Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

19 December 2024*

(Reference for a preliminary ruling – Common system of value added tax – Directive 2006/112/EC – Article 370 – Point 2 of Part A of Annex X – Derogation – Scope – Activities of a public radio and television body financed by a compulsory fee paid by the owners of devices capable of receiving radio and television broadcasts)

In Case C-573/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark, Denmark) made by decision of 8 July 2022, received at the Court on 26 August 2022, in the proceedings

A,

B,

Foreningen C

v

Skatteministeriet,

THE COURT (Fifth Chamber),

composed of I. Jarukaitis, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Gratsias (Rapporteur) and E. Regan Judges,

Advocate General: M. Szpunar,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 14 March 2024,

after considering the observations submitted on behalf of:

– A, by T. Gønge, T. Kári Kristjánsson and J. Nymand Hounsgaard, advokater,

– B, by C. Bachmann and P. Hansen, advokater,

* Language of the case: Danish.

– Foreningen C, by C. Holberg, advokat,

– the Danish Government, by D. Elkan and C. Maertens, acting as Agents, and by B. Søes Petersen, advokat,

– the French Government, by R. Bénard, A. Daniel and O. Duprat-Mazaré, acting as Agents,

– the European Commission, by J. Jokubauskaitė and U. Nielsen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(c) and Article 370 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive'), read in conjunction with point 2 of Part A of Annex X to that directive.

2 The request has been made in proceedings between A, B and Foreningen C, on the one hand, and the Skatteministeriet (Ministry of Taxation, Denmark), on the other, concerning an application by the former for reimbursement of value added tax (VAT) on the fee payable by owners of devices capable of receiving audiovisual broadcasts.

Legal context

European Union law

3 Article 1(1) of the VAT Directive states:

'This Directive establishes the common system of [VAT].'

4 Article 2(1)(c) of that directive provides that the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

5 Article 370 of that directive provides:

'Member States which, at 1 January 1978, taxed the transactions listed in Annex X, Part A, may continue to tax those transactions.'

6 Article 378(1) of that directive states:

'Austria may continue to tax the transactions listed in point (2) of Annex X, Part A.'

7 Point 2 of Part A of Annex X to the VAT Directive refers to 'the activities of public radio and television bodies other than those of a commercial nature'.

Danish law

8 From 1926, a fee intended to finance the institution known today as 'Danmarks Radio (DR)' was levied on the possession of radios in Denmark. From 1951, once DR began to broadcast television programmes, that fee was also levied in respect of television sets. Pursuant to lov nr. 215 om radiospredning (Law No 215 on Broadcasting) of 11 June 1959, that fee was transformed into an 'audiovisual fee', payable in the event of possession of a radio or television set. The latter law was repealed and replaced by lov nr. 421 om radio- og fjernsynsvirksomhed (Law No 421 on Radio and Television Activities) of 15 June 1973, which maintained the audiovisual fee, from then classified as a 'fee for the use of radio and television sets'.

9 Under lov nr. 589 om ændring af lov om radio- og fjernsynsvirksomhed (Law No 589 amending the Law on Radio and Television Activities) of 19 December 1985, the 'exclusive right' to broadcast radio and television programmes to the general public, held by DR, was converted into a simple 'right'. In addition, pursuant to bekendtgørelse nr. 640 (Decree No 640) of 20 December 1985, the name of the fee referred to in the preceding paragraph was changed to a 'fee on radio and television (audiovisual licence fee)'.

10 By lov nr. 335 om ændring af lov om radio-og fjernsynsvirksomhed (Law No 335 amending the Law on Radio and Television Activities) of 4 June 1986, a new public television channel called TV2, financed in part by revenue from the audiovisual licence fee was also authorised to broadcast audiovisual programmes to the general public.

11 Bekendtgørelse nr. 15 (Decree No 15) of 11 January 1995 stated that the audiovisual licence fee was payable irrespective of whether the reception apparatus concerned was used and irrespective of the way in which the broadcasts were received, for as long as that apparatus was capable of playing audiovisual programmes.

12 Lov nr. 1208 om ændring af lov om radio- og fjernsynsvirksomhed (Law No 1208 amending the Law on Radio and Television Activities) of 27 December 1996 provided that the proceeds of the audiovisual licence fee could, in accordance with the detailed rules laid down by the competent minister, be used, in addition to financing DR and TV 2, for 'any other media-related purposes'.

