Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 12 November 2020 [1] [i]

**Case C-703/19**

**J.K.**
**v**
**Dyrektor Izby Administracji Skarbowej w Katowicach,**
**third party:**
**Rzecznik Małych i Średnich Przedsiębiorców**

(Request for a preliminary ruling
from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 98 – Option for the Member States to apply one or two reduced rates of VAT to certain supplies of goods and services – Classification of a commercial activity as a 'supply of goods' or a 'supply of services' – Points (1) and (12a) of Annex III – Concepts of 'foodstuffs' and 'restaurant and catering services' – Meals for immediate consumption on the spot at the vendor's premises or in a food court – Meals for immediate consumption to take away)

## I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2] read in conjunction with point (12a) of Annex III to that directive and Article 6 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax. [3]

2. The request was made in the course of proceedings concerning taxation at a reduced rate in respect of supplies of food using various sales processes in fast food premises which are organised in accordance with a franchise agreement.

3. Those circumstances will require the Court to interpret for the first time the definition of 'restaurant and catering services', adopted by the EU legislature in the specific context of the option accorded to Member States to apply two reduced rates of value added tax (VAT) to certain categories of goods or services.

1 Original language: French.

2 OJ 2006 L 347, p. 1, 'the VAT Directive'.

3 OJ 2011 L 77, p. 1.

4. My analysis will lead me to recall the circumstances in which that option may be exercised in accordance with the case-law of the Court and to propose that a general criterion be adopted to enable 'foodstuffs' to be distinguished from 'restaurant and catering services' for the purposes of the taxation at reduced rates of the supply of prepared dishes accompanied by support services since they are characterised by their diverse nature and degree of importance which does not allow a simple comparison to be made with the circumstances that previously justified referring the matter to the Court.

## II. Legal framework

### *A. EU law*

#### *1. The VAT Directive*

5. Under Title VIII of the VAT Directive, entitled 'Rates', Chapter 2, entitled 'Structure and level of rates', includes a first section which deals with the 'standard rate' and contains Article 96 which is worded as follows:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the provision of services.' [4]

6. The second section of Chapter 2, entitled 'Reduced rates', contains Article 98 of the VAT Directive, [5] which provides: [6]

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

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

The reduced rates shall not apply to electronically supplied services.

3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature [7] to establish the precise coverage of the category concerned.'

[4] The principle of a single standard rate was enshrined in Article 12(3) 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 Sixth Directive').

[5] In the version resulting from the amendment by Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11, Article 2(2)), applicable from 1 January 2010.

[6] The provisions of Article 98 of the VAT Directive originate from those in Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates) (OJ 1992 L 316, p. 1), in particular Article 1(1), which replaced Article 12(3) of the Sixth Directive with new provisions relating to reduced rates. Article 12(3)(a) of the Sixth Directive has been amended by Article 1(7) of Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47). Consequently, the case-law of the Court relating to Article 12(3)(a) may be transposed for the purposes of interpreting Article 98 of the VAT Directive.

[7] The Combined Nomenclature was established by Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1). It is updated annually and is published in the *Official Journal of the European Union* (L Series) in the form of a European Commission implementing regulation.

7. Article 99 of the VAT Directive states:

'1. The reduced rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%.

2. Each reduced rate shall be so fixed that the amount of VAT resulting from its application is such that the VAT deductible under Articles 167 to 171 and Articles 173 to 177 can normally be deducted in full.'

8. Annex III to the VAT Directive is entitled 'List of supplies of goods and services to which the reduced rates referred to in Article 98 may be applied'. Point (1) of that annex contains, inter alia, foodstuffs (including beverages but excluding alcoholic beverages) for human consumption. Point (12a) of that annex, which was inserted by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax,[8] mentions restaurant and catering services. The supply of (alcoholic and/or non-alcoholic) beverages may be excluded.

*2. Implementing Regulation No 282/2011*

9. In accordance with recital 10 of Implementing Regulation No 282/2011, 'it is necessary to clearly define restaurant and catering services, the distinction between the two, and the appropriate treatment of these services'.

10. Article 6 of that implementing regulation provides:

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

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

## *B. Polish law*

11. Article 5a of the ustawa o podatku od towarów i usług (Law on the tax on goods and services)[9] of 11 March 2004, in the version applicable to the facts of the dispute in the main proceedings,[10] provides:

'The goods or services that are the subject of the transactions covered by Article 5, indicated in the classifications established on the basis of provisions concerning official statistics, shall be

[8] OJ 2009 L 116, p. 18.

[9] *Dziennik Ustaw* (Official Journal of Laws of the Republic of Poland) 2004, No 54, heading 535.

[10] *Dziennik Ustaw* 2011, No 177, heading 1054, 'the Law on VAT'.

identified using those classifications if the legal provisions or implementing regulations assign statistical headings to those goods or services.'

12. Paragraph 3(1) of the rozporządzenie Rady Ministrów w sprawie Polskiej Klasyfikacji Wyrobów i Usług (Regulation of the Council of Ministers on the Polish Classification of Goods and Services) [11] of 4 September 2015 provides:

'For the purposes of:

(1) VAT taxation,

…

until 31 December 2017, the Polish Classification of Goods and Services introduced by the rozporządzeniem Rady Ministrow w sprawie Polskiej Klasyfikacji Wyrobów i Usług [Regulation of the Council of Ministers on the Polish Classification of Goods and Services [12]] (PKWiU) of 29 October 2008 is applicable.'

13. In accordance with Article 41(1) of the Law on VAT, the standard rate of VAT is 22%. Article 41(2a) of that law provides:

'The rate applicable to the goods listed in Annex 10 to this law shall be 5%.'

14. Item 28 of Annex 10 to the Law on VAT is entitled 'Prepared meals and dishes, except for products with an alcohol content in excess of 1.2%'.

15. Paragraph 3(1)(1) of the rozporządzenie Ministra Finansów w sprawie towarów i usług dla których obniża się stawkę podatku od towarów i usług oraz warunków stosowania stawek obniżonych (Regulation of the Minister for Finance on goods and services to which a reduced rate of VAT applies and on conditions for applying reduced rates) [13] of 23 December 2013 provides:

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

(1) the goods and services listed in the annex to this regulation.'

16. Point III, item 7 of the annex to that regulation is worded as follows:

'Food and beverage serving services (PKWiU ex [14] 56), [15] except for sales of:

(1) alcoholic beverages with an alcohol content in excess of 1.2%,

[11] *Dziennik Ustaw* 2015, heading 1676, 'the PKWiU'.

[12] *Dziennik Ustaw* 2008, No 207, heading 1293.

[13] *Dziennik Ustaw* 2013, heading 1719.

[14] In accordance with Article 2(30) of the Law on VAT, the term 'ex' is used to refer to a category of goods or services in the PKWiU or only part of the goods or services in the corresponding category.

