OPINION OF ADVOCATE GENERAL
KOKOTT
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Case C-390/15

Rzecznik Praw Obywatelskich (RPO)

(Request for a preliminary ruling from the Trybunał Konstytucyjny (Constitutional Court, Poland))

(Tax law — VAT — Reduced tax rate for the supply of books, newspapers and periodicals — Validity of point 6 of Annex III to Directive 2006/112/EC, as amended by Directive 2009/47/EC — Article 113 TFEU — Involvement of the European Parliament — Principle of equal treatment — Difference in treatment of publications on paper and other physical supports in comparison with electronically supplied publications)

I – Introduction

1. The VAT law in force in the EU permits Member States to grant a tax advantage for the sale of books and also of newspapers and periodicals. However, this applies, without restriction, only to printed editions. The Member States may apply a reduced tax rate for sales of these, an advantage that is largely denied to digital editions.

2. By its request for a preliminary ruling, the Trybunał Konstytucyjny (Polish Constitutional Court) questions the validity of the reduced rate of VAT for books and other publications, as provided for under EU law. The focus of the examination by the Court of Justice will be the issue of the obligations that the principle of equal treatment imposes on the EU legislature in the context of VAT legislation and the issue of the extent to which those requirements were also met in the case of the reduced rates of tax for books, newspapers and periodicals.

II – Legal framework

3. Article 93 EC (2) (now Article 113 TFEU) laid down the following legislative powers of the European Community:

‘The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.’

4. On that basis, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (3) (‘the VAT Directive’) was adopted.

5. Under Article 2(1)(a) of the VAT Directive, ‘the supply of goods for consideration within the territory of a Member State by a taxable person acting as such’ is subject to VAT. The same applies under Article 2(1)(c) to ‘the supply of services’.

6. In relation to the tax rate, Article 96 of the VAT Directive provides that the Member States must set a ‘standard rate’, which must not be lower than a certain minimum level that is stipulated in Article 97. Article 98 of the VAT Directive, as amended by Directive 2008/8/EC, (4) further provides as follows:

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

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

The reduced rates shall not apply to electronically supplied services.

3. ...’

7. Annex III to the VAT Directive, to which the first subparagraph of Article 98(2) refers, contains the ‘list of the supplies of goods and services to which the reduced rates referred to in Article 98 may be applied’. Point 6 of Annex III to the VAT Directive, as amended by Directive 2009/47/EC, (5) which forms the subject matter of the dispute in the main proceedings, reads as follows:

‘(6) supply, including on loan by libraries, of books on all physical means of support (including brochures, leaflets and similar printed matter, children’s picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising;’

8. Before its amendment by Directive 2009/47, that provision was worded as follows:

‘(6) supply, including on loan by libraries, of books (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising;’

9. In the Commission proposal on which the amending Directive 2009/47 is based, the following wording was also envisaged for the provision (6):

‘6. Supply, including on loan by libraries, of books (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts, as well as audio books, CD, CD-ROMs or any similar physical support that predominantly reproduce the same information content as printed books), newspapers and periodicals, other than material wholly or predominantly devoted to advertising;’

10. The Republic of Poland exercised the powers granted under Article 98 of the VAT Directive, in conjunction with point 6 of Annex III thereto, by means of Article 41(2) and Article 41(2a) of the Ustawa o podatku od towarów i usług (Law concerning tax on goods and services) in conjunction with items 72 to 75 of Annex 3 and items 32 to 35 of Annex 10 to that Law. Under those provisions, reduced tax rates currently amounting to 8% or 5% apply to books, newspapers and periodicals that are printed or on other physical means of support (in particular, CDs or tapes). Books, newspapers and periodicals published in electronic format are subject to the standard rate of 23%.

III – The dispute in the main proceedings and the proceedings before the Court of Justice

11. In the view of the Rzecznik Praw Obywatelskich (Commissioner for Civic Rights), the difference in the taxation of identical publications which is to be assessed under Polish law infringes the principle of equal treatment in tax matters as arising from the Polish constitution. The Commissioner accordingly applied to the Trybunał Konstytucyjny (Constitutional Court) for an

examination as to the constitutionality of the Polish provisions relating to the reduced tax rate for publications.

12. The Constitutional Court regards the Republic of Poland as being compelled, on the basis of the provisions of the VAT Directive, to apply the standard rate to electronically supplied books and other electronic publications. However, it questions whether the corresponding provisions of the VAT Directive are valid. First, during the legislative procedure for the adoption of Directive 2009/47, on which the current version of point 6 of Annex III to the VAT Directive is based, the text of the Directive was substantially altered after the European Parliament had been consulted. Secondly, the Constitutional Court takes the view that the exclusion of the application of a reduced tax rate to electronic publications that are downloaded as a file via the internet or supplied by the so-called 'streaming' method is inconsistent with the principle of fiscal neutrality, which, in matters relating to value added tax, reflects the principle of equal treatment.

13. On 20 July 2015 the Constitutional Court accordingly submitted the following questions under Article 267 TFEU:

1. Is point 6 of Annex III to the VAT Directive invalid on the ground that, during the legislative procedure, the essential formal requirement of consultation with the European Parliament was not complied with?

2. Is Article 98(2) of the VAT Directive, in conjunction with point 6 of Annex III to that directive, invalid on the ground that it infringes the principle of fiscal neutrality to the extent to which it excludes the application of reduced tax rates to books published in digital format and other electronic publications?

14. In the proceedings before the Court of Justice, the Polish Commissioner for Civic Rights, the Prokurator Generalny (Polish General Public Prosecutor), the Hellenic Republic, the Republic of Poland, the Council of the European Union and the European Commission submitted written observations on these questions. The Polish Commissioner for Civic Rights, the Republic of Poland, the Council and the Commission took part in the hearing held on 14 June 2016.

IV – Legal assessment

15. By its questions, the Polish Constitutional Court essentially seeks to ascertain whether the current version of point 6 of Annex III to the VAT Directive, as resulting from Article 1.13 of Directive 2009/47, in conjunction with point 1 of the annex to that directive, is valid in two regards, namely in law and in substance.

A – *First question referred for a preliminary ruling: formal validity*

16. The first question referred for a preliminary ruling seeks clarification as to whether the legislative procedure for the adoption of Directive 2009/47, which gave point 6 of Annex III to the VAT Directive its current wording, was conducted correctly, inasmuch as the Parliament might not have been sufficiently involved with regard to that change.

17. The amending Directive 2009/47 was adopted on the basis of Article 93 EC. Under that provision, the Council, after consulting the European Parliament, is to adopt provisions for the harmonisation of legislation concerning, inter alia, turnover taxes.