13 Lov nr. 1569 om ændring af lov om radio- og fjernsynsvirksomhed (Law No 1569 amending the Law on Radio and Television Activities) of 20 December 2006 replaced the audiovisual licence fee with a 'media licence fee', covering 'devices capable of receiving and playing audiovisual programmes or services broadcast to the public', including radios.

14 Lov nr. 513 om ændring af lov om radio- og fjernsynsvirksomhed (Law No 513 amending the Law on Radio and Television Activities) of 27 May 2013 abolished the media licence fee in so far as it related to radios. Lov nr. 1517 om ændring af lov om radio- og fjernsynsvirksomhed (Law No 1517 amending the Law on Radio and Television Activities) of 27 December 2014 abolished the media licence fee for commercial enterprises and maintained it only for private households. Finally, lov nr. 1548 om ændring af lov om radio- og fjernsynsvirksomhed (Law No 1548 amending the Law on Radio and Television Activities) of 18 December 2018 provided for the gradual abolition, over a period of three years from 2019 to 2021, of the media licence fee, with the result that that fee was entirely abolished on 1 January 2022.

15 Since the introduction of VAT in Denmark in 1967, Danish VAT legislation has provided that 'radio and television broadcasts' are subject to VAT. Accordingly, the fee referred to in paragraphs 8 to 14 above was subject to VAT until it was abolished.

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

16 A and B, who are natural persons, and Foreningen C, which is made up of a group of natural persons bringing a collective action, brought actions before the Østre Landsret (High Court of Eastern Denmark, Denmark), the referring court, against the Ministry of Taxation for reimbursement of the sums which they had paid by way of VAT on the media licence fee for the years 2007 to 2017. In support of their actions, they submit, in essence, that the possibility for Denmark to apply Article 370 of the VAT Directive in order to make that fee subject to VAT presupposes the existence of a supply of services for consideration, within the meaning of Article 2(1)(c) of that directive, which, in the present case, is lacking.

17 For its part, the Ministry of Taxation submits that Article 370 of the VAT Directive constitutes a special provision authorising the Kingdom of Denmark to maintain the national tax system that was in force on 1 January 1978, irrespective of the scope of the harmonised general system of VAT.

18 The referring court is of the view that, in the light of the guidance provided by the judgment of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470), the media licence fee does not constitute consideration for the supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive. That court therefore considers that the main legal question raised by the case before it is whether Article 370 of the VAT Directive must be interpreted as allowing Member States to charge VAT on a fee that does not constitute such consideration and the collection of which depends only on the mere possession of a device that receives radio or television broadcasts.

19 If that question is answered in the affirmative, the referring court has doubts as to the applicability of Article 370 of the VAT Directive to the media licence fee in the light of the amendments to the national legislation concerning that fee during the period covered by the dispute in the main proceedings. In the first place, the fee levied on the basis of possession of radio and television sets was replaced by a fee charged for the possession of any device capable of receiving audiovisual programmes and services directly. In the second place, that legislation made it possible to allocate, at the discretion of the competent minister, a small part of the proceeds of the media licence fee to the financing of, first, broadcasters which, despite not being public broadcasters, carried out a public service activity and were subject to constraints similar to those to which the public broadcasting bodies were subject and, second, the Danske Filminstitut (Danish Film Institute), which is a public institution the objective of which is to promote cinematographic art and culture in Denmark, and a film school for children and young people, managed by a non-profit foundation created by public radio and television bodies in collaboration with other stakeholders.

20 In those circumstances, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 370 [of the VAT Directive], read in conjunction with point 2 of [Part A of Annex X to that directive], to be interpreted as permitting the Member States concerned to impose VAT on a statutory media licence fee to finance the non-commercial activities of public radio and television bodies, notwithstanding the absence of a “supply of services for consideration” within the meaning of Article 2(1) of that directive?

If Question 1 is answered in the affirmative, the Court of Justice is asked to answer the following questions referred for a preliminary ruling:

(2) Is Article 370 [of the VAT Directive], read in conjunction with point 2 of [Part A of Annex X to that directive], to be interpreted as meaning that a Member State’s option to impose VAT on a statutory media licence fee as specified in Question 1 may be maintained if, after the entry into force, on 1 January 1978, of [Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1)], the Member State has altered the licensing system from charging a licence fee for possessing radio and television equipment to charging a licence fee for possessing any device which can receive audiovisual programmes and services directly, including smartphones, computers, [and so forth]?

