

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

7 March 2017 (1)

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Point 6 of Annex III — Validity — Procedure — Amendment of a proposal for a Council directive after the Parliament has given an opinion — No fresh consultation of the Parliament — Article 98(2) — Validity — Reduced rate of VAT precluded from being applied to the supply of digital books electronically — Principle of equal treatment — Comparability of two situations — Supply of digital books electronically and on all physical means of support)

In Case C-390/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Trybuna? Konstytucyjny (Constitutional Court, Poland), made by decision of 7 July 2015, received at the Court on 20 July 2015, in proceedings brought by

Rzecznik Praw Obywatelskich (RPO)

other parties:

Marsza?ek Sejmu Rzeczypospolitej Polskiej,

Prokurator Generalny,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta and L. Bay Larsen, Presidents of Chambers, J. Malenovský (Rapporteur), J.-C. Bonichot, A. Arabadjiev, C. Toader, M. Safjan, E. Jaraši?nas, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2016,

after considering the observations submitted on behalf of:

- the Rzecznik Praw Obywatelskich (RPO), by A. Bodnar, Rzecznik Praw Obywatelskich, and M. Wróblewski and A. Grzelak, acting as Agents,
- the Prokurator Generalny, by R. Hernand, acting as Agent,
- the Polish Government, by B. Majczyna, A. Mi?kowska and K. Ma?kowska, acting as Agents,
- the Greek Government, by K. Georgiadis and S. Papaïoannou, acting as Agents,
- the Council of the European Union, by E. Moro, E. Chatziioakeimidou and K. Ple?niak,

acting as Agents,

– the European Commission, by L. Lozano Palacios and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of Article 98(2) of, and point 6 of Annex III to, 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 2009/47/EC of 5 May 2009 (OJ 2009 L 116, p. 18) ('Directive 2006/112 as amended').

2 The request has been made following the lodging by the Rzecznik Praw Obywatelskich (Commissioner for Civic Rights, Poland) of an application for a ruling that national provisions precluding the application of a reduced rate of value added tax (VAT) to the supply of books and other digital publications electronically do not comply with the Polish constitution.

Legal context

EU law

The Sixth Directive

3 Article 12(3)(a) 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'), as amended by Council Directive 2001/4/EC of 19 January 2001 (OJ 2001 L 22, p. 17), provided:

'The standard rate of value added tax shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. From 1 January 2001 to 31 December 2005, this percentage may not be less than 15%.

...

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.'

4 Article 1 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) provided:

'Directive 77/388/EEC is hereby temporarily amended as follows:

1. in Article 9:

(a) in paragraph (2)(e), a comma shall replace the final full stop and the following indents shall be added:

– “...

– electronically supplied services, inter alia, those described in Annex L.”

...

2. in Article 12(3)(a), the following fourth subparagraph shall be added:

“The third subparagraph shall not apply to the services referred to in the last indent of Article 9(2)(e).”

5 The Sixth Directive was repealed and replaced by Directive 2006/112, which entered into force on 1 January 2007.

Directive 2006/112

6 Article 14(1) of Directive 2006/112 as amended provides:

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

7 Article 24(1) of Directive 2006/112 as amended states:

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

8 Article 25 of Directive 2006/112 as amended states:

‘A supply of services may consist, inter alia, in one of the following transactions:

(a) the assignment of intangible property, whether or not the subject of a document establishing title;

...’

9 Article 96 of Directive 2006/112 as amended 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.’

10 Article 98(1) and (2) of Directive 2006/112 as amended is worded 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.’

11 Point 6 of Annex III to Directive 2006/112, in the version before Directive 2009/47 entered into force, referred to:

'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'.

12 On 7 July 2008, the European Commission presented a proposal for a Council Directive amending Directive 2006/112 as regards reduced rates of value added tax (COM(2008) 428 final; 'the proposal for a directive'), which provided for the replacement of point 6 of Annex III to Directive 2006/112, in the version before Directive 2009/47 entered into force, by the following:

'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'.

13 By a legislative resolution of 19 February 2009, the European Parliament, after amending the proposal for a directive, approved that proposal. None of the amendments adopted by the Parliament related to the text proposed by the Commission to replace point 6 of Annex III to Directive 2006/112, in the version before Directive 2009/47 entered into force.

14 On 5 May 2009, the Council approved the final text of Directive 2009/47. Point 6 of Annex III to Directive 2006/112 as amended was from then on worded 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'.