[15] The expression used in the request for a preliminary ruling is 'Usługi związane z wyżywieniem (PKWiU ex 56)'. In the Commission's written observations, this is translated as 'services relating to the supply of meals'. It should be noted that the expression 'food and beverage serving services' corresponds to that used in Code 56 of the Annex to Commission Regulation (EU) No 1209/2014 of 29 October 2014 amending Regulation (EC) No 451/2008 of the European Parliament and of the Council establishing a new statistical classification of products by activity (CPA) and repealing Council Regulation (EEC) No 3696/93 (OJ 2014 L 336, p. 1).

(2) alcoholic beverages which are mixtures of beer and non-alcoholic beverages with an alcohol content in excess of 0.5%,

(3) beverages prepared using a coffee or tea infusion irrespective of their proportion … in the prepared beverage,

(4) carbonated non-alcoholic beverages,

(5) mineral waters,

(6) other unprocessed goods taxed at the rate referred to in Article 41(1) of [the Law on VAT].'

17. Group 56.1 of the PKWiU, entitled 'restaurant and other catering establishment services', includes inter alia categories 56.10.11 ('meal serving services with full restaurant service'), 56.10.13 ('meal serving services in self-service establishments') and 56.10.19 ('other meal serving services').

18. According to the referring court, the interpretation of the PKWiU refers to the rozporządzenie Rady Ministrów w sprawie Polskiej Klasyfikacji Działalności (Regulation of the Council of Ministers on the Polish Classification of Economic Activities) [16] of 24 December 2007 and, in particular, division 56 thereof and its subclasses. That division includes service activities related to the supply of meals intended for immediate consumption in restaurants, including self-service restaurants and restaurants which offer meals to take away, with or without seating. What is important in that regard is not the type of establishment serving the meals, but the fact that those meals are intended for immediate consumption. Subclass 56.10.A, entitled 'Restaurants and other permanent catering establishments', includes restaurant services provided to customers sitting at a table, or customers who choose their own dishes from a displayed menu, irrespective of whether they consume those meals on the premises, take them away or have them delivered. That subclass includes the activities of restaurants, cafés, fast food restaurants and take-aways, ice cream parlours, pizzerias, restaurants or bars operated by means of transport or operated by separate entities.

19. The referring court states that that method of regulating the scope of 'restaurant services' in the PKWiU has affected the scope of the category 'Prepared meals and dishes, except for products with an alcohol content in excess of 1.2%' (ex 10.85.1). The reference to the PKD narrows that category down to subclass 10.85.Z of the PKD, which covers the 'manufacture of prepared meals and dishes'. That subclass includes the production of prepared meals and dishes (that is to say prepared, seasoned and cooked), frozen or preserved, consisting of at least two different ingredients (except spices, etc.), which are usually packaged and labelled for resale. That subclass does not include the preparation of meals intended for immediate consumption, which are classified in relevant subclasses of division 56 of the PKD.

## III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

20. According to the written observations submitted to the Court, the appellant in the main proceedings is a franchisee of a chain of fast food establishments, namely McDonald's Polska sp. z o.o. He sells prepared meals and dishes such as sandwiches, potato pancakes, salads, chips,

[16] *Dziennik Ustaw* 2007, No 251, heading 1885, 'the PKD'.

broccoli, ice creams, milk shakes, fruit juice, etc. Those products are served on a tray on which the customer receives disposable napkins and, for certain products, cutlery or a straw. The meals and dishes are prepared on site from semi-finished products. They may be served hot or cold and can be consumed on the spot or taken away by the customer.

21. In the course of his economic activity, the appellant adopts different sales methods:

– the sale of products to customers inside the restaurant ('in-store'),

– the sale of products from external counters of the restaurant, intended for consumption outside the restaurant, to customers in their cars or on foot ('drive-in' or 'walk-through'), and

– the sale of products to customers in designated areas in shopping centres ('food court').

22. In September 2016, the Urząd kontroli skarbowej (Tax Audit Office, Poland) carried out a check on the appellant's VAT returns and the calculation and payment of VAT for the period from 1 January to 30 June 2016.

23. Following that check, the tax authority considered that the appellant's activities had to be classified as 'food and beverage serving services', which are subject to VAT at a rate of 8%, and not supplies of 'prepared meals and dishes' to which the 5% rate of VAT applied, and as had been declared by the appellant. The reason given was that the goods sold are not classified under category 10.85.1 of the PKWiU, which does not include services. According to the tax authority, the meals themselves, the fact that they are prepared in order to be consumed on the spot and the option to consume them immediately, are essential elements in order to determine that at issue is a restaurant service and not the supply of a prepared dish.

24. By decision of 21 April 2017, the tax authority adjusted the amount of VAT payable by the appellant for the period under review.

25. By judgment of 1 March 2018, the Wojewódzki Sąd Administracyjny w Gliwicach (Regional Administrative Court, Gliwice, Poland) dismissed the action brought by the appellant against the tax authority's decision on the same grounds and by taking into consideration the customer's assessment of the taxable transaction.

26. The Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the referring court, before which the appellant's challenge to that decision has been brought, expresses doubts, in the light of the requirements of EU law, as to the transposition by the Polish legislature of Article 98 of the VAT Directive, including Annex III thereto, on account of the reference not to the Combined Nomenclature but to the PKWiU, which is a classification of activities for statistical purposes defining the scope of 'restaurant services' on the basis of the activity of specific entities and not, as is the case in respect of VAT, on the basis of the subject of the tax. Therefore, the expression 'food and beverage serving services', used to designate the PKWiU code ex 56, is broader than the 'restaurant … services' contained in the VAT Directive. Consequently, according to the referring court, this affects the scope of the category of goods entitled 'Prepared dishes'. Moreover, that concept must be interpreted in accordance with the case-law of the Court.

27. Furthermore, the referring court considers that the fact that the appellant disputes the relevance of statistical classifications in order to determine which rate of VAT applies to the sale of prepared dishes leads to decisive significance being attributed to the classification of those

services within the scope of 'restaurant services' or them being excluded from that heading. According to the referring court, the different conditions in which the dishes sold are served are decisive. From the point of view of the average customer, sales for consumption on the spot in an infrastructure that is adapted for that purpose, without any specialised service and with limited customisation of the dishes ordered, should be distinguished from the sale of food products to customers who go to the appropriate area outside the sales establishment in their vehicle ('drive-in') or on foot ('walk-through'), and sales in a food court. In such cases, for the customer, the possibility of being able to use the infrastructure offered by the appellant is not an essential part of the service provided by the appellant.

28. Moreover, in the light of the Court's case-law, the referring court asks about the relevance of the criterion based on the method of preparing the dishes which distinguishes dishes intended for consumption on the spot from those which cannot be consumed directly. It notes, in that regard, that each of the systems used by the appellant to sell prepared dishes contains elements which are connected with both a supply of goods and a supply of services. However, the second classification is dependent upon the extent of the infrastructure offered to customers and whether customers choose to use it.

