Provisional text

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 25 March 2021 (1)

Case C?21/20

Balgarska natsionalna televizia

v

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ – Sofia pri Tsentralno upravlenie na NAP

(Request for a preliminary ruling from the Administrativen sad Sofia-grad (Sofia City Administrative Court, Bulgaria))

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Scope – Supply of services effected for consideration – Article 132(1)(q) – Exemption – Television broadcasting financed partly from the State budget and partly from commercial activities – Right to deduct tax due)

Introduction

1. The Member States use two basic methods for financing public radio and television broadcasting: either by introducing a special levy, usually linked to the possession of a radio or television receiver, with the revenue being earmarked for public service broadcasting (licence fee), or directly from the State budget. (2) Some Member States combine these two methods, supplementing the revenue from the levy, which is considered insufficient given the public service broadcaster’s socio-political tasks, with direct subsidies from the State budget.

2. The present case concerns the question of how those methods for financing public service broadcasters should be classified from the point of view of value added tax (‘VAT’) and the effects of that classification on the position of those broadcasters as taxable persons.

3. The Court has already had occasion to rule that public broadcasting activities funded by a compulsory statutory fee paid by owners or possessors of a radio receiver and carried out by a public service broadcaster created by law do not constitute a supply of services ‘effected for consideration’ within the meaning of VAT provisions and therefore fall outside their scope. (3) The question arises, however, as to whether the same treatment should apply to a broadcaster financed by subsidies from the general State budget.

4. The Court will also have the opportunity to develop its case-law in this area by considering questions on the right of a public service broadcaster to deduct the tax due or paid in respect of goods and services it acquires for the purposes of its activities.

Legal framework

EU law

5. Pursuant to Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (4):

‘The following transactions shall be subject to VAT:

…

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

…’

6. Article 132(1)(q) of that directive states:

‘Member States shall exempt the following transactions:

…

(q) the activities, other than those of a commercial nature, carried out by public radio and television bodies.

…’

7. Pursuant to Article 168 of the directive:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-Community acquisitions in accordance with

Articles 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State.’

8. Finally, pursuant to the first subparagraph of Article 173(1) of Directive 2006/112:

‘In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.’

Bulgarian law

9. Under Article 6(3) of the Zakon za radioto i televiziata (Law on Radio and Television, ‘the ZRT’), Balgarska natsionalna televizia (‘BNT’) is a legal person, a national public provider of audiovisual media services. Pursuant to Article 70(3) of that law, BNT is financed by subsidies from the State budget, income from advertising and similar sources, and also from other sources.

10. Directive 2006/112 has been transposed into Bulgarian law by the Zakon za danak varhu dobavenata stoynost (Law on Value Added Tax). Under Article 42 of that law, BNT activities, inter alia, are exempt from VAT to the extent that they are financed from the State budget.

Facts, procedure and questions referred

11. BNT is a Bulgarian public television broadcaster, that is to say, an entity whose activities could in principle be covered by the exemption laid down in Article 132(1)(q) of Directive 2006/112. BNT is financed partly by a subsidy from the State budget and partly by income from its own commercial activities. Those activities include both the broadcasting of paid-for content, in particular advertising, and activities other than broadcasting such as the sale of intellectual property rights or equipment rental.

12. The dispute in the main proceedings concerns BNT’s right to deduct the tax paid or due in respect of goods and services BNT acquires for the purposes of its activities. The dispute stems from the different ways in which BNT and the Bulgarian tax authorities view BNT’s activities from a VAT perspective. In the view of BNT, a subsidy from the State budget cannot be regarded as payment for broadcasting and is therefore completely outside the scope of the VAT system. This leads BNT to conclude that it is entitled to deduct in full the tax due in respect of goods and services used for the purposes of its activities financed both from the subsidy and from commercial revenue. The tax authorities, on the other hand, take the view that BNT’s activities, in so far as they are financed from the State budget, are subject to the exemption provided for in Article 132(1)(q) of Directive 2006/112, and as a result BNT has the right to deduct tax solely on a pro rata basis, to the extent that BNT’s broadcasting activities are financed by revenue from commercial activities.

13. That dispute resulted in the tax decision of 14 December 2016, in which the tax authority ordered the amount of tax deducted by BNT which was due for the period from 1 September 2015 to 31 March 2016 to be corrected. BNT appealed against that decision, which was dismissed by the tax authority (a party to the main proceedings) by decision of 27 February 2017. BNT lodged an appeal against the latter decision before the referring court.

14. In those circumstances, the Administrativen sad Sofia-grad (Sofia City Administrative Court, Bulgaria) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can the supply of audiovisual media services to viewers by the public television broadcaster be regarded as a service supplied for consideration within the meaning of Article 2(1)(c) of the Directive [2006/112] if it is financed by the State in the form of subsidies, with the viewers paying no fees for the broadcasting, or does it not constitute a service supplied for consideration within the meaning of that provision and not fall within the scope of that directive?

