eský rozhlas and the Czech State

30. The Czech Government, in its observations, puts forward a different analysis, namely the existence of a triangular legal relationship in which the Czech State entrusts ?eský rozhlas with the task of providing a service in the public interest for the benefit of recipients (potential users) and at the same time ensures that it receives financial consideration in the form of the radio fee.

31. I am not convinced by that analysis, for the simple reason that the relationship between ?eský rozhlas and the Czech State is not a contractual relationship concerning a supply of services.

32. Public broadcasting operates in the public interest to meet the democratic, social and cultural needs of society, as well as to preserve media pluralism. (6) To that end, States create public bodies responsible for supplying broadcasting services and make provision for their funding, often in the form of a fee such as the radio fee at issue in the main proceedings. Those bodies have a public broadcasting remit to provide a service that is free of charge, freely accessible and independent of economic or other constraints contrary to their mission. It is with that in mind that the protocol on the system of public broadcasting in the Member States stipulates that the rules of the Treaties are to be without prejudice to the competence of the Member States to provide for the funding of public broadcasting.

33. Public broadcasting bodies are created by the State, which defines their mission, oversees the delivery of that mission and provides for their funding, for example by assigning to them the revenue obtained from a compulsory contribution specifically introduced for that purpose. It is not, therefore, an economic relationship which has been freely entered into by two autonomous entities (the State and the broadcaster), which, moreover, would have had to be fully subject to the rules of the Treaties and secondary legislation. The public broadcaster does not charge a 'price' for its services and the fee does not constitute the payment of such a price.

34. One of the arguments raised in the course of the present case has been that the fee at issue in the main proceedings is a form of tax for financing a given type of public activity. I would say that such a fee — particularly when it operates in the way that the Czech radio fee does, namely as a charge which the persons liable to it pay directly to the broadcasting body — is more akin to a subsidy in the particular form of an own resource assigned to that body by the State. An activity for which the taxable person receives no remuneration from those for whom it is performed and which is financed by a subsidy intended to finance the activities pursued by that taxable person in general certainly cannot be classified as an activity carried on for consideration.

35. Consequently, even when analysed from the point of view of the relationship between ?eský rozhlas and the Czech State, the radio fee cannot be regarded as consideration for the public broadcasting service, and the activity performed by ?eský rozhlas, in so far as it is financed from that fee, does not constitute an activity carried on for consideration within the meaning of the Sixth Directive.

The question of the relevance of the judgment in *Le Rayon d'Or*

36. The national court also draws the Court's attention to its judgment in *Le Rayon d'Or*, (7) and asks whether the solution adopted in that judgment, or a specific solution similar to it, might

conceivably be applied to public broadcasting financed from a charge.

37. That suggestion must, in my opinion, be dismissed. In that judgment, it is true that the Court held that the services supplied by a care home for the elderly were to be regarded as effected for consideration even though the remuneration for those services was paid not by the recipients of those particular healthcare services but by the health insurance fund on a lump-sum basis.

38. However, what distinguishes the case which gave rise to the judgment in *Le Rayon d'Or* (8) from the present case is the legal relationship that did exist between the recipients of the services, namely the residents of the care home for the elderly, and the care home. The only unusual feature of that relationship was the involvement of the health insurance fund, which participated, so to speak, in the obligations incumbent on the residents in order to cover the costs of the services which they had received. In the case of public broadcasting, on the other hand, as I noted in point 28 of the present Opinion, it is that very legal relationship that is missing. Consequently, the solution adopted by the Court in its judgment in *Le Rayon d'Or* (9) is not transposable to the present case.

The *ratio legis* of Article 13A(1)(q) of the Sixth Directive

39. The national court also asks what the Community legislature's intentions might have been in establishing the provision contained in Article 13A(1)(q) of the Sixth Directive, in a situation where the activity of public broadcasting, normally financed by a fee such as that at issue in the main proceedings, is considered not to fall within its scope. According to the Czech Government, the exemption contained in that provision is meaningless.