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

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

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

– there is no specialised waiter service;

– there is no service in the strict sense;

– the ordering process is simplified and partly automated; and

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

(2) Is the way in which the dishes are prepared, consisting in, in particular, the heating of certain semi-finished products and the composing of prepared dishes from semi-finished products, relevant to answering the first question?

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

30. The appellant, the Dyrektor Izby Administracji Skarbowej w Katowicach (Director of the Tax Administration Chamber in Katowice, Poland), the Rzecznik Małych i Średnich Przedsiębiorców (Ombudsman for small and medium-sized enterprises, Poland), the Polish Government and the Commission submitted written observations. The Court decided to give a ruling on the case without a hearing.

## IV. Analysis

### *A. Preliminary observations*

31. It follows from the wording of the questions referred for a preliminary ruling, which, in my view, should be examined together, that the referring court is asking the Court whether the various activities of selling prepared dishes for immediate consumption, such as those in the case in the main proceedings, in fast food premises, may be classified as restaurant services to which a reduced rate of VAT may be applied in accordance with Article 98(2) of the VAT Directive, read in conjunction with point (12a) of Annex III to that directive and Article 6 of Implementing Regulation No 282/2011.

32. However, it is clear from the reasoning in the order for reference that that question is justified in part by doubts regarding the transposition into Polish law of the applicable EU law. A number of written observations submitted to the Court have discussed this point.

33. Therefore, it seems appropriate to me to recall the subject matter of the dispute in which the Court has been asked to give a ruling and its context. It concerns the classification of supplies of meals as either 'restaurant services', or as supplies of 'prepared dishes', to which two different reduced rates of VAT apply, namely 8% in respect of the former, since the product can be consumed immediately, and 5% in respect of the latter, if the product does not satisfy that condition. That distinction is made by reference to a national statistical classification of economic activities, which the referring court notes as being decisive, and the difference from the Combined Nomenclature.

34. It is true that, as a preliminary point, that court questions the method chosen by the Polish legislature to make use of the option to fix one or two reduced rates of VAT afforded by Article 98 of the VAT Directive, read in conjunction with Annex III thereto. However, the proceedings brought before the Court do not concern the compatibility of the Polish legislation with EU law on VAT and in particular with points (1) and (12a) of Annex III to the VAT Directive the limits of which it is said to have exceeded.[17] In other words, the proceedings brought before the Court do not concern the choice to apply a reduced rate of VAT to goods or services which are not included in Annex III, which would have the consequence of having to apply the standard rate of VAT.

35. Nevertheless, it is clear from the request for a preliminary ruling that, on account of the diverse range of fast food restaurant transactions at issue in the main proceedings, the referring court expresses doubts with regard to the selective application of the two reduced rates fixed by the Polish legislature to tax the sale of food, in the light of the definition of 'restaurant and catering services' adopted by both the EU legislature and the Court. In that regard, it should be noted that

[17] See, by way of comparison, judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846).

this request is consistent with previous cases which gave rise to the judgments of 2 May 1996, *Faaborg-Gelting Linien*,[18] and of 10 March 2011, *Bog and Others*,[19] which concerned VAT taxation in respect of the supply of meals or food, with or without the related service.

36. However, in the present case, it is difficult to analyse the scope of those decisions. It should be noted, first, that the legislative framework within which the Court gave its rulings has evolved[20] and, secondly, the fast food restaurant transactions at issue in the main proceedings have features which, depending on the conditions in which the food is sold and the choice made by the customer, may be the features of a supply of goods or a supply of services. Therefore, to me, the case in the main proceedings highlights the unprecedented challenges faced in order to be able to distinguish between 'foodstuffs' and 'restaurant services'.

37. In those circumstances, since the classification of supplies of foodstuffs which are taxable at reduced rates, in accordance with Annex III to the VAT Directive, is an essential prerequisite for verifying the applicability of different rates of VAT to a category in that annex, it is for the Court to define the criteria which will be of use when making that assessment, which is a matter for the national court.

38. Therefore, I propose that the Court should take the view that the referring court is asking it, in essence, whether Article 98(2) of the VAT Directive and points (1) and (12a) of Annex III to that directive, read in conjunction with Article 6 of Implementing Regulation No 282/2011, must be interpreted as meaning that the various activities of supplying prepared dishes for immediate consumption in fast food premises fall within the scope of 'restaurant and catering services' or 'foodstuffs' for the purposes of taxation at a reduced rate of VAT.

39. Given the context of this request, which I have just highlighted, its examination warrants recalling the principles that apply to the reduced-rate taxation of transactions subject to VAT, in general, and to 'restaurant and catering services' in particular, before setting out the points which may guide how those principles might be interpreted so that they can be applied to the transactions at issue.

### *B. The reduced-rate taxation of supplies of goods and services*

40. Under Article 96 of the VAT Directive, each Member State is to fix and apply a standard rate of VAT which is the same for the supply of goods and for the supply of services.

41. By derogation from that principle, Article 98 of that directive provides for the possibility of applying one or two reduced rates of VAT. To that end, Annex III to the directive sets out an exhaustive list of the supplies of goods and services to which the reduced rates may be applied.[21]

18 C-231/94, EU:C:1996:184, 'the judgment in *Faaborg-Gelting Linien*'.

19 C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, 'the judgment in *Bog and Others*'.

20 Unlike in the cases which gave rise to the judgments in *Faaborg-Gelting Linien* and *Bog and Others*, the VAT Directive which entered into force on 1 January 2007 (see Article 413 of that directive) and the amendment of 1 June 2009 (see Article 3 of Directive 2009/47), which gave Member States the option of applying a reduced rate of VAT to 'restaurant and catering services', are applicable in the present case.

21 See judgment of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraph 22 and the case-law cited).

42. The purpose of that annex is to make less onerous, and thus more accessible for the final consumer, who ultimately pays the VAT, certain goods regarded as being particularly necessary.[22] The Court has considered foodstuffs to be essential commodities.[23]

43. As regards the specific content of Annex III to the VAT Directive, the Court has held that the EU legislature must be allowed a broad discretion, since it is called upon, when it adopts a fiscal measure, to make political, economic and social choices and to prioritise the diverging interests or make complex assessments.[24]

44. The Court has stated that, within the broad discretion enjoyed by the EU legislature when it adopts a tax measure, in establishing Annex III to the VAT Directive, the legislature intended that essential commodities, and goods and services serving social or cultural objectives, may be subject to a reduced rate of VAT, provided that they pose little or no risk of distortion to competition.[25]

45. Accordingly, pursuant to Annex III to the VAT Directive, Member States may apply one or more reduced rates of VAT to the following categories: '(1) foodstuffs …' and '(12a) restaurant and catering services …'.