(2) If the answer is that the audiovisual media services provided to viewers by the public television broadcaster fall within the scope of Article 2(1)(c) of Directive 2006/112/?C, can it then be considered that exempt supplies for the purposes of Article 132(1)(q) of the Directive [2006/112] are involved, and is a national regulation which exempts this activity solely on the basis of the payment from the State budget received by the public television broadcaster, regardless of whether that activity is also of a commercial nature, permissible?

(3) Is a practice which makes a right to deduct in full the tax due or paid on purchases dependent not solely on the use of the purchases (for taxable or non-taxable activity), but also on the way in which those purchases are financed, namely on the one hand from self-generated income (advertising services inter alia), and on the other hand from State subsidies, and which grants the right to deduct in full the tax due or paid only on purchases financed from self-generated income and not for those financed through State subsidies, with the delimitation thereof being required, permissible pursuant to Article 168 of Directive 2006/112/EC?

(4) If it is considered that the activity of the public television broadcaster consists of taxable and exempt supplies, having regard to its mixed financing, what is the scope of the right to deduct the tax due or paid in respect of those purchases and which criteria must be applied for the determination thereof?’

15. The request for a preliminary ruling was received by the Court on 17 January 2020. Written observations were submitted by BNT, the Spanish Government and the European Commission. BNT and the Commission replied in writing to the Court’s questions.

Analysis

16. The referring court referred four questions for a preliminary ruling. I will consider them in the order in which they were put.

First question referred

17. By its first question, the referring court seeks to determine whether Article 2(1)(c) of Directive 2006/112 must be interpreted as meaning that the activities of a public television broadcaster consisting in the supply of television media services, in so far as they are financed by a subsidy from the State budget, constitute a supply of services for consideration within the meaning of that provision.

Preliminary observations

18. The referring court’s doubts on this point relate to the judgment given on 23 April 2018 by the Varhoven Administrativen Sad (Supreme Administrative Court, Bulgaria) in which that court ruled that BNT’s activities are covered by the common system of VAT. The Varhoven Administrativen Sad (Supreme Administrative Court) based its judgment, in particular, on Article

25(c) of Directive 2006/112, pursuant to which a supply of services within the meaning of that directive may consist, inter alia, in the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law. (5) According to that court, this is the case with BNT's activities, which are carried out in pursuance of the law. The Varhoven Administrativen Sad (Supreme Administrative Court) referred to the Court's judgment in *Le Rayon d'Or*. (6) At the same time, it found that in view of the differences in the way BNT is financed as compared to public broadcasters financed from a licence fee, the Court's judgment in *?eský rozhlas* did not apply to BNT. (7)

19. The position of the tax authorities in the main proceedings is in line with the abovementioned judgment of 23 April 2018.

20. The question whether the conclusions of the *?eský rozhlas* judgment (8) are applicable to a public broadcaster financed by a subsidy from the State budget is central to answering the first question referred in the present case. I shall therefore briefly summarise that judgment.

?eský rozhlas judgment

21. In the *?eský rozhlas* judgment, (9) the Court first reiterated its previous case-law, according to which a supply of services is effected 'for consideration' within the meaning of Article 2(1) of Directive 77/388/EEC, (10) and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. (11) Therefore, according to the Court's case-law, the notion of the 'supply of services effected for consideration', within the meaning of the abovementioned Article 2(1) of Directive 77/388, requires the existence of a direct link between the service provided and the consideration received. (12)

22. Subsequently, the Court found that there exists no similar relationship between a public broadcaster financed by a licence fee and the persons liable to pay that fee, since, first, that obligation is linked not to the actual use of the services of the public service broadcaster, but solely to possession of a radio receiver, and, secondly, access to those services is in not subject to payment of the radio fee. Therefore, the fee does not constitute payment for the service provided by the public broadcaster. (13)

23. The Court also rejected the Czech Government's argument based on the existence of such a legal relationship between a public broadcaster and the State which provides it with financing through the establishment of the obligation to pay the licence fee. (14)

24. Similarly, the Court noted that the judgment in *Le Rayon d'Or* (15) cannot be applied to a public service broadcaster financed from a licence fee. The Court pointed out that in the *Le Rayon d'Or* case, a direct link existed between the supply of services and the consideration received, even if that consideration was in the form of a lump sum, and that therefore such a lump sum payment constituted consideration for the supply of services effected for consideration and, as a result, fell within the scope of VAT. By contrast, in the case of a public service broadcaster financed from a licence fee, there is no such direct link. (16)

25. Accordingly, the Court held that public broadcasting activities, such as those at issue in the *?eský rozhlas* case, funded by a compulsory statutory charge paid by owners or possessors of a radio receiver and carried out by a radio broadcasting company created by law, do not constitute a supply of services 'effected for consideration' within the meaning of Article 2(1) of Directive 77/388 and therefore fall outside the scope of that directive. (17)

Application to the present case

26. I am of the opinion that a similar ruling should be adopted with respect to a public broadcaster financed by a subsidy from the State budget. Such a broadcaster does not benefit from a special fee paid by those who possess television receivers, but instead receives a subsidy directly from the State budget to finance the tasks entrusted to it by law.