18. According to the settled case-law of the Court of Justice, due consultation of the European Parliament constitutes an essential formal requirement, breach of which renders the legal act concerned void. (7)

19. In the present case, the Parliament was consulted on the Commission's original proposal for a directive and it submitted written observations in relation to that proposal. (8) The original proposal provided for an amendment to point 6 of Annex III to the VAT Directive by adding additional examples to the catalogue of the types of 'books' to which a reduced tax rate may be applied, namely 'audio

books, CD, CD-ROMs or any similar physical support that predominantly reproduce the same information content as printed books'. (9)

20. However, during the subsequent legislative process the Council departed from that proposal. Directive 2009/47, as finally adopted, amended point 6 of Annex III to the VAT Directive which was then in force merely by adding the expression 'on all physical means of support' to the introductory passage 'supply of books'. (10) However, the examples contained in the original proposed directive were omitted.

21. The Parliament was not consulted again in relation to that wording of point 6 of Annex III to the VAT Directive adopted by the Council. However, according to the settled case-law of the Court of Justice, a further consultation of the Parliament is necessary if the text finally adopted, 'taken as a whole', differs in essence from the text on which the Parliament has already been consulted, except when the amendments substantially correspond to the wishes of the Parliament itself. (11)

22. As there is no indication of a corresponding wish on the part of the Parliament in the present case, the sole question therefore arising is whether the Council, after consulting the Parliament, substantially amended the text of the adopted Directive 2009/47, 'taken as a whole', as compared with the Commission's proposal.

23. First of all, the referring Constitutional Court is correct when it detects a substantive amendment in the reformulation undertaken by the Council of the new version of point 6 of Annex III to the VAT Directive.

24. However, it is not clear that, in contrast to the Commission's proposal, audio books are no longer covered by the wording of the new version, as the Constitutional Court believes, since audio books could also be regarded as books on a physical means of support. (12)

25. However, the fact that the version finally adopted of point 6 of Annex III to the VAT Directive no longer includes the additional condition contained in the proposed directive, namely that the physical support '[must] predominantly reproduce the same information content as printed books', clearly involves a substantive amendment. In addition, under both the English- and French-language versions of the proposed directive, the intention initially was that the reduced tax rate could only be extended to any *similar* physical means of support such as audio books, CDs and CD-ROMs, (13) whereas point 6 of Annex III to the VAT Directive now refers to *all* physical means of support. Both of these amendments extended the scope of application of the reduced tax rate to a certain degree in comparison with the Commission's proposal. (14)

26. However, this does not entail a modification to the proposed directive of such an extensive nature as to require the Parliament to be consulted again. In accordance with the case-law, amendments are only to be regarded as substantive when they go to the heart of the rules in question. (15)

27. The central objective of the proposed directive was permanently to provide the Member States with the possibility of applying reduced VAT rates to certain locally supplied services. (16) The extension of the scope of application of the reduced rate to books, by contrast, plays only a minor role in the proposal and is described as mere 'technical drafting adaptations'. (17)

28. Even if it is accepted that the criterion of materiality has to be observed in respect of each individual provision of a legislative proposal, the deletion of the restriction concerning the information content of a physical support and the shift from 'similar' to 'all' physical means of support does not go to the heart of the provision for amending the reduced tax rate for books. This is because that provision is primarily characterised by the extension of the scope of application of the reduced tax rate for books to physical supports other than paper. Within the context of that fundamental extension, the extensions to the scope of application referred to above constitute only secondary aspects.

29. Furthermore, in the course of the consultation that took place, the Parliament, in any event, had the opportunity to comment on these aspects, since the restrictions on the scope of application that were later abandoned were already part of the Commission's original proposal. (18)

30. Since the Parliament was therefore properly involved in the course of the legislative process that led to the adoption of Directive 2009/47, the validity of the current version of point 6 of Annex III to the VAT Directive is not affected in this respect.

B – *Second question referred for a preliminary ruling: substantive validity*

31. By its second question referred for a preliminary ruling, the Polish Constitutional Court asks whether point 6 of Annex III to the VAT Directive, in conjunction with Article 98(2) thereof, is invalid in so far as it excludes the application of a reduced tax rate to books transmitted in digital format and other electronic publications.

32. Although the referring court, in the wording of the question referred, refers to an infringement of the principle of fiscal neutrality, it is clear from the decision to refer the matter that it is seeking an examination from the standpoint of the principle of equal treatment. (19)

33. Such an examination alone, moreover, is possible, because the invalidity of point 6 of Annex III to the VAT Directive can only arise from a breach of primary law. However, the principle of fiscal neutrality is, *in itself*, solely an aid to the interpretation of the VAT Directive that does not have the status of primary law. (20) This also applies in so far as the principle of fiscal neutrality, in its variant meaning of neutrality in competition, (21) is an *expression* of the principle of equal treatment. (22) Nevertheless, the examination of the validity of a provision of the VAT Directive can only be based on the principle of equal treatment itself; it alone is endowed with the character of primary law and, in accordance with the case-law, it also imposes, in detail, other requirements than does the principle of fiscal neutrality.

34. It can be seen from the question referred, in light of the reasons for the order for reference, that it involves several differences in treatment that have to be examined for their compatibility with the principle of equal treatment. The referring court complains, principally, that *digital* books are treated differently depending on whether they are made available to the purchaser by means of a physical medium — such as a CD-ROM — or by electronic means — such as by downloading from the internet (23) (see below under 1). In addition, the question referred also calls into question the different treatment of publications other than books covered by the conditions for the application of the reduced tax rate, that is to say, newspapers and periodicals. The fact that these, in digital format, are excluded from the application of a reduced tax rate, even when supplied on a physical medium, will be dealt with first (see below under 2), before, finally, the difference in treatment of all digital publications supplied electronically in comparison with printed publications will require consideration (see below under 3).

35. The Court of Justice has not yet ruled on any of these matters. Even in recently decided infringement proceedings that concerned the application of point 6 of Annex III to the VAT Directive to digital books transmitted electronically, the Court expressly refrained from examining the question of whether that provision is compatible with the principle of equal treatment. (24)

1. The difference in treatment of digital books depending on the means of transmission

36. It must first be clarified whether point 6 of Annex III to the VAT Directive, in conjunction with Article 98(2) of that directive, infringes the principle of equal treatment in so far as Member States are allowed to provide for a reduced tax rate for digital (audio) books only if they are on a physical support but not if they are supplied by electronic means. (25)

37. According to settled case-law, the principle of equal treatment requires the EU legislature to ensure that comparable situations are not treated differently unless such treatment is objectively justified. (26) That general principle of equal treatment has now been enshrined in Article 20 of the Charter. (27)

a) Comparable situations

38. The first question arising is whether the supply of digital books on a physical support, on the one hand, and their supply electronically, on the other hand, constitute comparable situations.