46. The Court has noted that the application by Member States of either one or two reduced rates of VAT is not obligatory and is an exception to the principle that the standard rate applies. Consequently, according to settled case-law, the applicable relevant provisions must be interpreted strictly[26] and in accordance with the usual meaning of the terms at issue.[27]

47. Moreover, under Article 98(3) of the VAT Directive, in order to apply *reduced rates* to the categories *of goods* listed in Annex III to that directive, Member States 'may use the Combined Nomenclature to establish the precise coverage of the category concerned'.

48. In that regard, the Court has held that use of the Combined Nomenclature is just one of a number of ways to establish the precise coverage of the category concerned.[28]

49. To my knowledge, the Court has never been asked about the circumstances in which the option of applying reduced *rates* of VAT may be exercised by the Member States depending on the category in Annex H to the Sixth Directive or Annex III to the VAT Directive. More generally, with the exception of the judgment of 3 May 2001, *Commission* v *France*,[29] the

22 See judgment of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 22 and the case-law cited).

23 See judgment of 3 March 2011, *Commission* v *Netherlands* (C-41/09, EU:C:2011:108, paragraph 53).

24 See judgments of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 23 and the case-law cited), and of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraph 31 and the case-law cited). Moreover, it is interesting to note that the list in Annex III to the VAT Directive has the effect of allowing Member States to tax at a reduced rate or exempt around 65% of household consumption expenditure, according to the Commission Staff Working Document, Impact Assessment, accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of value added tax (SWD(2018) 7 final) (section 1.2), available in English only.

25 See judgment of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraphs 31 and 32 and the case-law cited).

26 See judgments of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 25 and the case-law cited), and of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraph 25).

27 See judgment of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraph 25).

28 See judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 25).

29 C-481/98, EU:C:2001:237. See paragraph 33 of that judgment.

previous judgments delivered by the Court concern the application of a single reduced rate of VAT and address the restriction of the application of that rate to certain goods [30] or certain services [31] within a single category.

50. Having regard to the circumstances of the case in the main proceedings, it seems to me appropriate to note that Article 98 of the VAT Directive contains no restrictions on the determination of reduced rates of VAT and the detailed rules for their application according to the categories of goods or services listed in Annex III to that directive. [32] Therefore, each of those categories, or even part of them, may be subject to two different rates of VAT, whether reduced or not, depending on the objectives pursued by the Member States. [33] In other words, the same reduced rate of VAT may be applied to the supply of goods or services. [34]

51. In that regard, it should be noted that the harmonisation of the applicable VAT rules by the EU legislature as a result of a significant amount of legislation, including the Sixth Directive which has been replaced and codified by the VAT Directive, has constantly given Member States the freedom to apply those rules and in particular the rules relating to the choice of rates which are fixed according to the goods or services concerned.

52. The fact remains that that option available to the Member States to apply different rates of VAT to goods or services cannot have the effect of exempting the Member States from complying with common principles. First, in accordance with the applicable EU law on VAT, taxable transactions must be distinguished according to their subject. [35]

53. Secondly, according to the settled case-law of the Court, Member States must comply with the principle of fiscal neutrality when they choose to apply a reduced rate of VAT to any of the 24 categories of goods or services set out in Annex III to the VAT Directive [36] and, where applicable, must limit its application selectively to some of the goods or services in each of those categories, [37] which, moreover, gives full meaning to the obligation to distinguish between goods and services noted in the previous point of this Opinion.

30 See, inter alia, judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 36).

31 See, inter alia, judgments of 27 February 2014, *Pro Med Logistik and Pongratz* (C-454/12 and C-455/12, EU:C:2014:111, paragraph 60), and of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 37).

32 It may also be observed that it is clear from the use, in Article 98(3) of that directive, of the expression 'when applying the reduced rates' and not, for example, the expression 'one of the reduced rates' that goods may be subject to taxation involving two different reduced rates. Moreover, in comparison to that wording, it may be argued that there is no special provision relating to supplies of services or which precludes the application of two different rates for the supply of services or which justifies different treatment. See, to the same effect, judgment of 8 May 2003, *Commission* v *France* (C-384/01, EU:C:2003:264, paragraph 27).

33 I also consider that that interpretation is supported by the purpose of the system of reduced rates of VAT chosen by the EU legislature. See, in that regard, points 43 and 44 of this Opinion. The Court's classification of foodstuffs as essential commodities may also be relied on. See, to that effect, judgment of 1 October 2020, *Staatssecretaris van Financiën (Reduced rate of VAT for aphrodisiacs)* (C-331/19, EU:C:2020:786, paragraphs 25, 26 and 35). Thus, the choice between two reduced rates of VAT of the lower rate may be justified for certain food products without any support services.
Moreover, as regards services, I consider that Article 101 of the VAT Directive should be cited to demonstrate the importance that the EU legislature attaches to services, including restaurant services, in view of the impact of reduced rates of VAT on job creation, economic growth and the proper functioning of the internal market.

34 See, in that regard, as examples of the reduced rates of VAT applied in the Member States, the Commission report entitled 'VAT rates applied in the Member States of the European Union, Situation at 1st January 2020' (Taxud.c.1(2020), Table II, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf (pp. 4 and 5).

35 See Articles 14 and 24 of the VAT Directive which define the 'supply of goods' and the 'supply of services' respectively.

36 See judgment of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 28 and the case-law cited).

37 See, inter alia, judgments of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 30 and the case-law cited), and of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraph 36 and the case-law cited).

54. That principle precludes similar goods or services which are in competition with each other being treated differently for VAT purposes. [38]

55. Since this is a principle inherent in the common system of VAT, [39] I consider that that case-law can be transposed to national legislation which has fixed *two* reduced rates of VAT for goods or services.

56. Consequently, subject to those reservations, it is for the Member States to determine precisely the supplies of goods and services included in the categories in Annex III to the VAT Directive to which the reduced rate or rates is or are to apply. [40]

57. Furthermore, it must be possible to justify the selective application of the reduced rate of VAT by concrete and specific aspects of the category in Annex III in question. [41]

58. It follows from the reminder of all of those principles, first, that the Court will examine the national law when it is asked whether the scope of one of the categories in Annex III to the VAT Directive has been complied with or when infringement of the principle of fiscal neutrality is invoked and the referring court has provided the Court with evidence as to the objectives pursued by the national legislature when choosing a reduced rate or rates of VAT.

59. Therefore, it is for the national court to verify that the choice made by the national legislature to apply a reduced rate of VAT, for example as in the present case, to the supply of food or to restaurant services concerns transactions which fall within the scope of Annex III to the VAT Directive, in points (1) and (12a) to be precise, and to treat goods or services which may fall under the same category differently for VAT purposes has been made in compliance with the principle of fiscal neutrality.