27. This does not, however, fundamentally affect the analysis of the activities of such a broadcaster from the point of view of VAT. Indeed, that subsidy does not constitute compensation for the services provided by a public service broadcaster, but is instead a way of financing a certain type of public service. The granting of such a subsidy or the provision of different means of financing is a necessary and inherent condition for allocating those public services. In other words, we are not dealing here with two performances which are functionally independent: the service provided by the public broadcaster and the remuneration paid by the State. Rather, we are dealing here with an intervention by the State, which organises a public service in the form of radio or television broadcasting by entrusting it to a public service broadcaster and, at the same time, ensures the financing of this service by, for instance, providing a subsidy to the broadcaster. From that point of view, such a broadcaster is not fundamentally different from public institutions such as schools, the army or the police. (18)

28. Thus, just as between a public service broadcaster and the persons liable to pay the licence fee, there is no legal relationship between a public service broadcaster financed from a subsidy and the State under which there would be reciprocal performance within the meaning of the Court's case-law on the scope of application of the common system of VAT. (19) In so far as there is a direct relationship between the service provided by a public service broadcaster and the subsidy it receives, it is not a relationship between two performances, but an inseparable and indispensable link between the performance of a particular public service and its financing.

29. Therefore, the solution adopted by the Court in the *Le Rayon d'Or* case (20) cannot be applied to a public service broadcaster financed by a subsidy from the State budget, since that case concerned services provided to specific recipients in return for which the service provider received remuneration which, although in the form of a lump sum and paid by a person other than the recipient of the services, constituted consideration.

30. For these reasons, I share the view expressed by both BNT and the Spanish Government that a subsidy from the State budget intended to finance the activities of a public television broadcaster does not constitute remuneration and, in so far as they are financed by that subsidy, these activities do not constitute a supply of services for consideration within the meaning of Article 2(1)(c) of Directive 2006/112.

31. Admittedly, there may be cases where the State purchases certain services from a public service broadcaster for consideration within the meaning of Article 2(1)(c) of Directive 2006/112. However, these would have to be specific cases where a public service broadcaster provides services that go beyond the ordinary tasks entrusted to it by law, and the remuneration for those services would have to be closely linked to their performance and reflect their scope and value, such that the remuneration in question could be considered to be the price of the services provided, since that is the price which is the taxable amount for VAT pursuant to Article 1(2) of Directive 2006/112. (21)

32. On the other hand, a general subsidy from the State budget intended to cover the operating costs of a public service broadcaster, which are defined in general terms, does not meet those criteria. I do not, therefore, agree with the Commission's view expressed in its observations that

the subsidy to BNT could be regarded as remuneration for the services provided by that broadcaster simply because it is calculated in proportion to broadcasting time. The manner in which the amount of the subsidy is calculated does not affect the essence of the subsidy, which is a means of financing the public tasks performed by the broadcaster rather than consideration for the services it provides. The classification of a taxable person's activities for VAT purposes should be based on the essential characteristics of those activities, including the manner in which they are financed, if that financing has a bearing on that classification, rather than on the manner in which the amount of financing is calculated.

Article 25(c) of Directive 2006/112

33. The above conclusions that the activities of a public service broadcaster are not covered by the common system of VAT are not undermined by Article 25(c) of Directive 2006/112.

34. That provision is contained in Title IV of the directive, entitled 'Taxable transactions'. Title IV contains the definitions of the taxable transactions listed in Article 2(1) of Directive 2006/112. Chapter 3 of that title concerns the supply of services. A general definition of supply of services is contained in Article 24(1) of the directive. The definition is open-ended as it stipulates that a supply of services is any transaction which does not constitute a supply of goods. Further provisions contained in Chapter 3 complete and clarify this definition and also introduce the possibility of certain derogations for Member States.

35. Article 25 of Directive 2006/112 clarifies that a supply of services may consist, inter alia, in three types of activities with respect to which it is not intuitively obvious that they fall within the concept of supply of services. These include the assignment of intangible property (Article 25(a)), the obligation to refrain from an act, or to tolerate an act or situation (Article 25(b)), and finally the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law (Article 25(c)). The word 'may' used in that provision does not imply an optional power for the Member States to regard the activities in question as supplies of services or not, (22) but a statement that a supply of services may in certain situations take the form of one of those activities.