39. According to what is now settled case-law, the comparability of two situations must be assessed as a whole in light of the objective of the rules at issue and the principles and objectives of the field to which the rules relate. (28) For a finding that two situations are not comparable, it is therefore not sufficient merely to determine that objective differences exist without explaining their relevance in light of the objectives of the rules, (29) or to follow blindly the assessment of the EU legislature. (30)

i) Objectives of the field to which the rules relate

40. According to recital 4 of the VAT Directive, the objective of the common system of VAT, of which the rules at issue on the reduced tax rate form part, is the implementation of the internal market. To this end, by means of EU-wide harmonisation, distortions of competition based on the imposition of turnover taxes by the Member States are to be prevented, both between and within the Member States.

41. In addition, pursuant to recital 8 of the VAT Directive, the objective of the harmonisation of turnover taxes is also to establish uniform bases of assessment throughout the EU for the purposes of the latter's own resources. That objective of the field to which the rules relate is, however, of no relevance in the present case because the provisions of the VAT Directive here at issue involve the tax rate and not the establishment of the basis of assessment.

42. As far as the objective of preventing distortions of competition is concerned, the Court of Justice has, in fact, already determined that infringement of the principle of fiscal neutrality in the matters relating to value added tax does not come into consideration only in relation to competing traders. (31) However, if a competitive situation exists which may be distorted by differing VAT provisions, in light of the fundamental objective of the common system of VAT, the comparability of the situations must, in any event, be assumed. (32) Taking account of the competitive situation of two products corresponds, moreover, to an approach used by the Court of Justice at the time of the development of the principle of equal treatment in its case-law. (33)

43. In the present case, digital books distributed by means of a physical support and digital books distributed electronically are in competition with one another. This is because, for the consumer, whose needs first establish the competitive situation, the same product is involved, namely the file of a digital book, which in both cases is not usable without an additional reading device. Only the means of transmission to the consumer is different. Depending on the conditions of supply, the consumer will therefore opt for one or other means of transmission in order to receive the same product.

44. This normally applies even if the consumer — as the Commission asserted at the hearing — should not acquire the right to pass on the file to another person when a digital book is obtained electronically, in contrast to a digital book obtained on a physical support. (34) As a rule, a consumer will acquire a digital book for his or her own use, with the result that the transferability of a file to a third party — if, in fact, this should be dependent on the type of transmission — has no decisive influence on the competitive situation. In addition, the Court of Justice has already held, against the background of copyright protection, that the sale of content on CD-ROM and by means of downloading from the internet is, 'from an economic point of view, … similar'. (35)

45. Consequently, in light of the fundamental objective of the common system of VAT, namely to prevent distortions of competition, the two forms of presentation of a digital book are comparable.

ii) Fundamental principles of the field to which the rules relate

46. Their comparability is not precluded by the fact that, under the provisions of the common system of VAT, the supply of a digital book on a physical means of support is a supply of goods (Article 14(1) of the VAT Directive), whereas, if it is transmitted electronically, it is a supply of services (Article 24(1) of the VAT Directive). (36)

47. According to recital 5 of the VAT Directive, the tax is to be levied 'in as general a manner as possible', that is to say, on all products. This is confirmed by the first subparagraph of Article 1(2) of the VAT Directive, which provides that a *general* tax on consumption is to be implemented by the common system of VAT. Therefore both chargeable events also contain identical requirements for the supply of goods (Article 2(1)(a) of the VAT Directive) and for services (Article 2(1)(c) of the VAT

Directive). VAT seeks in principle, therefore, to cover the consumption of goods and services in the same way.

48. In so far as the provisions of the common system of VAT distinguish, as an exception, between the supply of goods and the supply of services, there is in each case a special reason for this. When determining the place where a taxable transaction is carried out, for example (Article 31 et seq. of the VAT Directive), reference can be made to physical transport only in the case of a supply of goods.

49. However, in the present case, that difference in the physical presence of the products is not relevant in determining the amount of the tax rate. The VAT Directive does not, in principle, distinguish between the supply of goods and the supply of services in relation to the fixing of tax rates. Rather, Article 96 of the VAT Directive expressly states that the standard rate is to be the same for the supply of goods and for the supply of services. In addition, the reduced rates pursuant to the first subparagraph of Article 98(2) of the VAT Directive are laid down both for supplies of goods and for supplies of services.

iii) Objective of the rules at issue

50. Finally, the comparability of ‘physical’ and electronic supplies of digital books has to be assessed in light of the objective pursued by the rules at issue.

51. Point 6 of Annex III to the VAT Directive enables the Member States to apply a reduced tax rate for books, newspapers and periodicals. However, it is not apparent either from the text of Directive 92/77/EEC, by which the rules were originally introduced, (37) or from the directive’s history what purpose the granting of that tax benefit is intended to serve.

52. In the context of the present proceedings too, neither the Council nor the Commission have been able to provide a satisfactory answer to that question. It is, in fact, clear from a 2007 Communication from the Commission relating to reduced VAT rates that the corresponding provisions of the VAT Directive are not based ‘on a well structured or logical approach’ but simply reflect ‘the situation existing in Member States at the beginning of the 90s’. (38) The VAT rate structure thus does not follow any clear logic. (39)

53. Accordingly, the Commission, when questioned on that point at the hearing, stated, inter alia, that provision had been made for the reduced tax rate for books, newspapers and periodicals in EU law solely because at least some Member States applied such a reduced rate at that time and they were not to be deprived of that option by EU law.

54. Now it is quite conceivable that a rule of EU law does not pursue an autonomous objective other than that of leaving certain rules within the responsibility of the Member States. However, that is not the case here because the VAT Directive does not simply leave arrangements for reduced tax rates to the Member States, but rather, in accordance with Article 98 of the VAT Directive, in conjunction with Annex III thereto, it permits only those reduced tax rates that apply in respect of clearly defined deliverables that are listed exhaustively, but no others. To that extent, EU law assumes responsibility for the requirements for the application of reduced tax rates by the Member States. Consequently, the objectives of the authorisation under EU law allowing Member States to apply reduced tax rates just for books, newspapers and periodicals must also be determined autonomously for the purposes of EU law.