40. I do not share that concern. Article 13A(1)(q) of the Sixth Directive is one of a long list of exemptions 'for certain activities in the public interest'. Those activities, whether by virtue of their own nature or that of the persons who perform them, will often be excluded from the scope of the Sixth Directive because they are not activities carried on for consideration within the meaning of that directive. However, those activities may be financed in different ways. They, too, may be carried on for consideration, at least in part. This is also true of the activities of public broadcasting bodies that cannot be fully financed by a fee, as the Czech government itself recognises. (10) Such are the situations in which Article 13A(1)(q) of the Sixth Directive makes provision for the exemption of those activities. The fact that, in practice, these are often activities which do not fall within the scope of the VAT system in the first place does not render that exemption nugatory.

41. It should be added that, in any event, a provision of the Sixth Directive which exempts a given activity, such as Article 13A(1)(q), cannot be interpreted in such a way as to expand the scope of that directive as defined in Article 2. It is therefore categorisation as a taxable activity that is the condition of any exemption and not the other way round.

Conclusion as to the nature of the activity performed by ?eský rozhlas in so far as it is financed from the radio fee

42. In the light of the foregoing, it is appropriate, to my mind, to take the view that the activity performed by ?eský rozhlas, in so far as it is financed from the radio fee, does not fall within the scope of the Sixth Directive because it is not an activity carried on for consideration.

43. In principle, that finding provides a sufficient basis on which to answer the question referred for a preliminary ruling as formulated by the national court. However, it seems to me that, in the spirit of cooperation with national courts which underlies Article 267 TFEU and in the interests of providing the referring court with an answer that will be of optimum use in the resolution of the dispute in the main proceedings, the Court might consider pursuing its deliberations by addressing

the issue of the extent of ?eský rozhlas's right to deduct input tax.

The right to deduct enjoyed by taxable persons performing both taxable transactions and transactions falling outside the scope of the VAT system

Preliminary remarks

44. Article 17(2) of the Sixth Directive provides that, 'in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay' the VAT due or paid on those goods and services. The right to deduct input tax is the essential mechanism of the VAT system because it allows that tax to be neutral from the point of view of economic operators, the burden of it being borne, in principle, by consumers alone.

45. However, so that VAT is indeed levied on consumers, the right to deduct may relate only to goods and services which the taxable person goes on to use in connection with his taxable transactions. Thus, input VAT will be deducted from the output VAT which the taxable person levies on his own co-contractors by including it in the price of his own supplies of goods or services. On the other hand, if the taxable person were entitled to deduct input VAT on goods and services that will not be used in connection with his taxable transactions, that VAT would have to be refunded to him, with the result that taxable goods and services would not be taxed in practice. In such circumstances, the burden of taxation will therefore fall to the taxable person, instead of the consumer.

46. The VAT system includes correction mechanisms for situations in which the goods and services acquired by the taxable person are not used for the purposes of his taxable transactions. The two most common of these are where the taxable person uses the goods or services, in whole or in part, in connection with transactions which are exempt, and where he uses them for his own purposes or those of his employees.

47. However, the Sixth Directive does not contain specific rules applicable to the situation of a taxable person who performs both taxable transactions and transactions that do not fall within the scope of the VAT system at all. So far as concerns goods and services the taxable person's use of which in connection with either of those categories of transaction (that is to say, taxable and non-taxable) is easy to determine, the solution is simple and follows directly from Article 17(2) of the Sixth Directive. After all, goods and services used in connection with taxable transactions confer a right to deduct (unless those transactions are exempt) and goods and services used in connection with transactions falling outside the scope of the VAT system do not confer a right to deduct. The question of the extent of the right to deduct arises, however, in the context of goods and services used, simultaneously and indissociably, in connection with taxed transactions and transactions falling outside the scope of the VAT system. There may be many such goods and services and they may represent a significant proportion of the cost of the economic activity, such as electricity, office rental, cleaning services, certain facilities and so on.