36. Article 25 of the directive does not, therefore, extend the definition of the supply of services but merely clarifies, in case of doubt, that certain activities constitute the supply of services. Still, pursuant to Article 2(1)(c) of Directive 2006/112, a supply of services is subject to VAT only if it is made for consideration within the meaning of the latter provision. This condition applies to all transactions which are supplies of services, including those listed in Article 25. Thus, the assignment of intangible property, the obligation to refrain from an act, or to tolerate an act or situation and the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law are subject to VAT in so far as they are carried out for consideration within the meaning of Article 2(1)(c) of that directive.

37. Therefore, Article 25(c) of Directive 2006/112 cannot serve as a basis for making services provided by a public service broadcaster subject to VAT if the manner in which those services are financed does not allow them to be treated as a supply of services for consideration.

38. I therefore propose that the answer to the first question referred should be that Article 2(1)(c) of Directive 2006/112 must be interpreted as meaning that the activities of a public television broadcaster consisting in the supply of television media services, in so far as they are financed by subsidies from the State budget, do not constitute a supply of services for consideration within the meaning of that provision.

Second question referred

39. By its second question, the referring court seeks to determine, in essence, whether the services provided by a public broadcaster can be regarded as services exempt from VAT under Article 132(1)(q) of Directive 2006/112 on the ground that they are financed by subsidies from the State budget and to the extent that they are financed in this manner.

40. The referring court asks this question in the event that the answer to the first question is that the services of a public broadcaster financed by subsidies from the State budget are deemed to be subject to VAT. In my opinion, however, this question is also worth answering even if the answer to the first question is as I have proposed, since irrespective of whether the activities of a public service broadcaster are deemed to be outside the scope of VAT or exempt from VAT, the question remains to what extent the broadcaster in question is entitled to deduct the input tax paid or due. This is the subject of the third and fourth questions, and the analysis of the second question will make it possible to distinguish between the activities of a public service broadcaster carried out in the public interest (23) and its commercial activities.

Commercial activities of public service broadcasters

41. Article 132(1)(q) of Directive 2006/112 provides that 'the activities, other than those of a commercial nature, carried out by public radio and television bodies' are to be exempt from VAT. Moreover, in accordance with the case-law of the Court discussed above, (24) as well as with my proposed answer to the first question, services provided by public broadcasters (public radio and television bodies) are not subject to VAT to the extent that they cannot be regarded as being supplied for consideration. However, the transactions carried out by those broadcasters in the course of their 'commercial activities' are subject to VAT (that is to say, they are taxable and not exempt from that tax). Therefore, the correct application of the common system of VAT to the transactions carried out by those broadcasters requires that the meaning of 'commercial activities' be determined.

42. Neither Article 132(1)(q) of Directive 2006/112 nor any other provision of that directive defines the notion of 'commercial activities'. In particular, that notion should not be confused with the notion of 'economic activity' as defined in Article 9(1) of the directive, since 'economic activity' also covers exempt transactions. The definition of the notion of 'commercial activities' should therefore be constructed on the basis of the classification presented in, and the purposes of, Article 132(1)(q) of Directive 2006/112.

43. First of all, in my opinion, only transactions carried out for consideration within the meaning of Article 2 of Directive 2006/112 should be regarded as commercial activities. Since the commercial activities of public service broadcasters constitute an exception to the general rule that the activities of such broadcasters are exempt from VAT, they must consist in taxable transactions, that is to say, transactions carried out for consideration, as only such transactions can be covered by the exemption. As a result, services provided by public service broadcasters, which, due to the manner in which they are financed, cannot be regarded as provided for consideration, do not fall within the notion of 'commercial activities'. In other words, the activities of a public service broadcaster financed by a subsidy from the State budget cannot be regarded as its commercial activities within the meaning of Article 132(1)(q) of Directive 2006/112.

44. The core activity of radio and television broadcasters is broadcasting. (25) In the case of public service broadcasters, that activity is often financed from two types of sources. The first is public financing, whether in the form of a licence fee, as in *?eský rozhlas*, (26) or in the form of a subsidy, as in the present case. The second source is the broadcasting of advertising and other

‘audiovisual commercial communications’ (sponsorship, teleshopping and product placement), to use the terminology of Directive 2010/13/EU, (27) or their radio equivalents.

45. To the extent that such broadcasts are made on a paid basis, which they generally are since that is their role, they constitute supplies of services for consideration within the meaning of Article 2(1)(c) of Directive 2006/112 and fall within the scope of commercial activities of public service broadcasters within the meaning of Article 132(1)(q) of that directive. Therefore, they are in principle taxable, with the taxable amount being the price that advertisers pay for the broadcasting of their content.