Polish law

15 Under Article 146 and Article 41(2) and (2a) of the ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004, in the version applicable at the material time (Dz. U. of 2011, No 177, heading 1054; 'the Law on VAT'), read in conjunction with items 72 to 75 of Annex 3 to that law and items 32 to 35 of Annex 10 thereto, supplies of publications that are printed or on a physical support are subject to a reduced rate of VAT. On the other hand, a reduced rate of VAT does not apply to the electronic transmission of publications.

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

16 By application lodged on 6 December 2013, the Commissioner for Civic Rights requested the Trybunał Konstytucyjny (Constitutional Court, Poland) to rule that (i) items 72 to 75 of Annex 3 to the Law on VAT, read in conjunction with Article 41(2) thereof, and (ii) items 32 to 35 of Annex 10 to that law, read in conjunction with Article 41(2a) thereof, do not comply with the Polish constitution in that those provisions lay down that the reduced rates of VAT are to apply only to publications made available on a physical support, to the exclusion of publications transmitted electronically.

17 In the course of the main proceedings, the Marszałek Sejmu **Rzeczypospolitej Polskiej** (Speaker of the Lower House of the Parliament of the Republic of Poland) and the Prokurator Generalny (General Public Prosecutor, Poland) stated that, since the provisions of Polish law at issue were adopted in order to transpose Article 98(2) of Directive 2006/112 as amended and

point 6 of Annex III thereto into domestic law, the Polish legislature could not depart from those provisions without infringing its obligations under EU law. The same view was taken by the members of the Polish Government invited by the national court to express their opinion in the case.

18 The national court considers that there are, however, reasons to doubt that those two provisions of Directive 2006/112 as amended are valid.

19 First, that court observes that Directive 2009/47, from which point 6 of Annex III to Directive 2006/112 as amended stems, could be vitiated by a procedural defect, since that point differs in its wording from the text of the proposal for a directive which had been submitted to the Parliament.

20 Secondly, it considers that Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, could be contrary to the principle of fiscal neutrality. Whilst digital books made available on a physical support and those transmitted electronically have similar properties and meet the same consumer needs, Article 98(2) permits a reduced rate of VAT to be applied only to the supply of digital books on a physical support.

21 Consequently, the Trybuna? Konstytucyjny (Constitutional Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is point 6 of Annex III to Directive 2006/112 as amended 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 Directive 2006/112/EC as amended, 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 electronic books and other electronic publications?'

Consideration of the questions referred

Question 1

22 By its first question, the national court asks, in essence, whether point 6 of Annex III to Directive 2006/112 as amended is invalid on the ground that the legislative procedure that led to its adoption was vitiated by infringement of an essential procedural requirement. Since the wording of point 6 of Annex III to Directive 2006/112 as amended differs from the text which was set out in the proposal for a directive on the basis of which the Parliament was consulted, the national court wonders whether the Parliament should have been consulted afresh.

23 In this instance, it should be noted that, in accordance with Article 93 EC, now Article 113 TFEU, which prescribes a special legislative procedure, the Parliament had to be consulted before Directive 2009/47 was adopted and, consequently, before the replacement by that directive of point 6 of Annex III to Directive 2006/112.

24 Due consultation of the Parliament in the cases provided for by the EC Treaty, now the FEU Treaty, constitutes an essential formal requirement disregard of which means that the measure concerned is void (judgment of 10 May 1995, *Parliament v Council*, C-417/93, EU:C:1995:127, paragraph 9).

25 Effective participation of the Parliament in the legislative process, in accordance with the procedures laid down by the Treaty, indeed represents an essential factor in the institutional balance intended by the Treaty, since the Parliament's function reflects the fundamental

democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly (see, to that effect, judgments of 5 July 1995, *Parliament v Council*, C-21/94, EU:C:1995:220, paragraph 17, and of 10 June 1997, *Parliament v Council*, C-392/95, EU:C:1997:289, paragraph 14).

26 The obligation to consult the Parliament during the legislative procedure in the cases laid down by the Treaty means that the Parliament is consulted afresh whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except in cases where the amendments substantially correspond to a wish of the Parliament itself (see, to that effect, judgment of 5 October 1994, *Germany v Council*, C-280/93, EU:C:1994:367, paragraph 38 and the case-law cited).

27 Accordingly, it is necessary to examine whether point 6 of Annex III to Directive 2006/112 as amended differs in essence from the text that was set out in the proposal for a directive on the basis of which the Parliament was consulted.