60. Secondly, if those conditions are met, the fact that, without referring to the Combined Nomenclature, [42] national provisions class goods and services which are taxed at the same reduced rate of VAT in a single category, without formally drawing a distinction between those which fall within the scope of one of the points in Annex III to the VAT Directive as goods and those which are referred to as services in that annex, [43] is not subject to review by the Court. Likewise, it is immaterial that the national legislature chose to use similar terms to those used in a point contained in Annex III to the VAT Directive in order to designate a category of national classification, whilst retaining a broader scope, [44] since the goods and services referred to therein are taxable at a reduced rate of VAT in accordance with Article 98 of the VAT Directive and the

38 See the case-law cited in the previous footnote. See, also, with regard to the various meanings of the expression 'principle of fiscal neutrality' in the field of VAT, Opinion of Advocate General Hogan in *Golfclub Schloss Igling* (C-488/18, EU:C:2019:942, points 55 and 56 and footnotes 21 and 22).

39 See, to that effect, judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 23).

40 See judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 23 and the case-law cited).

41 See, inter alia, judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 24 and the case-law cited).

42 See point 48 of this Opinion.

43 I would point out that, in the present case, according to the referring court, the Polish legislature fixed a reduced rate of 5% which is applicable, inter alia, to 'prepared dishes' and another reduced rate of 8% which is applicable in particular to 'restaurant services' and that the rate of VAT is determined by reference to a statistical classification of goods and services (PKWiU), which is linked to the classification of types of commercial activities (PKD) which, in particular in respect of reduced rates, includes category 10.85.1 of the PKWiU, 'prepared meals and dishes', and group 56.1 of the PKWiU, 'restaurant and other catering establishment services', including 'meal serving services with full restaurant service', 'meal serving services in self-service establishments' and 'other meal serving services'. See points 13 to 19 of this Opinion.

44 In the present case, I note that, according to the referring court, the reference division includes service activities related to the supply of meals intended for immediate consumption (see points 18 and 19 of this Opinion), without any condition relating to the existence of support services.

principle of fiscal neutrality is observed. The situation would have been different if the national legislature had intended to refer in its reference classification solely, for example, to services listed in point (12a) of Annex III to that directive without complying with the conditions for applying the reduced rate of VAT chosen.

61. Consequently, in respect of the case in the main proceedings, the question as to the classification of the transactions at issue is meaningful only if it must result in them being taxed at a different reduced rate of VAT, in part or in full, having regard to the principle of fiscal neutrality, which would prompt the referring court to question the choice made by the Polish legislature to tax at the rate of 5% the category of 'prepared meals and dishes', which is defined as including any activity of the manufacture of prepared dishes which are not intended for immediate consumption, by contrast to the definition of activities connected with catering.

62. Since the EU legislature has specified the criterion for classifying restaurant or catering services transactions and the case-law of the Court had previously interpreted 'foodstuffs' in a different legislative framework, it is necessary to clarify which points may be useful in order to apply those concepts in a uniform manner.

### *C. The reduced-rate taxation of 'restaurant and catering services'*

63. Since 1 June 2009, the date on which Directive 2009/47[45] entered into force, Annex III to the VAT Directive has contained point (12a), in accordance with which, in respect of 'restaurant and catering services', Member States may derogate from the principle of taxing goods and services at the standard rate.

64. According to recital 2 of Directive 2009/47, the objective pursued is to promote job creation and combat the informal economy.

65. In Article 6(1) of Implementing Regulation No 282/2011, which, in accordance with Article 65 thereof, is applicable as of 1 July 2011, the EU legislature set out, for the purposes of ensuring uniform application of the VAT system,[46] the elements that characterise restaurant and catering services and those which distinguish between the two. Article 6(2) specifies which aspects do not enable the transaction to be classified as a restaurant or catering service.

66. Consequently, as regards, in particular, the supply of food ready for immediate consumption, which is the subject matter of the dispute in the main proceedings, examination of the wording of the first two sentences of Article 6(1) of Implementing Regulation No 282/2011 and that of Article 6(2) leads, in my view, to the conclusion having to be drawn that restaurant and catering services are characterised not by the way in which the food is prepared, but by the provision of support services which accompany the supply of that food. Moreover, those support services must be sufficient and predominant in order to ensure that the food prepared can be consumed immediately.

[45] The EU legislature intervened before the judgment in *Bog and Others* was delivered, which interpreted category 1 of Annex H to the Sixth Directive (see paragraph 8 of that judgment), now Annex III to the VAT Directive, which mentioned, for the purposes of taxation at a reduced rate of VAT, foodstuffs, inter alia, ingredients intended for the preparation of those foodstuffs and products intended to be used to supplement or substitute those foodstuffs, without making a distinction as to the ways in which they are sold. The Court ruled, in essence, that, in cases of the supply of goods, food and meals prepared for immediate consumption come within that category in Annex H to the Sixth Directive and may be subject to the reduced rate of VAT.

[46] See recital 4 of that implementing regulation.

67. Otherwise, it must be inferred, in my view, that the supply of food is to be regarded as a supply of goods, or more precisely, of 'foodstuffs'. [47]

68. In accordance with the third sentence of Article 6(1) of Implementing Regulation No 282/2011, only the place of the services which accompany the supply of food allows a distinction to be made between restaurant and catering services.

69. That single reminder should be sufficient to enable the Court to answer the questions referred for a preliminary ruling as they have been submitted. However, the factual circumstances of the dispute in the main proceedings, which fuelled the referring court's doubts, the developments in the analysis by the Polish authorities with regard to the VAT rate applicable to the transactions at issue and the concordance between the written observations submitted to the Court only in respect of sales outside fast food premises demonstrate the need to clarify the meaning of those definitions. [48]

70. Consequently, in accordance with the case-law of the Court cited in point 46 of this Opinion, 'restaurant … services' within the meaning of point (12a) of Annex III to the VAT Directive, read in conjunction with Article 6 of Implementing Regulation No 282/2011, must be interpreted strictly and the scope of that provision must not be extended to services which are not intrinsically linked to that concept.

71. As regards the wording of point (12a) of Annex III, it may be clarified, in the first place, that the expression 'restaurant … services', which, in everyday language, may designate both a place and a service, and the expression 'catering services', are consistent with the wording of Article 55 of the VAT Directive, which has not changed since 1 January 2010, the date on which that provision, introduced by Directive 2008/8, entered into force. That article defines the place of taxation of those services as the place where they are physically performed, which is generally the supplier's place of establishment, without drawing a distinction between the services.

72. In the second place, I consider that that distinction between restaurant services and catering services in respect of reduced rates of VAT, which I recall was introduced by the EU legislature in Annex III to the VAT Directive by Directive 2009/47 and defined in Implementing Regulation No 282/2011, must be likened to the only earlier definition of those concepts found in the case-law of the Court.