46. It is clear, however, that the revenue from those broadcasts is used to cover not only their costs, which are in any case minimal in relation to the total operating costs of radio or television broadcasters. The purpose of advertising and similar paid-for communications is to finance the broadcasters’ core activity of broadcasting programmes, which covers, broadly speaking, all content with the exception of commercial communications, where the broadcaster does not charge viewers or listeners for the broadcasting of that content. Therefore, the question arises as to how the broadcasting of those programmes by public service broadcasters, to the extent that it is financed by revenue from commercial communications, should be treated from the point of view of VAT.

47. In the case of commercial broadcasters financed entirely by revenue from paid-for commercial communications, all of their activities, that is to say, both the broadcasting of those paid-for communications and the broadcasting of other content, are of a uniform nature. Accordingly, for the purposes of VAT rules, the cost of the entirety of their broadcasting activities is deemed to be the cost of taxable transactions, which are services consisting in the broadcasting of paid-for commercial communications. (28)

48. In the case of public service broadcasters, the situation is more complicated. First, they are usually financed partly from public funds (in the form of a licence fee or subsidy) and therefore, in accordance with the Court’s existing case-law (29) and my proposed answer to the first question, their activities in that part are not taxable. Secondly, even to the extent that their activities are taxable, they are in principle exempt under Article 132(1)(q) of Directive 2006/112, except for commercial activities. The question, therefore, is whether the broadcasting of programmes other than paid-for commercial communications, to the extent that it is financed from the proceeds of those communications, should be classified as the commercial activities of public service broadcasters.

Rules on State aid

49. In the system of EU law, the Communication from the Commission on the application of State aid rules to public service broadcasting (30) (‘the Commission Communication’) regulates in detail the distinction between the activities of public service broadcasters in the public interest and their commercial activities. The Communication indicates that in the Commission’s view, commercial activities should be considered primarily to include the broadcasting of paid-for commercial communications, e-commerce activities and similar services (31) as well as services for which the broadcaster charges fees to its audience. By contrast, the free-of-charge broadcasting of other content constitutes, or in any event may constitute, public interest activities. (32)

50. If these criteria were to be applied under Article 132(1)(q) of Directive 2006/112, it would mean that only the broadcasting of paid-for commercial communications would be a taxable activity, while all other broadcasting activities would either not be taxable or would be exempt as public interest activities.

51. However, it should be borne in mind that the Commission Communication does not serve the same purposes as Directive 2006/112, and in particular Article 132(1)(q) thereof. The purpose of the Communication is, on the one hand, to give Member States freedom to define the public service remit (33) and, on the other hand, to prevent anti-competitive behaviour such as overcompensation for the costs of that remit and cross-subsidisation of commercial activities. (34) Financing the public service remit with proceeds from commercial activities is not, however, problematic. In terms of those purposes, it is reasonable to narrowly define the scope of activities considered commercial.

52. By contrast, the purpose of Article 132(1)(q) of Directive 2006/112 is, on the one hand, to reduce the costs of activities in the public interest by exempting them from VAT and, on the other hand, to avoid distortions of competition which could result from exempting activities carried out in competition with private broadcasters. In order to achieve those objectives, it is not necessary to define the meaning of ‘commercial activities’ of public service broadcasters as narrowly as in the Commission Communication. Indeed, from the point of view of competition, it is sufficient that the activities of those broadcasters are taxed in respect of the services they provide for consideration, that is to say, broadcasting commercial communications. This ensures that those broadcasters operate on the market on an equal footing with private broadcasters. On the other hand, classifying the broadcasting of other content, in so far as it is financed by the proceeds of paid-for commercial communications, as non-taxable or exempt does nothing to achieve the objectives of Article 132(1)(q) of Directive 2006/112. On the contrary, it may increase the costs of those activities, since the sole effect of such a classification would be to deprive public service broadcasters of the right to deduct the input tax paid or due in respect of goods and services used for the purposes of those activities.

53. I therefore consider that the criteria for distinguishing between the public interest activities of public service broadcasters and their commercial activities adopted in the Commission Communication should not be applied in the context of Article 132(1)(q) of Directive 2006/112.

Interpretation proposed by BNT

54. As regards that distinction, an interesting view is presented in BNT’s observations. If I understand its position correctly, BNT considers commercial activities to cover the broadcasting of all programmes which in its opinion attract an audience, thus allowing BNT to sell advertising airtime. This mainly concerns sporting events, foreign films and entertainment programmes. On that basis, during the period covered by the main proceedings, BNT deducted in full the VAT paid and due on the costs of broadcasting such programmes. By contrast, the broadcasting of other types of programmes is, according to BNT, carried out as part of its public service remit and as such is not subject to VAT.

55. However, in my view, that position is incorrect for two reasons.

56. First, BNT’s division of programmes into those that generate advertising revenue and those that do not appears to me to be arbitrary and not necessarily consistent with reality. It is easy to identify categories of programmes which clearly fulfil the criteria of the public service remit and at the same time usually attract a large audience and provide an excellent ‘vehicle’ for advertising, such as news programmes. By contrast, certain categories of programmes that BNT classifies as

commercial may perfectly well be classified as activities carried out in the public interest by public service broadcasters. That interest is, after all, linked to the ‘democratic, social and cultural needs … of society’, (35) and those needs also cover areas such as film, sports and entertainment.