28 The proposal for a directive envisaged that point 6 of Annex III to Directive 2006/112 would henceforth mention, among the supplies of goods and services to which the reduced rates of VAT may be applied, 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, 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’.

29 However, point 6 of Annex III to Directive 2006/112 as amended refers to the ‘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’.

30 It is thus apparent on comparing the respective wording of the proposal for a directive and of point 6 of Annex III to Directive 2006/112 as amended that point 6 differs from the proposal inasmuch as it does not mention, as physical means of support that can give rise to the application of a reduced rate of VAT, ‘audio books, CDs [and] CD-ROMs’, which are listed by the proposal, or expressly relate, unlike the proposal, to books ‘that predominantly reproduce the same information content as printed books’, but makes reference to the supply of books on ‘all physical means of support’.

31 Nonetheless, it cannot be concluded from those differences that point 6 of Annex III to Directive 2006/112 as amended differs in essence from the text that was set out in the proposal for a directive.

32 Given that that proposal indicated that it also covered books supplied on ‘any ... physical support [similar]’ to printed books, audio books, CDs and CD-ROMs, the list in the proposal must be regarded as not being exhaustive, but as being intended to illustrate the fact that all feasible physical means of support were covered, in line with what the Council finally decided upon in point 6 of Annex III to Directive 2006/112 as amended.

33 It is true that point 6 of Annex III to Directive 2006/112 as amended does not expressly specify that, in order for a reduced rate of VAT to be applied, the physical supports concerned must predominantly reproduce the same information content as printed books. However, since the wording indicates that only ‘books’ are concerned, a term which, in its ordinary meaning, refers to

a printed work, it follows that, in order to fall within the scope of that provision, the physical supports concerned must predominantly reproduce the same information content as printed books.

34 Consequently, as the Court found in paragraph 53 of the judgment of 5 March 2015, *Commission v Luxembourg* (C?502/13, EU:C:2015:143), the text of point 6 of Annex III to Directive 2006/112 as amended is nothing other than a simplification of the drafting of the text which was set out in the proposal for a directive and the substance of which has been fully preserved.

35 Accordingly, the Council was not required to consult the Parliament afresh.

36 It follows from the foregoing that point 6 of Annex III to Directive 2006/112 as amended is not invalid on the ground that the legislative procedure that led to its adoption was vitiated by infringement of an essential procedural requirement.

Question 2

37 By its second question, the national court asks whether Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, is invalid on the ground that it infringes the principle of fiscal neutrality by precluding the application of the reduced rates of VAT to the supply of electronic books and other electronic publications.

Preliminary remarks

38 First, although the national court refers in the wording of its question to the principle of fiscal neutrality, it is apparent from the order for reference that it raises in essence the question of the validity of Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, in the light of the principle of equal treatment as set out in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter').

39 Secondly, whilst in the wording of its question the national court mentions, in addition to electronic books, 'other electronic publications', it is also apparent from the order for reference that the doubts expressed by the national court relate only to whether there is any unequal treatment by Directive 2006/112 as amended of the supply of digital books according to whether they are transmitted using a physical support or electronically.

40 Accordingly, the national court asks, in essence, whether Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, is invalid on the ground that, by ruling out any possibility for the Member States of applying a reduced rate of VAT to the supply of digital books electronically, that article infringes the principle of equal treatment as set out in Article 20 of the Charter.

Findings of the Court

41 It should be recalled at the outset that the Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (judgments of 12 November 2014, *Guardian Industries and Guardian Europe v Commission*, C?580/12 P, EU:C:2014:2363, paragraph 51, and of 4 May 2016, *Pillbox 38*, C?477/14, EU:C:2016:324, paragraph 35).

– *Treatment of comparable situations*

42 In accordance with settled case-law of the Court, the factors which distinguish different situations, and the question whether those situations are comparable, must be determined and

assessed in the light of the subject matter of the provisions in question and of the aim pursued by them, whilst account must be taken for that purpose of the principles and objectives of the field in question (see, to that effect, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 26 and the case-law cited).

43 In the present instance, the different treatment referred to by the national court results from it not being possible for the Member States to provide that a reduced rate of VAT is to be applied to the supply of digital books electronically, although the application of a reduced rate is permitted in the case of the supply of digital books on all physical means of support. Consequently, the factors which characterise those two situations, and the question whether the situations are comparable, must be determined and assessed in the light of the objectives pursued by the legislature when it permitted the Member States to apply a reduced rate of VAT to the supply of digital books on all physical means of support.