55. Although both the Council and the Commission have stated in the present proceedings that the VAT Directive does not pursue any incentive objectives, it is, however, obvious that promoting the sale of certain products by the Member States is made possible only as a result of the option of applying a reduced tax rate and that specific policy objectives are thereby being pursued. (40) A reduced tax rate enables the taxable persons to quote a cheaper offer. That promotion of sales occurs, moreover, in favour of the consumers, for it is they alone who are ultimately to bear the burden of the VAT. (41)

56. The aim of that tax incentive appears to me to be obvious too. The reduced rate for books, newspapers and periodicals has a cultural objective. It serves, in a broad sense, to promote the education of the citizens of the European Union through reading, whether of fiction or non-fiction, or

of political, technical or entertaining newspapers and periodicals. The exclusion of the incentive in the case of publications that are 'wholly or predominantly devoted to advertising' provides an indication of that objective in the factual elements set out in point 6 of Annex III to the VAT Directive. Such publications do not pursue educational purposes. Moreover, that objective can also be found elsewhere in the common system of VAT, namely in the form of the extensive preferential tax treatment accorded to education services by Article 132(1)(i) and (j) of the VAT Directive.

57. Fulfilment of that educational purpose depends solely on the content, not on the means of transmission, of a digital book. Therefore, in light of the incentive objective pursued by point 6 of Annex III to the VAT Directive, there is, in principle, no difference between digital books that are distributed on a physical support and digital books that are transmitted electronically. Accordingly, both forms of performance are comparable in light of the objective of the rules at issue as well.

iv) Interim conclusion

58. In view of all of the foregoing, it must be held that the supply of digital books on a physical support, on the one hand, and their supply electronically, on the other hand, are comparable in light of both the objective of the rules at issue and the principles and objectives of the field to which the rules relate.

b) Justification

59. A difference in treatment of comparable situations may, however, be justified if it pursues a legally permitted aim and is proportionate to that aim. (42)

60. These requirements must be observed, irrespective of the area of law in which a difference in treatment is evident. They apply even where the EU legislature is explicitly allowed a broad discretion by the Court of Justice, (43) particularly with regard to the common agricultural policy, for example. (44)

61. However, the intensity of the examination into whether the difference is treatment is justified varies according to the degree of discretion at the EU legislature's disposal in the case in question. If the EU legislature differentiates on the basis of a differentiating criterion prohibited under Article 21 of the Charter, such as gender or race, (45) the justification for a difference in treatment will be subject to a strict examination by the Court of Justice. (46) However, if the differentiation is based on another criterion, the examination by the Court of Justice will be less rigorous in order to avoid substituting its own assessment for that of the EU legislature. (47) According to the case-law, this is especially true in the case of rules involving complex assessments of a political, economic, social or medical nature. (48) However, in accordance with the principle of proportionality, here too, the more serious the impact of a difference in treatment for individual EU citizens, the stricter the examination by the Court of Justice must be. (49)

i) Objective of the difference in treatment

62. Against the background of that restricted standard of review, the objective that the EU legislature is pursuing by means of the difference in treatment accorded to digital books on physical supports compared with those supplied electronically must first of all be identified.

63. The difference in treatment was introduced by Directive 2009/47. According to recital 4 of Directive 2009/47, the resultant expansion of the factual elements of the tax incentive in point 6 of Annex III to the VAT Directive to digital books supplied on a physical means of support is intended 'to clarify and update to technical progress the reference to books in its Annex III'. However, Directive 2009/47 leaves unchanged, in particular, the provision in the second subparagraph of Article 98(2) of the VAT Directive, according to which the reduced tax rates are, under no circumstances, applicable to electronically supplied services. As such, digital books transferred electronically cannot therefore be subject to a reduced tax rate. (50)

64. Full account was thus not taken of 'technical progress'. The 'natural' means of transmission of digital books, namely supply by electronic means, was not to be able to benefit from a reduced tax rate.

The reason for this lies ultimately in the provision in the second subparagraph of Article 98(2) of the VAT Directive, which excludes the application of a reduced tax rate for all electronic services, (51) that is to say, not only for electronically transferred digital books. The aim of that rule, which applies generally to the market in electronic services, is therefore decisive for justifying the difference in treatment in the present case.

65. The origin of the second subparagraph of Article 98(2) of the VAT Directive is the provision in the fourth subparagraph of Article 12(3)(a), in conjunction with the last indent of Article 9(2)(e), of Council Directive 77/388/EEC ('the Sixth Directive'), (52) which was adopted on the basis of Directive 2002/38/EC. (53) There is no indication in the recitals of Directive 2002/38 concerning the intention that was pursued by that provision.

66. However, the corresponding Commission proposal does refer to the uncertainty to which the providers of electronic services could be subject with regard to the applicable tax rate. (54) This is because, by Directive 2002/38, the obligation was introduced for providers of electronic services established outside the EU to tax their services provided to consumers within the EU in the Member State in which the consumer resides. (55) This is intended to prevent distortions of competition (56) that could arise as a result of the taxation policies of third countries. The consequence of the rule is that electronic services are subject to the tax rate applicable in the Member State in which the consumer is located.

67. However, the intention was, at the same time, to facilitate fulfilment by taxable persons established outside the EU of their new fiscal obligations within the EU, and possibly also to make compliance more likely. (57) At the same time the simplifications were also intended to benefit the tax authorities of the Member States and to improve their supervision options. (58) This was primarily to be accomplished by enabling taxable persons to comply with their obligations by making electronic tax returns in a single Member State for the whole EU. (59) In addition, the predecessor provision of the second subparagraph of Article 98(2) of the VAT Directive ensured that it is always only the Member State's standard rate that can apply to electronic services provided to local consumers.

68. Suppliers of electronic services established within the EU were, by contrast, in a different position because, for them, nothing was to change as a result of Directive 2002/38. They were to continue to tax their electronic services in the Member State where they were established, regardless of where the relevant consumer resided, (60) and were therefore subject, with their services, to the different tax rates of that Member State, of which there could not be more than three.

69. However, in the present proceedings the Commission has essentially stated that the prohibition of reduced tax rates for electronic services was also of relevance for taxable persons operating within the EU in so far as it prevented harmful tax competition between the Member States. Precisely because, for these taxable persons, solely their seat remained decisive for their tax liability with regard to electronic services, a Member State could have tried to induce these service providers to establish themselves in its territory by introducing a correspondingly reduced rate of tax. The headquarters of an electronic distribution network can be moved comparatively easily.