57. Secondly, the method proposed by BNT for classifying its services does not take into account the factor on which the VAT system is based, namely, the link between the goods and services that a taxable person acquires for the purposes of his or her activity and the taxable supplies of goods or services that he or she makes in connection with that activity. In other words, in order for input goods and services acquired by a taxable person to be regarded as being used for the purposes of his or her activity, the cost of their acquisition should, in principle, be a component of the cost of the output transactions carried out by that taxable person. (36)

Proposed answer

58. In the case of the costs of acquiring goods or services which are not directly used for the purposes of taxable transactions – as is the case with programmes broadcast free of charge which only have an indirect connection with the supply of services consisting in the broadcasting of paid-for commercial communications (37) – that objective can be achieved in two ways. The first consists in strictly allocating certain revenue from taxable activities to the acquisition of specific goods or services used for the purpose of broadcasting free-of-charge programmes, for instance the acquisition of the rights to broadcast a film or a sporting event. However, as the tax authorities rightly point out in the main proceedings, this requires separate bookkeeping to enable such income and expenditure to be linked.

59. The second way consists in calculating the proportion in which the activities of a public service broadcaster are financed by subsidies from the State budget (or by licence fees) and the proportion in which they are financed by revenue from taxable transactions. The latter amount, after deducting any revenue from transactions exempt under Article 132(1)(q) of Directive 2006/112, will reflect the share of a public service broadcaster’s commercial activities in its total activities. Subsequently, the costs incurred by the public service broadcaster may be allocated to those activities on a pro rata basis, without the need to strictly allocate costs between commercial activities and public service activities. (38)

60. In my view, therefore, the notion of ‘commercial activities’ within the meaning of Article 132(1)(q) of Directive 2006/112 must be regarded as covering not only services provided for consideration in the strict sense, such as the broadcasting of commercial communications, but also services for which recipients do not pay, in particular the broadcasting of programmes which are accessible free of charge in so far as they are financed from the proceeds of the former category of services.

61. I believe that this position is in line with the views of the Spanish Government and the Commission as expressed in their observations in the present case. (39) This position is also supported, in my opinion, by the guidelines of the VAT Committee resulting from its 52nd meeting on 28 and 29 May 1997. (40) At that meeting, the Member States were of the ‘almost unanimous’ opinion that the broadcasting of programmes financed from public funds (licence fees or subsidies) constitutes the only non-commercial activity of public service broadcasters. Logically, therefore, broadcasting, to the extent that it is financed by revenue from commercial activities, should be classified as a commercial activity.

62. I therefore propose that the answer to the second question referred should be that Article 132(1)(q) of Directive 2006/112 must be interpreted as meaning that the notion of ‘commercial activities’ carried out by public radio and television bodies, within the meaning of that provision, covers transactions carried out for consideration which do not constitute activities in the public

interest as well as services supplied without consideration in so far as they are financed by the revenue from those transactions carried out for consideration.

The third and fourth questions referred

63. By its third and fourth questions, which I propose to examine together, the referring court seeks, in essence, to establish the scope of the right of a public service broadcaster to deduct the input tax paid or due in respect of goods and services which it purchases for the purposes of its activities, where those activities are financed both by subsidies from the State budget and by revenue from commercial activities.

64. I have already analysed this issue in detail in my Opinion in the *?eský rozhlas* case (41) in relation to a public service broadcaster financed from a licence fee. However, that issue went beyond the scope of the questions referred for a preliminary ruling in that case and was not resolved by the Court in its judgment. I believe that the conclusions contained in that Opinion may be applied to the present case. In the light of the present case, I would like to add the following remarks.

Tax deduction rules for mixed activities

65. According to the settled case-law of the Court, transactions carried out by a taxable person which are not subject to VAT, for instance because they are not carried out for consideration within the meaning of Article 2(1) of Directive 2006/112, do not give rise to a right to deduct the tax due or paid in respect of goods and services acquired for the purposes of those transactions. The same principle applies to exempt transactions. (42)

66. That rule is easy to apply to goods and services acquired by a taxable person solely for the purposes of his or her non-taxable transactions – in this case, the taxable person does not have the right to deduct the tax paid on those goods and services.

67. The difficulty arises when the goods and services in question are used by the taxable person both for the purposes of his or her taxable transactions and his or her exempt and non-taxable transactions. In this situation, the taxable person has the right to deduct tax in proportion to the amount of goods and services acquired by him or her which are used for the purposes of his taxable transactions.

