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[**C-703/19 J.K.**](http://curia.europa.eu/juris/documents.jsf?oqp=&for=&mat=or&lgrec=en&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-703%252F19&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=7053257)

*This case is not available in English*

On 12 November 2020 the Court of Justice of the European Union (CJEU) delivered the opinion of Advocate General Jean Richard De La Tour (AG) in this Polish referral asking whether the concept of a ‘restaurant service’ covers the sale of prepared dishes where: the seller makes available to the buyer the infrastructure which enables him or her to consume the purchased meal on the premises (separate dining space, access to toilets); there is no specialised waiter service; the ordering process is simplified and partly automated; and the customer's ability to customise the order is limited? Is the way in which the dishes are prepared relevant? Is it sufficient that the customer is potentially able to use the infrastructure offered or is it also necessary to establish that, for the average customer, this element constitutes an essential part of the service provided?

J.K's supplies of food and beverages (‘ready for sale/prepared dishes’) are supplied through a franchise; ‘McDonald's Polska sp. z o.o.’. Products are served on a tray with which the customer receives disposable towels and, for some products, cutlery or a straw. Meals and dishes are prepared on site using semi-finished products. They can be served hot or cold and are to be consumed on site or taken away by the customer.

Sales methods include:

* Sales of products to customers inside restaurants;
* Sales of products from the window or counter of a restaurant for consumption outside that restaurant (drive-in or walk-through); and
* Sales of products to customers in designated zones inside shopping centres (food courts).

In 2016 the tax office carried out a VAT audit which covered the period from January to June 2016. During the audit, VAT errors were identified.

The tax authorities disagreed with J.K's position considering that its activities should be classified as ‘restaurant and catering services’ subject to the 8% VAT rate and not deliveries of ‘prepared meals’ (goods) to which the 5% VAT rate applies. By a decision of 21 April 2017, the tax authority issued a VAT assessment for the period covered by the audit.

The Regional Administrative Court subsequently dismissed J.K's appeal, finding that it is essential to determine whether a supply of goods or services has taken place in a given case. This requires consideration of all the circumstances in which the transaction occurred in order to determine its characteristics and dominant features. The provision of the service at issue in the immediate case cannot be regarded as a supply of goods, as the meals are prepared and served on the trader's premises and the customer has the option of consuming the purchased meal, even if it is served ‘to take away’, on the premises, and to take advantage of all the associated facilities.

The AG noted that Article 96 of the VAT Directive provides that each Member State sets and applies a standard VAT rate which is the same for deliveries of goods and for services. By deviation, Article 98 provides for the possibility of applying one or two reduced VAT rates. To this end, Appendix III of the Directive comprehensively lists the categories of goods and services that may be subject to reduced rates.

It is for individual Member States to determine precisely, among the deliveries of goods and services included in the categories of Annex III, those to which the reduced VAT rate or rates apply.

The AG considered that in the immediate case, the concept of ‘restaurant and catering services’ covers the provision of food in a place ‘under the control’ of the supplier in which goods and services are provided in order to guarantee the consumer comfort and safety for the immediate consumption of purchased food and beverages.

In this regard and considering J.K's supplies, the AG opined:

* **Sales in fast food establishments** – Such an operation is not limited to the provision of prepared meals (goods), but is accompanied by services that are predominant for the consumer, even though the delivery at the time of ordering the dishes and their service is simplified, even standardised, in order to meet the requirement of speed sought by the customer. Such a supply is one of restaurant and catering services. If, however, the consumer chooses to take the prepared dish and not consume it immediately and on the spot, such a supply should be classified as the delivery of ‘goods’, since the infrastructure offered by the subject is not decisive for the customer in this situation.
* **Sales outside fast food establishments** – Considering ‘drive-through’ and ‘walk through’ facilities the AG noted that these are characterised by the customer's choice not to use the supplier's infrastructure and accompanying services. Such supplies should be considered as supplies of food (goods) and not restaurant and catering services.
* **Sales within food courts**– The AG considered the situation where there are shared facilities within a shopping mall etc. and supplies take place in a space dedicated to the consumption of food and beverages. Where the facilities are not under the direct control of the supplier of the food and beverages, but its signage is used and it appears to offer services equivalent to those that the average consumer can find within the fast food establishment of the same brand, it is conceivable that the provision of the food court with adequate service would lead to the need to qualify the supply as a restaurant and catering service, even if the facilities are shared with other retailers.

The AG concluded by qualifying that the concept of 'food' covers the provision of food, for immediate consumption, away from the supplier's premises. Therefore, the sale of dishes, prepared in such terms as those at issue in the main proceedings, in fast food establishments, which the customer decides to take with him and not to consume within the facilities available and ‘managed’ (within the constraints discussed above) by the supplier does not constitute a restaurant service, but a delivery of food that can be taxed at a reduced rate of VAT.

*Comments: Whilst we await to see whether the CJEU follows the AG's opinion, it does appear to be in line with the UK's VAT treatment of similar supplies in that certain food sold for take away qualifies for zero-rating whilst similar items sold for consumption within provided facilities/premises are considered to be catering services and subject to VAT at the standard-rate. The AG has provided some qualifying views regarding facilities provided in food halls/malls and ‘drive-throughs’, businesses should consider whether current VAT accounting is in line with the AG's opinion.*