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JUDGMENT OF THE COURT (Fourth Chamber)

5 March 2015 (\*)

(Failure of a Member State to fulfil obligations — Taxation — VAT — Application of a reduced rate — Supply of digital books or electronic books)

In Case C-479/13,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 6 September 2013,

**European Commission**, represented by C. Soulay and F. Dintilhac, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**French Republic**, represented by D. Colas and J.-S. Pilczer, acting as Agents,

defendant,

supported by:

**Kingdom of Belgium**, represented by M. Jacobs and J.-C. Halleux, acting as Agents,

intervener,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its application, the European Commission asks the Court to declare that, by applying a reduced rate of value added tax ('VAT') to the supply of digital (or electronic) books, the French Republic has failed to fulfil its obligations under Articles 96 and 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1; the 'VAT Directive'), read in conjunction with Annexes II and III to that directive and Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing

measures for Directive 2006/112 (OJ 2011 L 77, p. 1).

## **Legal context**

### *EU law*

2 Article 14(1) of the VAT Directive provides:

“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.’

3 Article 24(1) of the VAT Directive provides:

“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

4 Article 96 of the VAT Directive provides:

‘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 supply of services.’

5 Article 98(1) and (2) of the VAT Directive provides:

‘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.’

6 Annex II to the VAT Directive, which includes an ‘[i]ndicative list of the electronically supplied services referred to in Article 58 and point (k) of the first paragraph of Article 59’, both of which articles deal with the determination of the place of supply of services provided to non-taxable persons, refers, at point 3 thereof, to the:

‘supply of images, text and information and making available of databases’.

7 Annex III to Directive 2006/112, in its original version, which contained a list of the supplies of goods and services to which the reduced rates referred to in Article 98 of that directive may be applied, referred, at point 6 thereof, to the:

‘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’.

8 Council Directive 2009/47/EC of 5 May 2009 (OJ 2009 L 116, p. 18) amended Directive 2006/112. Recital 4 in the preamble to Directive 2009/47 states:

‘Directive 2006/112/EC should furthermore be amended in order to allow for the application of reduced rates or an exemption respectively in a limited number of specific situations for social or health reasons and in order to clarify and update to technical progress the reference to books in its Annex III.’

9 Since 1 June 2009, the date of entry into force of Directive 2009/47, point 6 of Annex III to the VAT Directive reads as follows:

‘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’.

10 Article 7(1) and (2) of Implementing Regulation No 282/2011 provides:

‘1. “Electronically supplied services” as referred to in [the VAT Directive] shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.

2. Paragraph 1 shall cover, in particular, the following:

...

(f) the services listed in Annex I.’

11 Annex I to Implementing Regulation No 282/2011, entitled ‘Article 7 of this Regulation’, states, at point 3 thereof:

‘Point (3) of Annex II to [the VAT Directive]

...

(c) the digitised content of books and other electronic publications;

...’

#### *French law*

12 Article 278-0a of the General Tax Code (‘CGI’), in the version in force when the period laid down in the reasoned opinion issued on 25 October 2012 to the French Republic expired, provides:

‘[VAT] is levied at the reduced rate of 5.50% as regards:

A. — The purchase, import, intra-Community acquisition, sale, supply, commission, brokerage or any similar transaction concerning:

...

(3) Books, including their rental. This subparagraph applies to books on all physical means of support, including those supplied by download.

...’

#### **The pre-litigation procedure and the proceedings before the Court**

13 The Commission took the view that it was contrary to the VAT Directive to extend the reduced VAT rate to transactions on books supplied by download where the chargeable event took

place on or after 1 January 2012. Consequently, it sent to the French Republic a letter of formal notice on 4 July 2012. That Member State responded to that letter of formal notice by letter dated 3 August 2012.

14 On 25 October 2012, the Commission issued a reasoned opinion calling on that Member State to take the measures necessary to comply with the opinion within one month of its receipt. That Member State responded to that opinion by letter dated 23 November 2012.

15 Since it was not satisfied with the explanations provided by the French Republic, the Commission brought the present action.

16 By order of the President of the Court of 6 February 2014, the Kingdom of Belgium was granted leave to intervene in support of the form of order sought by the French Republic.

## **The action**

### *Preliminary observations*

17 The Commission states that the supply of digital or electronic books should be understood as the supply, for consideration, by download or web streaming ('streaming'), from a website, of books in electronic format that can be viewed on a computer, a smartphone, electronic book readers or other reading system (the 'supply of electronic books').