68. However, while Articles 173 to 175 of Directive 2006/112 contain detailed rules for calculating that proportion in respect of exempt transactions, those provisions do not apply to transactions which are not subject to VAT. In this situation, it is up to the Member States to regulate the rules for its calculation in their national laws, while respecting the structure and objectives of the common system of VAT. These rules should make it possible to objectively reflect the proportion of costs attributed to both taxable and non-taxable transactions. (43)

Application to public service broadcasters

69. As regards the present case, it follows from my proposed answer to the first question referred that a public service broadcaster does not carry out transactions subject to VAT in so far as its activities are financed by a subsidy from the State budget. Therefore, those activities do not give rise to the right to deduct the tax paid in respect of goods and services used for the purposes of those activities.

70. On the other hand, as follows from my proposed answer to the second question referred, in so far as the activities of a public service broadcaster are financed by revenue from the

broadcasting of paid-for commercial communications and from other taxable transactions, those activities constitute its commercial activities within the meaning of Article 132(1)(q) of Directive 2006/112. The latter activities are to be regarded in their entirety as activities carried out for consideration and therefore give rise to the right to deduct the tax paid or due in respect of goods and services used for the purposes of those activities.

71. Accordingly, a public service broadcaster whose activities are financed, on the one hand, by subsidies from the State budget and possible exempt transactions, and, on the other hand, by revenue from taxable transactions, has the right to deduct the tax due or paid on goods and services used for the purposes of those activities to the extent that its activities are financed from the latter category of revenue.

72. As I have already mentioned, Directive 2006/112 does not lay down rules for calculating the proportion of costs attributable to non-taxable activities, and this is therefore a matter for the Member States to determine in their national laws. I agree with the Commission's view expressed in its answer to the Court's question, according to which Member States may, but are not obliged to, apply by analogy the rules set out in Articles 173 to 175 of the directive for taxable and exempt transactions.

73. In particular, the adoption of the definition of commercial activities of public service broadcasters I have proposed here will allow the basic method for calculating this proportion, as set out in Article 174(1) of Directive 2006/112, to be applied. Under that method, the right to deduct the input VAT due or paid will arise in proportion to the amount of turnover attributable to taxable transactions in relation to the taxable person's total turnover. When applying the method to public service broadcasters financed both by subsidies from the State budget and by transactions carried out for consideration, the numerator should be the turnover generated on those transactions and the denominator should be total turnover plus the amount of subsidies. Subsequently, if the broadcaster carried out transactions for consideration which were exempt from VAT under Article 132(1)(q) of Directive 2006/112, the rules set out in Articles 173 to 175 of that directive would have to be applied to the proportion thus obtained in order to arrive at the final proportion in which the broadcaster would be entitled to deduct the input VAT paid or due.

74. Obviously, Member States may adopt other rules for calculating that proportion, provided they meet the criteria indicated in point 68 of this Opinion.

75. In the light of the foregoing, I propose that the answer to the third and fourth questions referred should be that Article 168 of Directive 2006/112 must be interpreted as meaning that a public service broadcaster whose activities are financed both by subsidies from the State budget and by revenue from taxable transactions has the right to deduct the VAT due or paid on goods and services used for the purposes of those activities to the extent that its activities are financed by revenue from taxable transactions.

Conclusions

76. In view of all of the above considerations, I propose that the Court's answer to the questions referred for a preliminary ruling by the Administrativen sad Sofia-grad (Sofia City Administrative Court, Bulgaria) should be as follows:

(1) Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the activities of a public television broadcaster consisting in the supply of television media services, in so far as they are financed by subsidies from the State budget, do not constitute a supply of services for consideration within the meaning of that provision.

(2) Article 132(1)(q) of Directive 2006/112 must be interpreted as meaning that the notion of 'commercial activities' carried out by public radio and television bodies, within the meaning of that provision, covers transactions carried out for consideration which do not constitute activities in the public interest as well as services supplied without consideration in so far as they are financed by the revenue from those transactions carried out for consideration.

(3) Article 168 of Directive 2006/112 must be interpreted as meaning that a public service broadcaster whose activities are financed both by subsidies from the State budget and by revenue from taxable transactions has the right to deduct the VAT due or paid on goods and services used for the purposes of those activities to the extent that its activities are financed by revenue from taxable transactions.

1 Original language: Polish.

2 See Berg, C.E., and Lund, A.B., 'Financing Public Service Broadcasting – A Comparative Perspective', *Journal of Media Business Studies*, No 9/2012, p. 7, and Bron, C.M., 'Le financement et le contrôle des offres des radiodiffuseurs de service public', *IRIS Plus 2010-4. Médias de service public: pas de contenu sans financement*, Observatoire européen de l'audiovisuel, Strasbourg, 2010, p. 7.

3 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, operative part).