(3) Is Article 370 [of the VAT Directive], read in conjunction with point 2 of [Part A of Annex X to that directive], to be interpreted as meaning that a Member State’s option to impose VAT on a statutory media licence fee as specified in Question 1 may be maintained if, after the entry into force, on 1 January 1978, of [the Sixth Directive 77/388], the Member State has altered the licensing system so that a [small] proportion of the licence fee resources will, at the discretion of the Minister for Culture, be used to finance (i) radio and television bodies which receive public subsidies but are not themselves public, and (ii) media and film [undertakings] which contribute to but do not themselves carry out radio and television activities?’

Procedure before the Court

21 By decision of the President of the Court of 20 January 2023, the proceedings in the present case were stayed pending delivery of the judgment of 26 October 2023, *GIS* (C-249/22, EU:C:2023:813). They were resumed following delivery of the judgment in that case.

Consideration of the questions referred

The first question

22 By its first question, the referring court asks, in essence, whether Article 2(1)(c) and Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, must be interpreted as precluding a Member State which, on 1 January 1978, imposed VAT on public broadcasting activities financed by a compulsory statutory fee paid by any owner of equipment

capable of receiving broadcasting programmes from continuing to tax those activities, irrespective of whether those activities are covered by the concept of 'supply of services for consideration' within the meaning of Article 2(1)(c) of that directive.

23 It should be noted that, under Article 2(1)(c) of the VAT Directive, which appears under Title I of that directive entitled 'Subject matter and scope', the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

24 Accordingly, where an activity is classified as a transaction effected 'for consideration' within the meaning of that provision, it falls, on that basis, within the scope of the VAT Directive. By contrast, an activity which is not classified as such does not fall within the scope of that directive (judgment of 26 October 2023, *GIS*, C-249/22, EU:C:2023:813, paragraph 34 and the case-law cited).

25 However, Article 370 of the VAT Directive, read in conjunction with Part A of Annex X to that directive, allows Member States which, on 1 January 1978, taxed the activities of public radio and television bodies other than those of a commercial nature, to derogate from Article 2(1)(c) of that directive by giving them the option of continuing to tax those activities.

26 In addition, it should be noted that that derogation is, in essence, identical to that provided for in favour of the Republic of Austria in Article 378(1) of the VAT Directive.

27 In that regard, the Court has already held, in essence, in paragraphs 36, 37, 42 and 51 of the judgment of 26 October 2023, *GIS* (C-249/22, EU:C:2023:813), that Article 378(1) of the VAT Directive allows the Republic of Austria to derogate, inter alia, from the provisions of Article 2(1)(c) of that directive, by maintaining a system of taxation of the activities concerned already in existence, provided that the arrangements for that taxation remain essentially unchanged. That reflects the gradual and still partial harmonisation of national VAT legislation. Moreover, it is in the nature of a provision such as Article 378(1) of that directive to introduce exceptions to the scope of the rules of which it forms part. The taxation permitted by that provision is not harmonised taxation which forms an integral part of the VAT system as arranged by that directive. Rather, the option provided for in that provision allows that Member State to maintain its legislation on the taxation of the services concerned, without the differences that may result between it and other Member States being contrary to EU law.

28 Relying, in particular, on those grounds, the Court held, in paragraph 52 of the judgment of 26 October 2023, *GIS* (C-249/22, EU:C:2023:813), that Article 2(1)(c) and Article 378(1) of the VAT Directive had to be interpreted as not precluding the Republic of Austria from imposing VAT on a public broadcasting activity, financed by a compulsory statutory fee and paid by any person operating a broadcast receiver in a building within the terrestrial broadcasting area of the public broadcasting body concerned, irrespective of whether the public broadcasting activity concerned is covered by the concept of a 'supply of services for consideration' within the meaning of Article 2(1)(c) of the VAT Directive.

29 In the light of the finding set out in paragraph 26 of the present judgment, a similar interpretation must be given to Article 370 of the VAT Directive.

30 As a result, the answer to the first question is that Article 2(1)(c) and Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, must be interpreted as not precluding a Member State which, on 1 January 1978, imposed VAT on public

broadcasting activities financed by a compulsory statutory fee paid by any owner of equipment capable of receiving broadcasting programmes from continuing to tax those activities, irrespective of whether those activities are covered by the concept of 'supply of services for consideration' within the meaning of Article 2(1)(c) of that directive.

The second question

31 By its second question, the referring court asks, in essence, whether Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, must be interpreted as precluding a Member State which, on 1 January 1978, imposed VAT on public broadcasting activities financed by a compulsory statutory fee paid by any person who owned a radio or television set, from continuing to tax those activities where the legislation relating to that fee was amended after that date so that that fee is levied for the possession of any device capable of receiving broadcasting programmes, including a smartphone or computer.