70. However, the legal position here has fundamentally changed since 1 January 2015. In accordance with the applicable Article 58(1)(c) of the VAT Directive, (61) the same rule now applies for taxable persons established within the EU as for those established outside the EU: electronic services are always to be taxed in the Member State of the relevant consumer. All suppliers can now also comply with their tax obligations in relation to all Member States by submitting a tax return in only one Member State. (62)

71. As a result, we therefore have to deal with two different objectives of the second subparagraph of Article 98(2) of the VAT Directive and its predecessor provisions, which must also be differentiated on a time basis: up to 31 December 2014 the aim of the prohibition of reduced tax rates for electronic services was, on the one hand, to simplify the tax obligations of taxable persons established outside the EU and, on the other hand, to prevent harmful tax competition between the Member States; from 1 January 2015 the aim of the prohibition has only been the simplification of tax obligations, but now for the whole electronic services market.

ii) Appropriate pursuit of objectives

72. Those objectives also had to be pursued by the EU legislature in an appropriate manner. The consequences of the difference in treatment must be compared with the advantages arising from pursuit of the objectives. It must be borne in mind in this connection that, in the area of tax law, the EU legislature has to conduct complex economic and financial assessments and has a broad discretion in that context. (63)

73. With regard to the objective of simplification of the tax obligations on the basis of compliance with a smaller number of VAT rates, a distinction must be made, because the prohibition of reduced tax rates for electronic services helps both taxable persons and the tax authorities of the Member States. (64)

74. The simplification existing for the benefit of taxable persons is disproportionate to the disadvantages arising for them from denial of the reduced tax rate for digital books that are transmitted by electronic means, because their protection against a variety of tax rates comes at too high a price: their services are subject to a higher tax rate and are therefore also placed at a competitive disadvantage. Naturally, the use of any tax advantage makes the application of the tax law more complicated for those who benefit. However, that complexity cannot mean that the tax legislature has carte blanche to treat comparable situations differently.

75. With regard to facilitating the work of the tax authorities of the Member States, the appropriateness of the pursuit of the objectives could be countered by an old dictum of the Court of Justice, namely that practical difficulties cannot justify the imposition of a charge — in this case on the sale of electronically transmitted digital books — which is manifestly unequal. (65) However, within the context of the ban on discrimination imposed by the fundamental freedoms, the Court of Justice recently recognised in clear terms that the tax authorities have a legitimate interest in rules which can be easily managed and supervised. (66)

76. Therefore, establishing a special taxation scheme for the taxation of all electronic services on the basis of their place of consumption in principle lies within the discretion of the EU legislature. The fact that such a special taxation scheme may be necessary results from the specific context of electronic services, which, in comparison with conventional trade in goods, are supplied on a cross-border basis almost effortlessly and, in addition, require only a minimal physical presence, making access difficult for the national tax authorities.

77. In addition, the Court of Justice has already recognised that, where complex systems are involved, the EU legislature may opt for a step-by-step approach. (67) To that extent it is understandable if the EU legislature initially structures a new type of taxation procedure as simply as possible. This applies particularly during a period when the suppliers of electronic services are developing a variety of new products whose classification within the existing categories of reduced tax rates may be doubtful.

78. However, it is a condition for the appropriateness of such a step-by-step approach that regular reviews are undertaken of the regulatory system. (68) So far action by the relevant bodies of the European Union is sufficient. By introducing corresponding provisions, the Council has already provided that the special taxation scheme for electronic services is to be reviewed after a certain period on the basis of the experience gained. (69) In addition, the Commission has recently announced, in relation to the equal treatment of electronically transmitted digital books, that it will draw up a proposal for a directive to amend the VAT Directive. (70)

79. In so far as, up to 31 December 2014, the objective of simplification of the taxation system affected solely taxable persons established outside the EU, the foregoing considerations have comparatively little relevance. However, this is offset, for that period at any rate, by the legitimate aim of preventing harmful tax competition between the Member States. (71)

80. The other side of the balance, by contrast, is not very significant.

81. The distortions of competition between suppliers of digital books supplied on a physical support and digital books supplied electronically are likely to be limited. At the hearing, the Republic of Poland correctly pointed out that the costs of electronic distribution are much lower than those for the traditional distribution of goods. Consequently, digital books transmitted by electronic means can generally be offered at a lower price than those on physical supports, even though they are subject to a higher rate of VAT.

82. In light of this, serious impediments to cross-border access to books, which is protected by the fundamental freedoms, or to access to books by persons with disabilities (72) — a point to which the Polish Commissioner for Civic Rights correctly drew attention — are not apparent.

83. The objectives pursued by the EU legislature by the second subparagraph of Article 98(2) of the VAT Directive are therefore also pursued in an appropriate manner.

c) Interim conclusion

84. The differing treatment of digital books depending on their means of transmission, which results from point 6 of Annex III to the VAT Directive, in conjunction with Article 98(2) of that directive, in view of the reduced tax rate, is therefore justified and consequently does not infringe the principle of equal treatment.

2. The exclusion of digital newspapers and periodicals on physical supports

85. Secondly, it must now be examined whether the fact that point 6 of Annex III to the VAT Directive, in conjunction with Article 98(2) of that directive, does not permit a reduced tax rate for digital newspapers and periodicals on physical supports is compatible with the principle of equal treatment. Two separate differences in treatment must be considered here.

a) Comparison with digital books

86. Digital newspapers and periodicals are treated differently from digital books in that a reduced tax rate may be applied to the latter if they are supplied on a physical support.

87. An infringement of the principle of equal treatment resulting from this requires, in the first place, that newspapers and periodicals, on the one hand, and books, on the other hand, involve comparable situations. (73)

88. However, this is not the case. The situations are not comparable either in view of the objectives of the field to which the rules relate or in light of the objective of the rules at issue. (74)

89. First, newspapers and periodicals are not normally in competition with books. The different forms of publication cater for different consumer needs, since, as a general rule, they differ in terms of text length, type of information, creative aspirations and lasting relevance. In light of the objective of the common system of VAT, namely to prevent distortions of competition, (75) they are therefore not comparable.

90. Secondly, in light of the objective of the rules at issue, there is also no comparability between newspapers and periodicals, on the one hand, and books, on the other hand. As a general rule, the educational purpose pursued by point 6 of Annex III to the VAT Directive (76) differs significantly with regard to these different forms of publication. While newspapers and periodicals have more of a topical, practical focus, books often involve communication of knowledge of greater long-term significance, or artistic expression. Accordingly, the objective of a tax incentive, within the education sector, for books, on the one hand, and for newspapers and periodicals, on the other hand, is quite different.