73. In that regard, a chronological comparison of the drafting choices made by the EU legislature can be made only with the grounds of the judgment in *Faaborg-Gelting Linien*, delivered on 2 May 1996. The judgment in *Bog and Others*, which clarified the scope, was delivered on 10 March 2011, before the adoption of Implementing Regulation No 282/2011 on 15 March 2011.

74. In paragraph 14 of the judgment in *Faaborg-Gelting Linien*, the Court held that 'restaurant transactions are characterised by a cluster of features and acts, of which the provision of food is only one *component and in which services* largely *predominate*. They must therefore be regarded

[47] See, with regard to the reasons for that analysis, points 80 and 86 of this Opinion.

[48] See also, to that effect, Report from the Commission to the Council on the place of taxation of the supply of goods and the supply of services, including restaurant services, for passengers on board ships, aircraft, trains or buses drawn up in accordance with Article 37(3) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (COM(2012) 605 final) (pp. 7 and 10), which refers to the need for clarification in the light of the Court's case-law.

as supplies of services within the meaning of Article 6(1) of the Sixth Directive. The situation is different, however, where the transaction relates to *"take-away" food and is not coupled with services* designed to enhance consumption on the spot in an appropriate setting'.[49]

75. I observe, first of all, that, in the judgment in *Faaborg-Gelting Linien*, only the term 'restaurant' is used. The subject matter of the dispute is defined as the VAT taxation of 'restaurant transactions' carried out on board ferries. However, the circumstances which characterise them[50] are those which correspond in general to those of services offered in a restaurant.

76. Next, the fact that those transactions were carried out on a vessel might make it possible to understand what justifies the distinction between services provided by the supplier in its establishments and outside those establishments in a place supplying restaurant services.[51]

77. Finally, examining the differences is more informative. In Article 6 of Implementing Regulation No 282/2011, the EU legislature excluded criteria relating to the preparation of food ('prepared or unprepared') or the transport of food ('whether or not including transport') and did not use the criterion of 'consumption on the spot'.[52]

78. The EU legislature therefore put an end to the doubts as to the scope of the judgment in *Faaborg-Gelting Linien*, in particular with regard to the predominance of elements comprising the preparation and supply of food, which, unlike the criterion of the qualitative importance of the elements of supply of restaurant services, was likely to lead to insoluble problems of differentiation in view of the diversity and complexity of food and the ways of serving it.[53]

79. In that regard, convergent decisions of the EU legislature, in Implementing Regulation No 282/2011, and of the Court, in the judgment in *Bog and Others*, with a view to identifying precise criteria which distinguish the supply of goods from the supply of services in the case of the sale of prepared dishes for immediate consumption may be noted.

80. In those circumstances, and because of the broad scope of the judgment in *Bog and Others* resulting from the diverse factual circumstances of the cases which gave rise to that judgment, although Directive 2009/47 was not applicable *rationae temporis*,[54] I take the view that Article 6 of Implementing Regulation No 282/2011 must be read in the light of that judgment.

81. In the judgment in *Bog and Others*, the Court ruled with regard to four different situations concerning the sale of dishes ready for consumption. At issue was the sale of, inter alia, sausages and chips in vehicles parked at markets,[55] the sale of popcorn and tortilla chips (nachos) in cinema foyers,[56] the sale of grilled meats and chips at snack stalls[57] and dishes prepared by a caterer.[58]

49 Emphasis added.

50 See judgment in *Faaborg-Gelting Linien* (paragraph 13).

51 See judgment in *Faaborg-Gelting Linien* (paragraph 15).

52 See judgment in *Faaborg-Gelting Linien* (paragraph 14).

53 See judgment in *Bog and Others* (paragraphs 19, 21, 36 and 43).

54 See judgment in *Bog and Others* (paragraph 8).

55 Case of *Bog* (C-497/09), see judgment in *Bog and Others* (paragraph 13).

56 Case of *CinemaxX* (formerly Flebbe Filmtheater) (C-499/09), see judgment in *Bog and Others* (paragraph 26).

57 Case of *Lohmeyer* (C-501/09), see judgment in *Bog and Others* (paragraph 32).

58 Case of *Fleischerei Nier* (C-502/09), see judgment in *Bog and Others* (paragraph 38).

82. Although the criterion of the existence of 'services designed to enhance consumption on the spot in an appropriate setting' could be inferred from paragraph 14 of the judgment in *Faaborg-Gelting Linien*, in paragraphs 70 and 71 of the judgment in *Bog and Others*, the Court held that the supply of food from stalls, vehicles or cinemas, *accompanied by rudimentary facilities* which require *only negligible human intervention* had to be regarded as *supplies of goods*. The Court interpreted that concept as also covering food and meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means. [59]

83. By contrast, the services provided by a caterer, unless they are the delivery of standard meals, *are supplies of services* since the preparation of dishes, the composition of menus and the possible supply of crockery, cutlery and furniture are the predominant elements of the service. [60]

84. However, in accordance with Article 6(2) of Implementing Regulation No 282/2011, 'the supply of … food … without *any* other support services … shall not be considered restaurant or catering services', [61] whereas such services are defined in paragraph 1 of that article as consisting of 'the supply of … food … accompanied by *sufficient* support services allowing for the immediate consumption thereof … [which] is only one component of the whole in which *services shall predominate*'. [62]

85. In those circumstances, what lessons can be learned from the clarification provided in the judgments in *Faaborg-Gelting Linien* and *Bog and Others* with regard to the different levels of support services noted by the Court where the taxable transactions occur in circumstances other than those which have previously been examined by it? It should be noted that, in the present case, the questions referred for a preliminary ruling concern the classification of fast food restaurant transactions which have specific features since, depending on the choice made by the customer, they may have the characteristics of a restaurant or catering service or even a take-away service and, in any event, the place of sale is not organised in a rudimentary manner, but is a permanent space which is specifically dedicated to the immediate consumption of the products sold.

86. In my view, first, it is clear from the combination of the judgments in *Faaborg-Gelting Linien* and *Bog and Others*, in the light of which I propose that the Court should read Article 6 of Implementing Regulation No 282/2011, [63] that the sale of dishes to take away must be classified as the supply of goods. That interpretation can be reconciled with the work of the VAT Committee. [64]

[59] See judgment in *Bog and Others* (paragraph 88).

[60] See judgment in *Bog and Others* (paragraphs 77, 79 and 80).

[61] Emphasis added.

[62] Emphasis added.

[63] See point 80 of this Opinion.