18 The French Republic argues that the definition of digital or electronic books to which a reduced rate of VAT under Article 278-0a of the CGI can be applied is stricter than that adopted by the Commission. According to the French Republic, the reduced rate of VAT applies, under that provision, only to 'homothetic' books, namely, books which are analogous to printed books or books supplied on a physical support which are only different from the latter in respect of a few elements inherent to their format.

19 In that regard, it must be held that the argument that Article 278-0a of the CGI applies only, in relation to digital or electronic books, to homothetic books give no grounds, in itself, for concluding that the Commission necessarily intends, by its action, to designate a category of digital or electronic books broader than that to which the reduced rate of VAT applies pursuant to that provision. Digital or electronic books, referred to by the Commission in its application, are defined by the manner by which they are supplied. The French Republic does not dispute that, in the light of that criterion, homothetic books constitute books as designated by the Commission in its application.

20 Furthermore, even if Article 278-0a of the CGI uses the term 'download', that Member State does not claim that the supply of books by streaming is excluded from the scope of that provision.

21 In those circumstances, there is no need to limit the examination of the action to a more restricted category of digital or electronic books than that referred to by the Commission in its application.

### *Substance*

22 The Commission claims that the application, by the French Republic, of a reduced rate of VAT to the supply of electronic books is incompatible with Articles 96 and 98 of the VAT Directive, read in conjunction with Annexes II and III to that directive and Implementing Regulation No 282/2011.

23 The Commission observes that, under the first subparagraph of Article 98(2) of the VAT

Directive, the reduced rates of VAT may apply only to supplies of goods and services referred to in Annex III to that directive. The supply of electronic books does not fall within the scope of that annex and a reduced VAT rate could not therefore apply to it. That interpretation is borne out by the second subparagraph of Article 98(2) of the VAT Directive which excludes the application of a reduced rate of VAT to electronically supplied services.

24 The French Republic, supported by the Kingdom of Belgium, disputes the interpretation adopted by the Commission of the relevant provisions of the VAT Directive. According to those Member States, the supply of electronic books is covered by point 6 of Annex III to the VAT Directive and a reduced rate of VAT can therefore be applied to that supply.

25 In that regard, it should be noted that Article 96 of the VAT Directive provides that the same rate of VAT, namely, the standard rate, is applicable to supplies of goods and services. As an exception to that principle, Article 98(1) of the VAT Directive gives the Member States the option of applying either one or two reduced rates of VAT. In accordance with the first subparagraph of Article 98(2), the reduced rates of VAT can apply only to supplies of goods and services in the categories set out in Annex III to the VAT Directive (judgment in *K*, C?219/13, EU:C:2014:2207, paragraphs 21 and 22).

26 As regards the argument raised by the French Republic and the Kingdom of Belgium that the supply of electronic books is covered by point 6 of Annex III to the VAT Directive, it should be borne in mind that, in determining the scope of a provision of EU law, its wording, context and objectives must all be taken into account (see, inter alia, judgment in *NCC Construction Danmark*, C?174/08, EU:C:2009:669, paragraph 23 and the case-law cited).

27 It should be noted that point 6 of Annex III to the VAT Directive expressly refers, in the category of services that may be subject to reduced rates of VAT, to the 'supply of books ... on all physical means of support'. It is thus clear from the terms of that point that the reduced VAT rate is applicable to a transaction consisting of the supply of a book on a physical medium. As the Commission rightly points out, any other interpretation would render the words 'on all physical means of support', found in that point, meaningless.

28 Admittedly, in order to be able to read an electronic book, physical support, such as a computer, is required. However such support is not included in the supply of electronic books.

29 In the light of the terms of point 6 of Annex III, it follows that that provision does not include in its scope the supply of electronic books.

30 That interpretation is supported by the context of that provision. That provision is an exception to the principle that Member States are to apply a standard rate of VAT to transactions subject to VAT and must therefore be interpreted strictly (see, inter alia, judgment in *Commission v Spain*, C?360/11, EU:C:2013:17, paragraph 18 and the case-law cited).

31 It is true, as the French Republic and the Kingdom of Belgium rightly point out, that by expanding the scope of point 6 of Annex III to the VAT Directive to encompass the 'supply of books on all physical means of support', via the amendment introduced by Directive 2009/47, the EU legislature intended, as is apparent from recital 4 of the preamble to Directive 2009/47, to clarify and update to technical progress the reference to the notion of 'books' referred to in that point.

32 Similarly, as the French Republic rightly argued, by drawing up Annex III to Directive 2006/112, the EU legislature intended that essential commodities and goods and services having social or cultural objectives may be subject to a reduced rate of VAT, provided that those goods or

services pose no or little risk of distortion to competition (see, to that effect, judgment in *Commission v Netherlands*, C?41/09, EU:C:2011:108, paragraph 52).