The case of ?eský rozhlas

48. That is the situation in which ?eský rozhlas will also find itself if the Court endorses my proposed answer to the question referred with respect to the classification of its activity in so far as it is financed from the radio fee. (11) In that event, the proposition put forward by the Czech tax authorities, to the effect that the activity performed by ?eský rozhlas, in so far as it is financed by the radio fee, falls within the scope of the VAT system but qualifies for the exemption provided for in Article 13A(1)(q) of the Sixth Directive, will have to be dismissed. It will not therefore be possible to use the pro rata method of calculating the right to deduct provided for in Article 17(5) and Article

19 of the Sixth Directive. For the term ‘transactions in respect of which [VAT] is not deductible’, used in those provisions, does not cover transactions performed in the course of an activity which falls outside the scope of the VAT system. (12)

49. ?eský rozhlas, for its part, submits principally that the refusal to classify the radio fee as remuneration would have the inevitable effect of excluding the income from that fee from the calculation of the deductible proportion. Consequently, its right to deduct would have to amount to 100% of the input VAT. (13) That view is not without relevance, particularly if the analysis were confined to the nature of the income from the radio fee. After all, it is settled case-law that the right to deduct is an integral part of the VAT scheme which, in principle, may not be limited and is exercised in respect of all the taxes charged on taxable transactions relating to inputs. (14) The fact that a taxable person obtains income that does not represent consideration for his services and does not form part of his turnover should not, in principle, have the effect of limiting his right to deduct.

50. However, that analysis ignores the fact that the radio fee is not a secondary income stream for ?eský rozhlas, but is one of its main sources of financing. (15) That charge thus enables it to finance the activity for which it was established, or at least the essential part of that activity. The nature of the activity financed in this way is therefore indissociable from the nature of its financing per se, which, in this case, presents itself not as remuneration for services rendered but rather as an own resource. (16) In accordance with my proposed answer in the present case, therefore, that activity cannot be regarded as an activity carried on for consideration within the meaning of Article 2(1) of the Sixth Directive. The question, therefore, is whether that activity is capable of conferring a right to deduct input VAT on goods and services used for the purposes of both that activity and taxed activities.

51. In my view, the answer to that question should be in the negative. After all, granting a right to deduct input tax on goods and services used for the purposes of an activity that falls outside the scope of the VAT system would be contrary to the logic of that system and, more specifically, to the categorical and clear wording of Article 17(2) of the Sixth Directive. (17) If that were the case, input VAT would not be deducted from the output VAT owed by the taxable person on his taxed transactions (because there would not be any) and he could apply to have it refunded. Consequently, the input VAT would end up not being paid by anyone and the goods and services in the chain of downstream transactions would be effectively exempt, in breach of the principle of the universality of VAT.

52. This is particularly true in the case of a taxable person that is a public broadcaster, because the latter’s activities, if they were carried on for consideration and were therefore taxable, would — with the exception of any commercial activities, of which there are none here — be exempt under Article 13A(1)(q) of the Sixth Directive and would not confer any right to deduct. (18) It would therefore be illogical to grant the right to deduct in the case of activities which are not taxable on the ground that they are not carried on for consideration and not to grant that right in connection with the same activities if they were taxable.

53. A comparison with the situation of a private broadcaster may be informative. Private broadcasters may, and often do, broadcast their programmes on an open access basis, that is to say, without remuneration from listeners. However, since they do not receive a fee or any other means of public funding, they must finance their activities by broadcasting ‘commercial communications’, to use the terminology of the Audiovisual Media Services Directive, (19) in other words advertisements, sponsored programmes, and so on. Since commercial communications are directed at those listening to the broadcaster’s programmes, the broadcasting of the commercial communications is indissociable from the broadcasting of the programmes. From an economic

point of view, therefore, those broadcasts in their entirety constitute the activity which the broadcaster finances from the income generated by the commercial communications that make up that broadcaster's turnover. Thus, the input VAT on the goods and services used by that broadcaster in connection with the entirety of its activity will be deducted from the output VAT included in the price that it charges for the commercial communications. The inclusion of the output VAT therefore justifies its right to deduct all of the input tax.

54. That is not the situation of a public broadcaster, the activity of which is at least partly financed by a fee. Since that fee does not represent consideration for the services supplied, there is no output VAT and the input VAT is not therefore deductible. The public broadcaster may of course also engage in a commercial activity financed by other means. That activity will entitle it to deduct input tax, but only on the proportion of goods and services used for the purposes of that commercial activity.