[64] See Guidelines resulting from the 86th meeting of the VAT Committee of 18 and 19 March 2009 (taxud.d.1(2009)357988), available at the following address: https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines-vat-committee-meetings_en.pdf (pp. 117 and 118). Those guidelines state that, first, the following are to be considered neither as catering, nor as restaurant services:
– the mere supply of prepared or unprepared foods (for example take-away food from restaurants, supermarkets and the like);
– supplies consisting of the mere preparation and transport of food;
– in general, supplies consisting of the preparation and delivery of food and/or beverages without any other support service.
Secondly, according to that committee, in those cases, the supply of food and/or beverages without accompanying services is a supply of goods, the place of which is to be determined on the basis of Articles 31 to 37 of the VAT Directive. Member States may apply a reduced rate to the supply of food (including beverages, but excluding alcoholic beverages) in accordance with category 1 of Annex III to the VAT Directive.

87. Secondly, the same applies to the places in which the ability to eat on the premises cannot be a predominant element of service, from the point of view of the consumer, on account of the minimal services offered by the supplier (packaging, provision of cutlery, limited space) which are provided by a limited number of persons (usually the vendor(s)).

88. Thirdly, it must also be inferred from this that the classification of restaurant transactions calls for precise examination and the mere quantitative finding that there are facilities which encourage consumption on the spot is insufficient.

89. However, those various factors do not enable a precise answer to be given to the referring court's questions as to the levels of services that are required in order to exclude the various sales at issue ('in-store', 'drive-in', 'walk-through', 'food court') from being classified as a supply of goods. [65]

90. To me, that finding justifies ensuring that the Court's answer can be easily adapted to other types of sales of prepared dishes in various fast food premises, such as those in shops, museums, sports venues, petrol stations, markets, in the vicinity of vending machines providing meals, and those which are likely to grow, as has been seen during the current health crisis. I am thinking, in that regard, of cases in which restaurateurs have sold meals to customers, who could not stay on the premises to eat them, in the form of prepared dishes in packaging and on plates which could be kept for a number of days or reheated immediately.

91. In my view, it is clear from the definition of restaurant and catering services laid down in Article 6 of Implementing Regulation No 282/2011, read in the light of the Court's case-law, that the use of staff who are responsible for providing services which complement the immediate consumption of food supplied from facilities created for that purpose is a decisive criterion in order to clarify what is covered by the expression 'sufficient support services'. Specifically, I am of the opinion that, in the majority of cases, the fact that the food is supplied from premises which are under the control of the taxable person, in which human and material resources are organised and put in place in order to ensure that consumers are comfortable (for example, by providing tables and chairs) and safe (in particular, by ensuring facilities are clean) makes it possible to distinguish between the supply of services and the supply of goods.

92. However, such a criterion must be combined with *the consumer's choice* to use the services which support the supply of food which will be presumed *depending on how the meal which can be consumed immediately is sold*, namely inside or outside the supplier's premises. In the latter case, the mere provision of the physical and human infrastructure providing services is, in my view, insufficient for the transaction to be classified as a supply of services. In other words, the view must be taken that no other support services accompany the supply of food.

93. I would point out that a distinction of that kind cannot have any impact on the choice of the reduced rate of VAT applicable by the Member State. Therefore, in that situation, if two reduced rates of VAT are applicable, there is nothing in my view, in the light of the principles recalled in points 50 and 59 of this Opinion, to prevent the same rate of VAT being applied where the criteria for classifying the transaction under Annex III to the VAT Directive are met.

[65] See point 21 of this Opinion.

94. In other words, it seems to me to be economically justified for the sale of prepared dishes which are not consumed on the spot to be taxed differently, as a supply of goods, depending on whether they are sold in a grocery shop or, on the contrary, the sale consists of providing the customer with those dishes which are made to order, whether or not they are for immediate consumption. In my view, they are not objectively similar as they do not meet the same needs from the point of view of consumers and call for different degrees of human intervention. In any event, that assessment of the similarity of the goods or services concerned falls to the national court. [66]

95. Consequently, the Court could answer the referring court's questions as follows:

– Article 98(2) of the VAT Directive, read in conjunction with point (12a) of Annex III to that directive and Article 6 of Implementing Regulation No 282/2011, must be interpreted as meaning that 'restaurant and catering services' cover the supply of food from premises which are under the control of the taxable person in which human and material resources are organised and put in place in order to guarantee that consumers have a sufficient level of services to ensure their comfort and safety so that that food can be consumed immediately on the spot.

– Article 98(2) of the VAT Directive, read in conjunction with point (1) of Annex III to that directive, must be interpreted as meaning that 'foodstuffs' covers the supply of food, for immediate consumption, outside the premises made available by the taxable person which have sufficient support services allowing for the immediate consumption of that food on the spot.

96. That response could be usefully supplemented, in view of the diverse range of circumstances in the case in the main proceedings, by clarification as to the prior classification of sales transactions, to enable the national court to decide whether, from the point of view of the average consumer, a rate of 8% may be applied to the sale of prepared dishes, having regard solely to the criterion that they are consumed immediately, whereas a rate of 5% is applicable to the supply of prepared meals.

### *D. The classification of the sales transactions at issue*

97. In the course of his economic activity, the appellant in the main proceedings adopts different sales methods, as I recalled in point 21 of this Opinion.

98. I share the view expressed by the Commission in its written observations, in accordance with which, the fact that the services which support the sale of dishes and meals differ according to the sales systems adopted by the taxable person, those sales systems must be examined separately.

[66] See, inter alia, judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544, paragraph 48 and the case-law cited).

*1. Sales in fast food establishments*

99. In respect of the sales made by the appellant in fast food establishments ('in-store'), the referring court has noted the characteristics of the goods sold [67] and those of the services provided, as identified by the tax authority. The support services are the following:

'– customers may use a dining room with chairs, tables and an adjacent bathroom (toilets);

– customer service consists of a series of operations, from the preparation of the meal to its distribution, carried out by designated employees who are often the only ones able to perform those tasks in order to preserve the original and characteristic taste of the product;

– customers enjoy free internet access;

– the appellant gives customers access to newspapers and periodicals;

– the premises are air conditioned in the summer and heated in the winter;

– to make the customer's stay more enjoyable, music is piped across the site;

– in addition to the activities associated with the sale of meals, the appellant provides a maintenance service consisting of cleaning, wiping the tables and chairs, disposing of rubbish, washing the floors and occasionally distributing small gifts;

– the premises are surrounded by greenery, there are play areas for children and customers can leave their vehicles in the customer car park.'

100. Those characteristics lead me to consider, to ensure consistency with the case-law of the Court [68] and in the same vein as the Commission, that the supply by the taxable person may be classified as a supply of restaurant services, in accordance with Article 98(2) of the VAT Directive, read in conjunction with point (12a) of Annex III to that directive and Article 6 of Implementing Regulation No 282/2011. Such a transaction is not limited to the supply of prepared meals, but is accompanied by services which predominate in the eyes of the consumer, even though the supply when the meals are ordered and served is simplified, or even standardised, in order to satisfy the customer's need for speed.