44 In that regard, it should be pointed out that the power of the Member States to apply a reduced rate of VAT to the supply of printed books was laid down for the first time by 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). Article 1 of that directive inserted into the Sixth Directive Annex H relating to the list of supplies of goods and services which may be subject to reduced rates of VAT, point 6 of which was reproduced in point 6 of Annex III to Directive 2006/112, in the version before Directive 2009/47 entered into force. That power was extended by Directive 2009/47 to the supply of books on 'all physical means of support'.

45 As the Advocate General has observed in point 56 of her Opinion, the objective underlying the application of a reduced rate of VAT to the supply of books consists in the promotion of reading, whether of literature, non-fiction, newspapers or periodicals.

46 Thus, by permitting the Member States to apply reduced rates of VAT to the supply of books on all physical means of support, Directive 2006/112 as amended must be regarded as pursuing such an objective.

47 That conclusion is, moreover, supported by the fact that point 6 of Annex III to Directive 2006/112 as amended rules out the possibility of applying a reduced rate of VAT to the supply of 'material wholly or predominantly devoted to advertising'. A feature of such material is that it does not in any way pursue the objective referred to in paragraph 45 of this judgment.

48 That said, in order that such an objective may be achieved, what matters is that citizens of the Union can have access to the content of books effectively, and the manner in which the books are supplied does not play a decisive role in that regard.

49 Consequently, it must be found that, in the light of the objective pursued by Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, the supply of digital books on all physical means of support and the supply of digital books electronically amount to comparable situations.

50 That conclusion is not called into question by the fact that, in accordance with Article 14(1) of Directive 2006/112 as amended, the supply of a digital book on a physical support constitutes, in principle, a supply of goods whereas, by virtue of Articles 24(1) and 25 of that directive, the supply of a digital book electronically constitutes a supply of services. As the rules on VAT are intended, in principle, to tax the consumption of goods and the consumption of services in the same way, that different classification does not appear decisive in the light of the objective, noted in paragraph 45 of this judgment, that is pursued by Article 98(2) of that directive, read in

conjunction with point 6 of Annex III thereto.

51 Consequently, since Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, has the effect of precluding the application of a reduced rate of VAT to the supply of digital books electronically although application of a reduced rate is permitted for the supply of digital books on all physical means of support, those provisions must be regarded as establishing a difference in treatment between two situations that are, however, comparable in the light of the objective pursued by the EU legislature.

– *Justification*

52 Where a difference in treatment between two comparable situations is found, the principle of equal treatment is not infringed in so far as that difference is duly justified (see, to that effect, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 46).

53 That is the case, according to settled case-law of the Court, where the difference in treatment relates to a legally permitted objective pursued by the measure having the effect of giving rise to such a difference and is proportionate to that objective (see, to that effect, judgments of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, paragraph 77, and of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paragraph 43).

54 In that respect, it is understood that, when the EU legislature adopts a tax measure, it is called upon to make political, economic and social choices, and to rank divergent interests or to undertake complex assessments. Consequently, it should, in that context, be accorded a broad discretion, so that judicial review of compliance with the conditions set out in the previous paragraph of this judgment must be limited to review as to manifest error (see, to that effect, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123, and of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 35).

55 In the present instance, it should be noted that the difference in treatment found in paragraph 51 of this judgment results from Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, which precludes the application of a reduced rate of VAT to the supply of all electronic services and, consequently, to the supply of digital books electronically, unlike the supply of books — which may be digital — on all physical means of support.

56 It is apparent from the preparatory documents for Directive 2002/38 that the amendments proposed by the Commission constituted, as regards the taxation of electronically supplied services, a first step in implementing a new policy on VAT, intended to simplify and strengthen the VAT system in order to encourage legitimate commercial transactions within the internal market. Indeed, according to the preparatory documents, e-commerce offers considerable potential for creating wealth and employment in the European Union, and the provision of a clear and definite regulatory environment is an essential prerequisite for creating the climate of confidence in which business will invest and trade.

57 As the Council and the Commission explained in reply to a written question asked by the Court and at the hearing, the ruling out, in Article 98(2) of Directive 2006/112 as amended, of the application of a reduced rate of VAT to the supply of digital books electronically must be viewed as forming part of a specific VAT regime for e-commerce. Indeed, it is apparent from their explanations that it was considered necessary to make electronically supplied services subject to clear, simple and uniform rules in order that the VAT rate applicable to those services may be

established with certainty and, thus, that the administration of VAT by taxable persons and national tax authorities is facilitated.