91. The differing treatment of digital newspapers and periodicals on physical supports compared with digital books on physical supports therefore does not infringe the principle of equal treatment.

b) Comparison with newspapers and periodicals on paper

92. However, digital newspapers and periodicals on physical supports are treated differently from newspapers and periodicals that are published on paper.

93. Although the outcome here is slightly less clear than previously, I believe that newspapers and periodicals in paper form and digital newspapers and periodicals on physical supports are also not objectively comparable.

94. It is true that in light of the tax incentive objective of point 6 of Annex III to the VAT Directive, it must, in principle, be assumed that digital and printed newspapers and periodicals are comparable, since only the content should be regarded as relevant in that regard. (77)

95. However, the same does not apply in respect of the objective of the field to which the rules relate, namely the prevention of distortions of competition. (78) In the judgment in *K*, the Court of Justice has already held, in respect of books, that competition does not necessarily exist between their digital versions on physical supports and their paper versions. Rather, the existence of such competition is dependent on a number of factors that may not only differ from Member State to Member State, but may also vary over time. (79) However, in actual circumstances that are unclear in this way, it is not for the Court of Justice but for the EU legislature alone to undertake the complex assessment of a competitive situation across the European Union within the scope of its legislative discretion. (80)

96. Accordingly, the principle of equal treatment is also not infringed as a result of digital newspapers and periodicals on physical supports, in contrast to their paper versions, not being allowed to be subject to a reduced rate of tax in accordance with point 6 of Annex III to the VAT Directive, in conjunction with Article 98(2) of that directive.

3. The differing treatment of publications transmitted electronically compared with printed publications

97. Finally, the question must also be examined whether the differing treatment of all digital publications that are transmitted electronically compared with printed publications resulting from point 6 of Annex III to the VAT Directive, in conjunction with Article 98(2) of that directive, might infringe the principle of equal treatment.

98. That, however, in view of the foregoing considerations, is not the case.

99. The question of whether digital and printed publications within the meaning of the case-law are, in general, not sufficiently comparable can ultimately be left open. This is borne out, in light of the objective of the rules at issue here, by the fact that a significant difference exists between digital publications that are transmitted by electronic means and printed publications with regard to their *need* for support, which results from the very different distribution costs. (81) Account would also have to be taken of the EU legislature's discretion in assessing the competitive situation. (82)

100. However, even if their comparability were to be assumed, the difference in treatment of publications transmitted by electronic means and printed publications would currently be justified. This results, as has been seen, in particular from the legitimate legislative objective of providing for a special taxation scheme for electronic services. (83) In this respect, the differing treatment of publications transmitted electronically compared with printed publications is even more appropriate, as the competition situation is likely to be less pronounced than is the case with identical digital publications. (84)

101. Accordingly, the principle of equal treatment is also not infringed in so far as point 6 of Annex III to the VAT Directive, in conjunction with Article 98(2) of that directive, excludes electronically transmitted publications, in contrast to printed publications, from the scope of application of the reduced tax rate.

V – Conclusion

102. In light of all of the foregoing considerations, I propose that the Court should give the following reply to the questions referred:

Examination of the questions referred has disclosed no factor capable of affecting the validity of point 6 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Directive 2009/47/EC.

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1 – Original language: German.

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2 – Treaty establishing the European Economic Community, as amended by the Treaty of Amsterdam (OJ 1997 C 340, p. 173).

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3 – OJ 2006 L 347, p. 1.

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4 – See Article 2(2) of 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).

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5 – See Article 1.13 of, in conjunction with point 1 of the annex to, Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ 2009 L 116, p. 18).

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6 – See point 3 of page 13 of the Proposal of the Commission of 7 July 2008 for a Council Directive amending Directive 2006/112/EC as regards reduced rates of value added tax (COM(2008) 428 final).

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7 – Cf., inter alia, judgments of 4 February 1982 in *Buyl and Others* v *Commission* (817/79, EU:C:1982:36, paragraph 16), of 11 November 1997 in *Eurotunnel and Others* (C-408/95, EU:C:1997:532, paragraph 45) and of 10 September 2015 in *Parliament* v *Council* (C-363/14, EU:C:2015:579, paragraph 82).

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8 – See the European Parliament legislative resolution of 19 February 2009 on the proposal for a Council directive amending Directive 2006/112/EC as regards reduced rates of value added tax (COM(2008)0428 — C6-0299/2008 — 2008/0143(CNS)) (OJ 2010 C 76 E, p. 110).

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9 – Cf. point 9 above.

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10 – In addition, in the German version of point 6 of Annex III to the VAT Directive, the example ‘music printed or in manuscript form’ was amended to ‘music printed or manuscripts’. However, the intention was evidently only to make a drafting change and not a change to the content of the German version, as demonstrated by the English- and French-language versions, which are unchanged in this respect (before and after their amendment by Directive 2009/47, these read: ‘music printed or in manuscript form’ and ‘les partitions imprimées ou en manuscrit’ respectively).

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11 – See, inter alia, judgments of 16 July 1992 in *Parliament* v *Council* (C-65/90, EU:C:1992:325, paragraph 16), of 5 July 1995 in *Parliament* v *Council* (C-21/94, EU:C:1995:220, paragraph 18), of 11 November 1997 in *Eurotunnel and Others* (C-408/95, EU:C:1997:532, paragraph 46) and of 25 September 2003 in *Océ Van der Grinten* (C-58/01, EU:C:2003:495, paragraph 100); cf. judgment of 15 July 1970 in *ACF Chemiefarma* v *Commission* (41/69, EU:C:1970:71, paragraphs 69, 178 and179).

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12 – That conclusion is also not affected by the fact that recital 6 of the proposal, which, inter alia, makes explicit reference to ‘audio books’, is not reproduced in Directive 2009/47.

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13 – See point 3 on page 13 (‘audio books, CD, CD-ROMs or any similar physical support’) and point 3 on page 15 (‘de livres audio, de disques compacts, de cédéroms ou d’autres supports physiques similaires’) respectively of the proposal of the Commission (cited in footnote 6).

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14 – In its judgment of 5 March 2015 in *Commission* v *Luxembourg* (C-502/13, EU:C:2015:143, paragraph. 53), the Court of Justice admittedly stated that the text adopted by the Council was ‘nothing other than’ a ‘simplification of the drafting’ of the Commission’s proposal. However, in the absence of a statement of reasons and also in view of the different background, that finding cannot and does not have to be gone into further in the context of the present case.