33 However, the fact remains that, as is clear from the second subparagraph of Article 98(2) of the VAT Directive, the EU legislature decided to exclude any possibility of a reduced rate of VAT being applied to 'electronically supplied services'.

34 The supply of electronic books is an 'electronically supplied service ...' within the meaning of the second subparagraph of Article 98(2).

35 First, under Article 24(1) of the VAT Directive, a 'supply of services' means any transaction which does not constitute a supply of goods, whereas, under Article 14(1) of that directive, a 'supply of goods' means the transfer of the right to dispose of tangible property as owner. Contrary to what the French Republic argues, the supply of electronic books cannot be regarded as a 'supply of goods' within the meaning of that provision, since an electronic book cannot qualify as tangible property. As is clear from paragraph 28 above, the physical support enabling an electronic book to be read, which could qualify as 'tangible property', is not part of that supply. It follows that, pursuant to Article 24(1) thereof, the supply of electronic books must be classified as a supply of services.

36 Second, according to Article 7(1) of Implementing Regulation No 282/2011, electronically supplied services, within the meaning of the VAT Directive, are to include 'services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology'. The supply of electronic books clearly meets that definition.

37 That interpretation is confirmed by point 3 of Annex II to the VAT Directive, read in conjunction with Article 7(1) and (2) of Implementing Regulation No 282/2011 and point 3 of Annex I to that regulation, from which it follows that the supply of digitised content of books constitutes such a service.

38 The fact that Annex II to the VAT Directive contains an indicative list of the electronically supplied services referred to in Article 58 and point (k) of the first paragraph of Article 59 of the VAT Directive is not at odds with that interpretation. The fact that that annex lists only the electronically supplied services which are relevant to the application of those two provisions has no bearing on those services' very nature.

39 Moreover, as is clear from the wording of Article 7(1) of Implementing Regulation No 282/2011, the purpose of referring, in the context of that provision, to the services listed in point 3 of Annex II to the VAT Directive is to determine the electronically supplied services which are covered by the VAT Directive generally and not only by certain provisions of that directive.

40 Consequently, since the supply of electronic books is an electronically supplied service within the meaning of the second subparagraph of Article 98(2) of the VAT Directive, and since that provision precludes the possibility of applying a reduced rate of VAT to such services, it is not possible to interpret point 6 of Annex III to the VAT Directive to include within its scope the supply of electronic books without failing to have regard to the EU legislature's intention that a reduced rate of VAT should not apply to those services.

41 It follows that, taking into account both the terms of point 6 of Annex III to the VAT Directive and its context and the purpose of the legislation of which that provision forms a part, that point cannot be interpreted as including the supply of electronic books within its scope.

42 Contrary to what the French Republic and the Kingdom of Belgium argue, that interpretation is not undermined by the principle of fiscal neutrality, which was intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment (judgment in *NCC Construction Danmark*, EU:C:2009:669, paragraph 41 and the case-law cited).

43 The principle of fiscal neutrality cannot extend the scope of reduced rates of VAT to the supply of electronic books (see, to that effect, judgment in *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 50 and the case-law cited). Point 6 of Annex III to the VAT Directive is not a provision which, unequivocally, extends the scope of reduced rates of VAT to the supply of electronic books. On the contrary, as is clear from paragraph 49 above, such a supply is not covered by that provision.

44 Since it is also undisputed that the supply of electronic books does not fall within any other category of services referred to in Annex III to the VAT Directive, the application of a reduced rate of VAT to such a supply is not in accordance with Article 98(2) of the VAT Directive.

45 It follows that the Commission's application is well founded.

46 Consequently, it must be held that, by applying a reduced rate of VAT on the supply of digital books (or electronic books), the French Republic has failed to fulfil its obligations under Articles 96 and 98 of the VAT Directive, read in conjunction with Annexes II and III to that directive and Implementing Regulation No 282/2011.

## **Costs**

47 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for the French Republic to be ordered to pay the costs, and the latter has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission.

48 Article 140(1) of the Rules of Procedure provides that the Member States which intervened in the proceedings are to bear their own costs. The Kingdom of Belgium must therefore bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Declares that, by applying a reduced rate of value added tax to the supply of digital or electronic books, the French Republic has failed to fulfil its obligations under Articles 96 and 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as amended by Council Directive 2010/88/EU of 7 December 2010, read in conjunction with Annexes II and III to that directive and Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC;**
- 2. Orders the French Republic to bear its own costs and to pay those incurred by the European Commission;**
- 3. Orders the Kingdom of Belgium to bear its own costs.**

[Signatures]

\* Language of the case: French.