58 Doubt cannot reasonably be cast on the fact that such an objective is legally permitted.

59 Indeed, the principle of legal certainty, which underlies that objective, requires that EU rules enable those concerned to know unequivocally the extent of their rights and obligations so that they are in a position to order their affairs with the benefit of full information (see, to that effect, judgment of 15 July 2010, *Commission v United Kingdom*, C-582/08, EU:C:2010:429, paragraph 49 and the case-law cited).

60 Furthermore, the Court has already acknowledged the legitimacy of the objective consisting in the laying down by a legislature of general rules which can be easily applied by economic operators and are easily verified by the competent national authorities (see, to that effect, judgment of 24 February 2015, *Sopora*, C-512/13, EU:C:2015:108, paragraph 33).

61 As regards whether the measure set out in Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, is appropriate for achieving the objective pursued, as specified in paragraphs 56 and 57 of this judgment, it does not appear that the assessment which the EU legislature carried out exceeded the discretion that it enjoys.

62 By precluding the application of a reduced rate of VAT to electronically supplied services, the EU legislature spares taxable persons and national tax authorities from an obligation to examine, for each type of electronic service that is supplied, whether it falls within one of the categories of services that qualify for such a rate under Annex III to Directive 2006/112 as amended.

63 Thus, the measure at issue must be regarded as being appropriate for achieving the objective of establishing with certainty the VAT rate applicable to electronically supplied services and thus of facilitating the administration of VAT by taxable persons and national tax authorities.

64 So far as concerns the requirement, associated with the proportionality condition, that the measure chosen must be the least restrictive among the appropriate measures that may be envisaged and that the disadvantages caused must not be disproportionate to the objectives pursued, it should be noted that the EU legislature might possibly have separated the supply of digital books electronically from electronic services as a whole and, accordingly, have permitted the application of a reduced rate of VAT to those books.

65 However, such a solution would be liable to run counter to the objective pursued by the EU legislature relating to the need to remedy the lack of legal certainty resulting from the constant developments to which all electronic services are subject, for which reason the EU legislature excluded all of those services from the list of transactions qualifying for a reduced rate of VAT under Annex III to Directive 2006/112 as amended.

66 To accept that the Member States are able to apply a reduced rate of VAT to the supply of digital books electronically, as is permitted for the supply of such books on all physical means of support, would effectively compromise the overall coherence of the measure intended by the EU legislature, consisting in the exclusion of all electronic services from the possibility of a reduced rate of VAT being applied.

67 As to the option of extending the possibility of applying a reduced rate of VAT to all electronic services, it should be pointed out that the adoption of such a measure would have introduced, generally, unequal treatment between non-electronic services, to which a reduced rate

of VAT does not, as a rule, apply, and electronic services.

68 Consequently, the EU legislature was able to take the view, within the bounds of the discretion that it enjoys, that neither of those two theoretically feasible measures was appropriate for achieving the various objectives pursued by it.

69 It should be added that it is apparent from Articles 4 and 5 of Directive 2002/38 and Article 6 of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112 as regards the place of supply of services (OJ 2008 L 44, p. 11) that the Council envisaged re-examining the specific taxation system for electronically supplied services, in the light of experience acquired. Moreover, in a communication to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT (COM(2016) 148 final), the Commission announced its intention to consider the drawing up of a proposal for a directive amending Directive 2006/112 as amended.

70 Accordingly, the difference in treatment — resulting from Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto — between the supply of digital books electronically and the supply of books on all physical means of support must be regarded as duly justified.

71 It must, therefore, be held that Article 98(2) of Directive 2006/112 as amended, read in conjunction with point 6 of Annex III thereto, which has the effect of ruling out the possibility for the Member States of applying a reduced rate of VAT to the supply of digital books electronically, while permitting them to apply a reduced rate of VAT to the supply of digital books on all physical means of support, does not infringe the principle of equal treatment as set out in Article 20 of the Charter.

72 It follows from the foregoing considerations that examination of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of point 6 of Annex III to Directive 2006/112 as amended or of Article 98(2) of that directive, read in conjunction with point 6 of Annex III thereto.

Costs

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

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

Examination of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect 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 Council Directive 2009/47/EC of 5 May 2009, or of Article 98(2) of that directive, read in conjunction with point 6 of Annex III thereto.

[Signatures]

1 Language of the case: Polish