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15 – Judgments of 16 July 1992 in *Parliament* v *Council* (C-65/90, EU:C:1992:325, paragraph 19), of 5 July 1995 in *Parliament* v *Council* (C-21/94, EU:C:1995:220, paragraph 22) and of 10 June 1997 in *Parliament* v *Council* (C-392/95, EU:C:1997:289, paragraph 20).

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16 – Proposal of the Commission (cited in footnote 6), explanatory memorandum under 3.1.

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17 – Proposal of the Commission (cited in footnote 6), explanatory memorandum under 5.3 on Article 1 and also recital 6 of the text of the directive; cf. also the summary of the impact assessment in the Commission Staff Working Document (SEC(2008) 2191), which does not even deal with the amendment affecting books.

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18 – See, on the relevance of such an opportunity to comment, judgment of 11 November 1997 in *Eurotunnel and Others* (C-408/95, EU:C:1997:532, paragraph 58).

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19 – See the order for reference, paragraph 3.2.22.

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20 – See judgments of 29 October 2009 in *NCC Construction Danmark* (C-174/08, EU:C:2009:669, paragraph 42), of 19 July 2012 in *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 45), of 15 November 2012 in *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 50), of 13 March 2014 in *Klinikum Dortmund* (C-366/12, EU:C:2014:143, paragraph 40) and of 2 July 2015 in *De Fruytier* (C-334/14, EU:C:2015:437, paragraph 37).

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21 – Cf. in relation to the various meanings of that principle, judgment of 15 November 2012 in *Zimmermann* (C-174/11, EU:C:2012:716, paragraphs 46 to 48) and in addition judgments of 17 May 2001 in *Fischer* and *Brandenstein* (Cases C-322/99 and C-323/99, EU:C:2001:280, paragraph 76) and of 2 July 2015 in *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 40).

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22 – Cf. in this regard judgments of 8 June 2006 in *L.u.p.* (C-106/05, EU:C:2006:380, paragraph 48), of 10 April 2008 in *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 49), of 29 October 2009 in *NCC Construction Danmark* (C-174/08, EU:C:2009:669, paragraph 41), of 10 June 2010 in *CopyGene* (C-262/08,

EU:C:2010:328, paragraph 64), of 19 July 2012 in *Lietuvos geležinkeliai* (C-250/11, EU:C:2012:496, paragraph 45) and of 28 November 2013 in *MDDP* (C-319/12, EU:C:2013:778, paragraph 38).

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23 – See the order for reference, paragraphs 3.2.30 and 3.2.31.

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24 – Judgment of 5 March 2015 in *Commission* v *Luxembourg* (C-502/13, EU:C:2015:143, paragraphs 55 and 56).

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25 – Cf. regarding that content of the rules, judgments of 5 March 2015 in *Commission* v *France* (C-479/13, EU:C:2015:141, paragraphs 17, 40 and 41) and of 5 March 2015 in *Commission* v *Luxembourg* (C-502/13, EU:C:2015:143, paragraphs 26, 47 and 49); see also the guidelines arising from the meetings of the VAT committee, 92nd meeting of 7 and 8 December 2010, document A — taxud.c.1(2011)157667-684, and, on the significance of the guidelines, my Opinion in *RR Donnelley Global Turnkey Solutions Poland* (C-155/12, EU:C:2013:57, points 47 to 50).

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26 – See, inter alia, judgments of 19 October 1977 in *Ruckdeschel and Others* (Cases 117/76 and 16/77, EU:C:1977:160, paragraph 7), of 12 March 1987 in *Raiffeisen Hauptgenossenschaft* (215/85, EU:C:1987:127, paragraph 23), of 17 September 1998 in *Pontillo* (C-372/96, EU:C:1998:412, paragraph 41), of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23) and of 4 May 2016 in *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 35); cf. regarding another approach based on Article 52(1) of the Charter, judgment of 29 April 2015 in *Léger* (C-528/13, EU:C:2015:288, paragraphs 50 to 52).

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27 – Charter of fundamental rights of the European Union of 7 December 2000, in the version adopted in Strasbourg on 12 December 2007 (OJ 2016 C 202, p. 389).

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28 – Judgments of 16 December 2008 in *Société Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 26), of 12 May 2011 in *Luxembourg* v *Parliament and Council* (C-176/09, EU:C:2011:290), of 18 July 2013 in *Sky Italia* (C-234/12, EU:C:2013:496, paragraph 16), of 26 September 2013 in *IBV & Cie* (C-195/12, EU:C:2013:598, paragraph 52) and of 6 November 2014 in *Feakins* (C-335/13, EU:C:2014:2343, paragraph 51); cf. also, on the prohibition of discrimination imposed by the fundamental freedoms, inter alia, judgments of 27 November 2008 in *Papillon* (C-418/07, EU:C:2008:659, paragraph 27) and of 2 June 2016 in *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 48).

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29 – See in this regard, however, inter alia, also judgment of 13 December 1994 in *SMW Winzersekt* (C-306/93, EU:C:1994:407, paragraph 31).

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30 – See in this regard, however, precisely in relation to value added tax, judgment of 13 March 2014 in *Jetair und BTWE Travel4you* (C-599/12, EU:C:2014:144, paragraph 55).

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31 – Judgments of 10 April 2008 in *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 49) and of 25 April 2013 in *Commission* v *Sweden* (C-480/10, EU:C:2013:263, paragraph 17).

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32 – Cf. in this regard also the judgments of 29 October 2009 in *NCC Construction Danmark* (C-174/08, EU:C:2009:669, paragraph 44) and of 19 July 2012 in *Lietuvos geležinkeliai* (C-250/11, EU:C:2012:496, paragraph 45).

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33 – Judgments of 19 October 1977 in *Ruckdeschel and Others* (117/76 and 16/77, EU:C:1977:160, paragraph 8), of 19 October 1977 in *Moulins et huileries de Pont-à-Mousson und Société cooperativeProvidence agricole de la Champagne* (Cases 124/76 and 20/77, EU:C:1977:161, paragraph 18) and of 25 October 1978 in *Royal Scholten-Honig* and *Tunnel Refineries* (Cases 103/77 and 145/77, EU:C:1978:186, paragraphs 28 to 32).

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34 – Doubts may, however, arise in this regard on the basis of the findings of the judgment of 3 July 2012 in *UsedSoft* (C-128/11, EU:C:2012:407).

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35 – Judgment of 3 July 2012 in *UsedSoft* (C-128/11, EU:C:2012:407, paragraph 61).

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36 – Cf. judgments of 5 March 2015 in *Commission* v *France (*C-479/13, EU:C:2015:141, paragraphs 17 and 35) and in *Commission* v *Luxembourg* (C-502/13, EU:C:2015:143, paragraphs 26 and 42).