55. To remove any ambiguity, I should add that the solution adopted by the Court in its judgment in *Kretztechnik* (20) cannot, in my view, be transposed to the situation of a public broadcaster. In that judgment, the Court endorsed the deduction of input VAT on expenditure incurred in connection with the issue of shares by a taxable person, on the ground that a share issue served the entire economic (and therefore taxed) activity of that taxable person. However, the activity of a public broadcaster is not carried on with a view to obtaining the fee. On the contrary, the broadcaster's purpose is to perform the activity of broadcasting, the fee being merely a means of financing that activity. Moreover, even if such an activity were carried on for consideration, it would be exempt under Article 13A(1)(q) of the Sixth Directive. There is therefore no analogy with the situation in the case that gave rise to the judgment in *Kretztechnik*.

Calculating the scope of the right to deduct

56. The finding that an activity financed from a fee does not confer any right to deduct input VAT applies not only to the goods and services which the taxable person uses exclusively for the purposes of his non-taxable activities but also to those which he uses simultaneously and indissociably for the purposes of both non-taxable and taxed activities. Goods and services falling into the first category do not pose a problem because the taxable person simply does not have the right to deduct. So far as concerns the second category, however, it is important to determine the extent to which the taxable person must be able to benefit from his right to deduct so as to ensure, first, that that right can be maintained in so far as it relates to his taxable transactions and, secondly, that there is no undue 'overcompensation'.

57. As the Court observed in its judgment in *Securenta*, (21) the provisions of the Sixth Directive do not include any rules relating to the methods or criteria which the Member States are required to apply when adopting provisions permitting the apportionment of input VAT paid according to whether the relevant expenditure relates to taxable activities or to non-taxable activities.

58. The Commission suggests in its written observations that a fee such as the radio fee at issue in the main proceedings could be regarded as a subsidy within the meaning of the second indent of Article 19(1) of the Sixth Directive. In accordance with that provision, it would then be possible for the Member States to include such a fee in the denominator of the deductible proportion, thus limiting proportionally the extent of the right to deduct.

59. However, that possibility is not, in my view, applicable to a fee which is used to finance public broadcasting operators in the Member States. For, whether or not the radio fee at issue in the main proceedings is a subsidy having the particular nature of an own resource, I see two drawbacks to such a proposition.

60. First, that solution would bring within the VAT system activities which do not fall within its scope. As I explained in point 50 of the present Opinion, the radio fee cannot be analysed separately from the activity which it serves to finance. Because of the way in which it is financed, that activity is not carried on for consideration and does not fall within the scope of the VAT system. If the mechanism provided for in Article 19 of the Sixth Directive is not applicable to non-taxable activities, (22) it is not possible to include in it amounts corresponding to those activities.

61. Secondly, the mechanism provided for in that article is applicable only in the case of a ‘mixed’ taxable person, that is to say one who performs both taxed and exempt transactions. It cannot be applied to a taxable person who performs only taxed transactions and also receives subsidies, the denominator of the deductible proportion of whose inputs would therefore consist only of the turnover from taxed transactions and the amount of the subsidies. (23) In addition to the activity financed from the fee, some public broadcasters may carry on other activities that will be exempt under Article 13A(1)(q) of the Sixth Directive, but others may just as well not carry on such activities. The solution advocated by the Commission, however, would apply only to the former group, a fact which might give rise to serious distortions of competition and would undermine the harmonising objective of the Sixth Directive.

62. In my view, the issue of fees used to finance public broadcasters must be resolved on the basis of the solution adopted by the Court in its judgment in *Securenta*. In that judgment, the Court, having noted that the provisions of the Sixth Directive contain no rules for determining the extent of the right to deduct enjoyed by taxable persons who carry out both taxable (and taxed) activities and non-taxable activities, held that the determination of the methods and criteria for apportioning input VAT between taxable and non-taxable activities is in the discretion of the Member States, who, when exercising that discretion, must have regard to the aims and broad logic of the Sixth Directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity. (24)

63. It is true that the judgment in *Securenta* concerned the specific issue of expenditure connected with the issue of shares and investment securities. However, the solution adopted in that judgment is not specifically reserved for that sphere and is, in my opinion, perfectly transposable to other situations involving taxable persons carrying on both a taxed activity and an activity that falls outside the scope of the VAT system.