4 OJ 2006 L 347, p. 1.

5 This provision has not been expressly transposed into Bulgarian law; however, the Varhoven Administrativen Sad (Supreme Administrative Court) considered it to have direct effect. On this point, that court was, in my view, correct, as Article 25 of Directive 2006/112 is part of the definition of a service within the meaning of that Directive and as such does not require separate transposition into national law. However, Article 25 does not apply to BNT's activity financed by the subsidy from the State budget, as discussed below (see points 33 to 37 of this Opinion).

6 Judgment of 27 March 2014, C?151/13, EU:C:2014:185.

7 Judgment of 22 June 2016, C?11/15, EU:C:2016:470.

8 Judgment of 22 June 2016, C?11/15, EU:C:2016:470.

9 Judgment of 22 June 2016, C?11/15, EU:C:2016:470.

10 Sixth Council Directive 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). Currently, with respect to the supply of services, Article 2(1)(c) of Directive 2006/112.

11 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, paragraph 21).

12 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, paragraph 22).

13 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, paragraphs 23 to 27).

14 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, paragraphs 29 to 30).

15 Judgment of 27 March 2014, C?151/13, EU:C:2014:185.

16 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, paragraphs 34 to 35).

17 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, operative part).

18 Additional considerations relating to the relationship between a public broadcaster and the State are included in my Opinion in *?eský rozhlas* (C?11/15, EU:C:2016:181, points 30 to 35).

19 See judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470, paragraph 21 and the case-law cited).

20 Judgment of 27 March 2014, C?151/13, EU:C:2014:185.

21 Although in that case those services could be exempt from VAT under Article 132(1)(q) of Directive 2006/112.

22 Since in such a case the EU legislature would use the phrase ‘Member States may treat’, as in Article 27 of Directive 2006/112, or similar wording.

23 Article 132 of Directive 2006/112 is to be found in Chapter 2 of Title IX thereof, which is entitled ‘Exemptions for certain activities in the public interest’.

24 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470).

25 In this Opinion, I focus on the core activity of public service broadcasters, which is also the subject of the questions referred, namely, broadcasting. Broadcasters may also engage in other transactions, such as the sale of intellectual property rights, equipment rental services, the organisation of cultural events, and so forth. Such transactions are generally carried out for consideration and, save in exceptional cases, are part of the commercial activities of public service broadcasters, that is to say, they are taxable. However, I shall omit those transactions from subsequent parts of my argument as they do not give rise to the same difficulties of interpretation as broadcasting does.

26 Judgment of 22 June 2016, C?11/15, EU:C:2016:470.

27 See Article 1(1)(h) of 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 (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1).

28 In this regard, see also my Opinion in *?eský rozhlas* (C?11/15, EU:C:2016:181, point 53).

29 Judgment of 22 June 2016, *?eský rozhlas* (C?11/15, EU:C:2016:470).

30 OJ 2009 C 257, p. 1.

31 See, in particular, paragraphs 48 to 49, and also paragraph 57, of the Commission

Communication.

32 See, in particular, paragraph 65 of the Commission Communication.

33 See, in particular, paragraph 47 of the Commission Communication.

34 See, in particular, paragraphs 70 to 76 of the Commission Communication.

35 Protocol (No 29) on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties.

36 See, most recently, judgment of 12 November 2020, *Sonaecom* (C?42/19, EU:C:2020:913, paragraphs 41 to 42).

37 This connection is based on the fact that, on the one hand, those programmes attract an audience which provides the rationale for the broadcasting of commercial communications and, on the other hand, their broadcasting is financed by the revenue from those commercial communications.

38 For the sake of clarification, I should add that, in principle, the Commission Communication does not permit the public financing of public service broadcasters to generate a profit for them (see paragraphs 72 to 74 of the Commission Communication). Accordingly, if the application of VAT rules is to be compatible with State aid rules, any excess of revenue over expenditure, outside the scope allowed by the Commission Communication, should be attributed to commercial activities.

39 However, I must emphasise that I do not share the Commission's view that, where a broadcaster's activity is financed in whole or in part by revenue from broadcasting commercial communications, the broadcasting of programmes is ancillary to the broadcasting of those commercial communications, and the only recipients of that broadcaster's services are advertisers. In my view, in this case the services provided to viewers or listeners (the broadcasting of programmes) are financed by the recipients of other services, namely, services consisting in the broadcasting of commercial communications. However, this does not change the classification of those services from the point of view of VAT.

40 Document XXI/1500/96.

41 Opinion in Case C?11/15, EU:C:2016:181, points 44 to 63.

42 See, most recently, judgment of 8 May 2019, *Zwi?zek Gmin Zag??bia Miedziowego* (C?566/17, EU:C:2019:390, paragraphs 26 to 27).

43 See, most recently, judgment of 8 May 2019, *Zwi?zek Gmin Zag??bia Miedziowego* (C?566/17, EU:C:2019:390, paragraphs 28 to 29).