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37 See Article 1.5 of, in conjunction with category 6 of the annex to, 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).

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38 – Communication of 5 July 2007 from the Commission to the Council and the European Parliament on VAT rates other than standard VAT rates (COM(2007) 380 final), under 3.1.

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39 – Communication from the Commission (cited in footnote 38), under 4.2.

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40 – Cf. also the Opinion of the Committee on the Internal Market and Consumer Protection of 22 January 2009 for the Committee on Economic and Monetary Affairs on the proposal for a Council directive amending Directive 2006/112/EC as regards reduced rates of value added tax (COM(2008)0428) (Document of the European Parliament in plenary sitting of 11 February 2009, A6-0047/2009, p. 6).

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41 – Judgments of 3 May 2012 in *Lebara* (C-520/10, EU:C:2012:264, paragraph 25) and of 7 November 2013 in *Tulică* and *Plavoşin* (Cases C-249/12 and C-250/12, EU:C:2013:722, paragraph 34).

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42 – Cf., inter alia, judgments of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 47), of 17 October 2013 in *Schaible* (C-101/12, EU:C:2013:661, paragraph 77) and of 22 May 2014 in *Glatzel* (C-356/12, EU:C:2014:350, paragraph 43).

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43 – Judgment of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraphs 57 and 58).

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44 – Judgment of 6 November 2014 in *Feakins* (C-335/13, EU:C:2014:2343, paragraph 56).

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45 – The prohibitions on discrimination are only specific expressions of the general principle of equal treatment; see, in particular, judgment of 27 January 2005 in *Europe Chemi-Con (Deutschland)* v *Council* (C-422/02 P, EU:C:2005:56, paragraph 33).

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46 – Cf. also the Opinion of Advocate General Poiares Maduro in *Arcelor Atlantique et Lorraineand Others* (C-127/07, EU:C:2008:292, point 32).

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47 – Cf., to that effect, inter alia, judgments of 12 May 2011 in *Luxembourg* v *Parliament and Council* (C-176/09, EU:C:2011:290, paragraph 35) and of 22 May 2014 in *Glatzel* (C-356/12, EU:C:2014:350, paragraph 64).

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48 – Cf. judgments of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 57) and of 22 May 2014 in *Glatzel* (C-356/12, EU:C:2014:350, paragraph 52); see, specifically in relation to the Common Agricultural Policy, inter alia, judgments of 29 October 1980 in *Roquette Frères* v *Council* (138/79, EU:C:1980:249, paragraph 25), of 5 October 1994 in *Germany* v *Council* (C-280/93, EU:C1994:367, paragraphs 89 and 90) and of 30 June 2016 in *Lidl* (C-134/15, EU:C:2016:498, paragraph 47); cf. in addition, on the general obligations imposed by the principle of proportionality, inter alia, judgments of 12 November 1996 in *United Kingdom* v *Council* (C-84/94, EU:C:1996:431, paragraph 58), of 1 March 2016 in *National Iranian Oil Company* v *Council* (C-440/14 P, EU:C:2016:128, paragraph 77) and of 4 May 2016 in *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 49).

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49 – Cf., to that effect, judgment of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 59); cf. in particular, in the case of interferences with fundamental rights, judgment of 8 April 2014 in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 47).

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50 – Cf. judgments of 5 March 2015 in *Commission* v *France (*C-479/13, EU:C:2015:141, paragraphs 17 and 40) and in *Commission* v *Luxembourg* (C-502/13, EU:C:2015:143, paragraphs 26 and 47).

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51 – See, in this regard, the non-exhaustive list of electronically supplied services in Annex II referred to in Article 58(1)(c) of the VAT Directive and the supplementary definition in Article 7 of and Annex I to 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 (recast) (OJ 2011 L 77, p. 1).

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52 – 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) which, in accordance with Article 411(1) and Article 413 of the VAT Directive, was applicable until 31 December 2006.

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53 – See Article 1(2) of Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services (OJ 2002 L 128, p. 41).

54 – Proposal of the Commission of 7 June 2000 for a Council Directive amending Directive 77/388/EEC as regards the value added tax arrangements applicable to certain services supplied by electronic means (COM(2000) 349 final), under 3.1 and 5.2 on Article 1.2.

55 – See Article 9(2)(f) of the Sixth Directive and now Article 58(1)(c) of the VAT Directive.

56 – Cf. now recital 23 of the VAT Directive.

57 – Cf. the proposal of the Commission (cited in footnote 54) under 3.1 and 3.2.

58 – Cf. the proposal of the Commission (cited in footnote 54) under 5, at the beginning.

59 – Cf. recital 5 of Directive 2002/38; see now Article 358a et seq. of the VAT Directive.

60 – This resulted from the general rule in Article 9(1) of the Sixth Directive; cf. the proposal of the Commission (cited in footnote 53) under point 2.

61 – The provision was amended with effect from 1 January 2015 by Article 5(1) of Directive 2008/8.

62 – See Article 358 to Article 369k of the VAT Directive.

63 – Cf. point 61 above.

64 – See point 67 above.

65 – Cf. judgment of 25 October 1978 in *Royal Scholten-Honig* and *Tunnel Refineries* (Cases 103/77 and 145/77, EU:C:1978:186, paragraphs 81, 82 and 83).

66 – Cf. judgment of 24 February 2015 in *Sopora* (C-512/13, EU:C:2015:108, paragraph 33).

67 – Cf. judgments of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 57) and of 17 October 2013 in *Schaible* (C-101/12, EU:C:2013:661, paragraph 91).

68 – Cf., to that effect, judgment of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 62).

69 – See Article 4 and Article 5 of Directive 2002/38 and Article 6 of Directive 2008/8.

70 – See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT (COM(2016) 148 final) under point 5.

71 – Cf. point 69 above.

72 – Cf. in this regard Article 26 of the Charter.

73 – Cf., in relation to that requirement, point 37 above.

74 – Cf., in relation to that requirement, point 39 above.

75 – Cf. points 40 and 42 above.

76 – Cf. points 55 and 56 above.

77 – Cf. points 56 and 57 above.

78 – Cf. point 40 above.

79 – Cf. judgment of 11 September 2014 in *K* (C-219/13, EU:C:2014:2207, paragraphs 24 to 32).

80 – Cf. point 61 above.

81 – Cf. point 81 above.

82 – Cf. point 95 above.

83 – Cf. point 66 et seq. above.

84 – Cf. point 81 above.