101. If the customer chooses to take the prepared dish away and not consume it on the spot, that transaction should be classed as the supply of goods as the infrastructure offered by the taxable person is not a decisive factor for the customer in that situation. [69]

102. In such a case, as the Commission has stated, I consider that the taxable person must retain the evidence justifying the selective application of the VAT rate. [70]

67 See point 20 of this Opinion.

68 See points 74 and 82 of this Opinion.

69 See, to that effect, judgment in *Bog and Others* (paragraph 64).

70 See, in that regard, the general principles recalled in paragraph 31 of the judgment of 21 November 2018, *Fontana* (C-648/16, EU:C:2018:932).

*2. Sales outside fast food establishments*

103. The sale of products from external counters of the restaurant to consumers in their cars or on foot ('drive-in' and 'walk-through') are characterised by the customer choosing not to go *into* the infrastructure provided by the appellant in the main proceedings. It therefore seems logical to take the view that, from the point of view of the average consumer, as a general rule, all of the support services provided inside the establishment, which he does not enter when purchasing the prepared dish, which is accounted for when the prepared dish is supplied (no plate, supplied in a bag for transport), are not predominant.

104. Consequently, to me, the conditions for applying Article 6(2) of Implementing Regulation No 282/2011 appear to be met.

105. For the substantive reasons set out in points 91 and 92 of this Opinion, the mere possibility of nevertheless being able to use the infrastructure provided by the person responsible for the fast food premises is not, in my view, such as to contradict that analysis. In the present case, I consider that this is supported by comparing it with the circumstances examined by the Court in the judgment in *Bog and Others*.[71]

106. The common trait with sales from lorries, in cinemas and from snack stalls, for which the services are very limited because of the way in which premises intended for immediate consumption are organised, is the consumer's choice to have a fast and limited service from premises which are designed to meet those expectations.

107. Consequently, I infer from this, as has the Commission, that the sales made by the taxable person in the context of the 'drive-in' and 'walk-through' systems must be regarded as supplies of foodstuffs.

*3. Sales within shopping centres in food courts*

108. In respect of sales in food courts in shopping centres ('food court'), the referring court explains that this is a system for selling dishes to be consumed on the spot in special areas which are designated for that purpose and situated within the shopping centre. Food courts contain a number of stands selling food products for different companies. Each brand has part of the sales and checkout area, part of the kitchen and sometimes a storage area. A common area is provided for customers to eat the dishes from all of the providers selling their food products in the food court. That area has tables and chairs which are not separated or assigned to a particular brand. The customer goes to one of the stands and purchases a prepared meal in disposable packaging, which he may take away or eat in the dining area which, despite having tables and chairs, is not a restaurant and does not have the infrastructure of a restaurant (a separate kitchen, crockery, cutlery, tablecloths, dishwashers, professional servers, chefs, etc.) or of a cloakroom. The toilets belong to the shopping centre. Moreover, the space may also be used as a waiting or meeting area. Tables cannot be reserved.

[71] See point 81 of this Opinion.

109. Where the referring court considers that the option available to customers to use the infrastructure offered does not appear, from the point of view of the average consumer, to constitute a significant element of the service, in contrast to sales in a restaurant, it must be inferred from this that that transaction must be classified as a supply of foodstuffs, like the sales outside the fast food establishment.

110. However, I share the Commission's view that certain characteristics of the sales system in food courts described by the referring court may warrant different classifications.

111. I take into account the fact that the sale of prepared dishes takes place in a space which is dedicated to consumption on the spot, albeit not under the exclusive responsibility of the appellant in the main proceedings, but in which his brand is visible[72] and that that space appears to offer services which are equivalent to those that the average consumer may find within the same brand of fast food establishment. In such a case, it is conceivable that the provision of the food court together with the appropriate service results in the transaction having to be classified as a supply of services, even if the fast food premises are shared with other brands. In that regard, it should be noted that, in accordance with the wording of Article 6(1) of Implementing Regulation No 282/2011, the concept of 'catering services' generally covers the supply of all such services off the premises of the supplier.

112. To me, the situation could be different if sales counters were installed in the shopping centres and their organisation was identical to that of the 'walk-through' system and if the customer was able to consume the product in an area for which the shopping centres were responsible, in which only tables and chairs are provided for customers, irrespective of the purpose of the purchase (consumption on the spot or a waiting area).

113. Consequently, I take the view that the sale of prepared dishes in a permanent infrastructure which is dedicated to the consumption of meals on the spot, whether or not shared with other suppliers of prepared dishes, which the taxable person makes available to customers, constitutes a restaurant service, even though the service provided by staff is limited to managing the use of the restaurant area and facilities by customers.

114. It follows from all the foregoing that the answer to the referring court could be that:

– the sale of dishes, prepared in accordance with procedures such as those at issue in the present case, in fast food premises in which the taxable person provides the customer with an infrastructure allowing meals to be consumed on the spot, which he has organised or shares with other suppliers of prepared dishes, constitutes a restaurant service, and

– the sale of dishes, prepared in accordance with procedures such as those at issue in the present case, in fast food premises, where the customer decides to take the food away and not consume it on the spot in the infrastructure provided by the taxable person for that purpose, does not constitute a restaurant service, rather it is a supply of foodstuffs which may be taxed at a reduced rate of VAT. That rate may be identical to the rate which applies to restaurant services, provided that it does not undermine the principle of fiscal neutrality.

[72] Specifically, that situation can be distinguished from that in other restaurant premises which are set up in markets and contain only tables and chairs with no areas reserved for a particular vendor.

## V. Conclusion

115. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) as follows:

1. Article 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with point (12a) of Annex III to that directive and Article 6 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, must be interpreted as meaning that 'restaurant and catering services' cover the supply of food from premises which are under the control of the taxable person in which human and material resources are organised and put in place in order to guarantee that consumers have a sufficient level of services to ensure their comfort and safety so that that food can be consumed immediately on the spot.

   Consequently, the sale of dishes, prepared in accordance with procedures such as those at issue in the present case, in fast food premises in which the taxable person provides the customer with an infrastructure allowing meals to be consumed on the spot, which he has organised or shares with other suppliers of prepared dishes, constitutes a restaurant service.

2. Article 98(2) of Directive 2006/112, read in conjunction with point (1) of Annex III to that directive, must be interpreted as meaning that 'foodstuffs' covers the supply of food, for immediate consumption, outside the premises made available by the taxable person which have sufficient support services allowing for the immediate consumption of that food on the spot.

   Consequently, the sale of dishes, prepared in accordance with procedures such as those at issue in the present case, in fast food premises, where the customer decides to take the food away and not consume it on the spot in the infrastructure provided by the taxable person for that purpose, does not constitute a restaurant service, rather it is a supply of foodstuffs which may be taxed at a reduced rate of value added tax. That rate may be identical to the rate which applies to restaurant services, provided that it does not undermine the principle of fiscal neutrality.

[i] — Points 70 and 71 have been amended since the Opinion was first put online.