Conclusion

64. In the light of the foregoing, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Nejvyšší správní soud (Supreme Administrative Court):

1) Article 2(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 must be interpreted as meaning that the activity of a public broadcasting body that is financed from a compulsory fee laid down by statute and payable by anyone in possession of a radio receiver does not constitute an activity carried on for consideration within the meaning of that provision and does not confer a right to deduct VAT due or paid on goods and services acquired by that body and used for the purposes of that activity.

2) The determination of the methods and criteria for apportioning input VAT between that activity and the activity conferring a right to deduct is in the discretion of the Member States, who, when exercising that discretion, must have regard to the aims and broad logic of Sixth Directive 77/388, and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity.

1 – Original language: French.

2 – OJ 1977 L 145, p. 1.

3 – I shall refer only to those criteria that are relevant to the analysis of the question referred in the present case.

4 – See, in particular, the judgments in *Tolsma* (C?16/93, EU:C:1994:80, paragraph 14) and *Lebara* (C?520/10, EU:C:2012:264, paragraph 27).

5 – See, in particular, the judgments in *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121, paragraph 10) and *GFKL Financial Services* (C?93/10, EU:C:2011:700, paragraph 17).

6 – Protocol (No 29) on the system of public broadcasting in the Member States, annexed to the TEU and the FEU Treaty.

7 – C?151/13, EU:C:2014:185.

8 – C?151/13, EU:C:2014:185.

9 – C?151/13, EU:C:2014:185.

10 – It is difficult to provide specific examples here because it is for the legislation of each Member State to define which activities of public broadcasters are public and which commercial. However, the sale to private broadcasters of programmes produced as part of a public service mission could be regarded as an activity exempted under Article 13A(1)(q) of the Sixth Directive.

11 – That is to say, if the Court considers that the activity performed by ?eský rozhlas, in so far as it is financed from the radio fee, falls outside the scope of the VAT system.

12 – See, in particular, the Opinion of Advocate General Mazák in *Securenta* (C?437/06, EU:C:2007:777, point 40 and the case-law cited) and the judgment in *Securenta* (C?437/06, EU:C:2008:166, paragraph 33).

13 – More precisely, it would amount to 100% if all of the transactions which ?eský rozhlas performs for consideration were commercial activities within the meaning of Article 13A(1)(q) of the Sixth Directive, since such activities are not exempt. If, on the other hand, ?eský rozhlas also performs transactions which are taxable but exempt under that provision, which the order for

reference does not make clear, it would be necessary to apply to the deduction of the totality of the input VAT a proportion taking into account only the income from the transactions falling within the scope of VAT (taxable and exempt).

14 – See, in particular, the judgments in *BP Soupergaz* (C?62/93, EU:C:1995:223, paragraph 18) and *Securenta* (C?437/06, EU:C:2008:166, paragraph 24).

15 – According to Article 10 of the Law on Czech Radio (zákon o ?eském rozhlasu), ?eský rozhlas's sources of financing are the radio fee and the income from its own economic activities.

16 – See point 34 of the present Opinion.

17 – It should be recalled that that provision confers the right to deduct '*in so far as* the goods and services are used for the purposes of [the taxable person's] taxable transactions' (emphasis added).

18 – In fact, the exemption provided for in Article 13A(1)(q) of the Sixth Directive is subjective: all activities of public broadcasters, with the exception of commercial activities, are exempt.

19 – Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, p. 1).

20 – C?465/03, EU:C:2005:320.

21 – C?437/06 (EU:C:2008:166, paragraph 33).

22 – See point 49 of the present Opinion and the case-law cited.

23 – See the judgment in *Commission* v *Spain* (C?204/03, EU:C:2005:588, paragraphs 25 and 26).

24 – Judgment in *Securenta* (C?437/06, EU:C:2008:166, paragraph 2 of the operative part).