32 According to their wording, those provisions authorise Member States to continue to tax 'the activities of public radio and television bodies other than those of a commercial nature', if, on 1 January 1978, those States subjected those activities to VAT.

33 Therefore, according to the wording of those provisions, the Member States concerned by them are authorised only to maintain an existing system of taxation of the abovementioned activities and not to introduce new taxation of those activities, which means that the arrangements for taxing those activities, in force since 1 January 1978, must have remained essentially unchanged in order for that taxation to continue to be covered by the derogation provided for in Article 370 of the VAT Directive (see, by analogy, judgment of 26 October 2023, *GIS*, C-249/22, EU:C:2023:813, paragraphs 42 and 43).

34 An amendment to the arrangements for that taxation which merely takes account of technological innovations which have occurred since 1 January 1978, without altering the chargeable event giving rise to the obligation to pay the fee intended to finance a public broadcasting activity, does not have the effect of excluding the application of a derogating provision, such as Article 370 of the VAT Directive (see, to that effect, judgment of 26 October 2023, *GIS*, C-249/22, EU:C:2023:813, paragraph 45).

35 That is the case of an amendment to those arrangements, such as the one in question in the main proceedings, which has the effect of linking the obligation to pay a fee intended to finance public broadcasting activities to the possession not only of a radio or a television set, but also of any device capable of receiving radio programmes, including smartphones or computers. Such an amendment reflects technological developments that have taken place since the derogation in question was introduced.

36 Furthermore, as the Advocate General observed, in essence, in points 27 to 29 of his Opinion, the considerations set out in the preceding paragraph of the present judgment are not called into question either by the fact that the widening of the category of devices the possession of which entails an obligation to pay a fee intended to finance public broadcasting activities may have involved a concurrent enlargement of the persons subject to that fee, or by the fact that the reception of radio or television programmes may be classified as ancillary functions of devices such as smartphones or computers.

37 First, Article 370 of the VAT Directive does not require that the number or volume of transactions taxed by a Member State on 1 January 1978 remain unchanged. Indeed, it should be observed that, even without any alteration as to the nature of the equipment the possession of which entails an obligation to pay a fee intended to finance public broadcasting activities, the number of persons required to pay that fee was likely to increase in line with the increase in the number of radios and television sets in peoples' possession, owing to the greater availability and reduction in the purchase price of such equipment.

38 Second, in so far as the chargeable event for a fee such as the one in question in the main proceedings is not linked to the use of a public broadcasting service by the persons subject to that obligation, but only to the possession of a device capable of receiving the programmes of a broadcasting organisation, it is irrelevant that some of those devices, such as smartphones or computers, also fulfil other functions which may, in some circumstances, be regarded as their principal functions.

39 Moreover, it should be noted, in that regard, that radio and television receivers may also be used for functions other than the reception of programmes from public broadcasting bodies, such as, for example, the reception of commercial radio or television programmes or for playing discs or other digital media (see, to that effect, judgment of 22 June 2016, *Český rozhlas*, C-11/15, EU:C:2016:470, paragraph 26).

40 In the light of all of the foregoing considerations, the answer to the second question is that Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, must be interpreted as not precluding a Member State which, on 1 January 1978, imposed VAT on public broadcasting activities financed by a compulsory statutory fee paid by any person who owned a radio or television set, from continuing to tax those activities where the legislation relating to that fee was amended after that date so that that fee is levied for the possession of any device capable of receiving broadcasting programmes, including a smartphone or computer.

The third question

41 It should be noted, as a preliminary point, that, although, according to its wording, the third question concerns the effect on the applicability of Article 370 of the VAT Directive, inter alia, of the fact that a small part of a fee such as the one in question in the main proceedings is used to finance 'media and film [undertakings] which contribute to but do not themselves carry out radio and television activities', it is apparent from the information provided by the referring court, summarised in paragraph 19 of the present judgment, that that court is concerned, more specifically, with such undertakings which are public entities or have been created by public broadcasting bodies, in some circumstances together with other stakeholders.

42 Therefore, by its third question, the referring court asks, in essence, whether Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, must be interpreted as precluding a Member State which, on 1 January 1978, imposed VAT on public broadcasting activities financed by a compulsory statutory fee from continuing to tax those activities where the legislation relating to that fee was amended after that date so as to allow a small part of the revenue from that fee to be used to finance, first, broadcasters which, despite not being public bodies, carry out public broadcasting activities and, second, media or film undertakings which are public bodies or have been set up by public broadcasting bodies and which contribute to broadcasting activities, without carrying out those activities themselves.

43 In that regard, it should be recalled that, as is apparent, in essence, from paragraphs 32 and 33 of the present judgment, Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, authorises Member States only to maintain a system of taxation of non-commercial activities of public radio and television bodies which existed on the date laid down in Article 370, which means that the arrangements for taxing those activities must have remained essentially unchanged.

44 It follows that a fee, such as the one in question in the main proceedings, could be subject to VAT under Article 370 of the VAT Directive, during the period concerned by the dispute in the main proceedings, only if it was used to finance the activities of those bodies (see, by analogy, judgment of 26 October 2023, *GIS*, C-249/22, EU:C:2023:813, paragraphs 46 to 49).

45 However, it cannot be inferred from this that Article 370 of the VAT Directive precludes the taxation of a fee such as the one in question in the main proceedings merely because the revenue from that fee is not paid in full to the public radio and television bodies.

46 In the present case, it is apparent from the request for a preliminary ruling that an amendment, subsequent to 1 January 1978, to the national legislation which introduced the fee in question in the main proceedings made it possible to allocate a small part of the revenue from that fee to the financing of entities other than public radio and television bodies. In particular, that part of the revenue was allocated, first, to a radio and television organisation which, although a private entity, had a remit like the one fulfilled by public media, was subject to legal constraints similar to those of the public radio and television bodies and was financed for the most part by the revenue from that fee, second, to an entity the role of which was to provide financial support for the production of films and, third, to film schools for children and young people, managed by a foundation whose founders include, among others, public radio and television bodies.

47 The fact that a small proportion of a fee such as the one in question in the main proceedings is paid to other public bodies or to entities created by the public broadcasting bodies themselves, in some circumstances together with other stakeholders, in order to finance activities, such as film production, situated upstream of and closely linked to broadcasting activities, does not support the conclusion that that fee has ceased to be used to finance the activities of the public broadcasting bodies.

48 As the Advocate General observed, in essence, in points 37 and 38 of his Opinion, Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, does not prescribe the legal form which the public bodies concerned must take, nor does it apply solely to the broadcasting activities of those bodies, since the second of those provisions does not use the term ‘broadcasters’, but rather the broader term ‘bodies’. It follows that those provisions must be interpreted as not precluding other types of activities, such as those listed in the preceding paragraph of the present judgment, from being covered by the derogation laid down in those provisions, so long as those activities come within the remit of public radio and television bodies and are financed by a compulsory fee, such as the fee in question in the main proceedings.

49 In the light of all the foregoing, the answer to the third question is that Article 370 of the VAT Directive, read in conjunction with point 2 of Part A of Annex X to that directive, must be interpreted as not precluding a Member State which, on 1 January 1978, imposed VAT on public broadcasting activities financed by a compulsory statutory fee, from continuing to tax those activities where the legislation regarding that fee was amended after that date so as to allow a small part of the revenue from that fee to be used to finance, first, broadcasters which, despite

not being public bodies, carry out public broadcasting activities and, second, media or film undertakings which are public bodies or have been set up by public broadcasting bodies and which contribute to broadcasting activities, without carrying out those activities themselves.

Costs

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

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

1. **Article 2(1)(c) and Article 370 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with point 2 of Part A of Annex X to that directive,**

   must be interpreted as not precluding a Member State which, on 1 January 1978, imposed value added tax on public broadcasting activities financed by a compulsory statutory fee paid by any owner of equipment capable of receiving broadcasting programmes from continuing to tax those activities, irrespective of whether those activities are covered by the concept of 'supply of services for consideration' within the meaning of Article 2(1)(c) of that directive.

2. **Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive,**

   must be interpreted as not precluding a Member State which, on 1 January 1978, imposed value added tax on public broadcasting activities financed by a compulsory statutory fee paid by any person who owned a radio or television set, from continuing to tax those activities where the legislation relating to that fee was amended after that date so that that fee is levied for the possession of any device capable of receiving broadcasting programmes, including a smartphone or computer.

3. **Article 370 of Directive 2006/112, read in conjunction with point 2 of Part A of Annex X to that directive,**

   must be interpreted as not precluding a Member State which, on 1 January 1978, imposed value added tax on public broadcasting activities financed by a compulsory statutory fee, from continuing to tax those activities where the legislation on that fee was amended after that date so as to allow a small part of the revenue from that fee to be used to finance, first, broadcasters which, despite not being public bodies, carry out public broadcasting activities and, second, media or film undertakings which are public bodies or have been set up by public broadcasting bodies and which contribute to broadcasting activities, without carrying out those activities themselves.

[Signatures]