“Eppur si muove” (on public televisions and VAT, case C-21/20)

Francisco Javier Sánchez Gallardo

FACTS

In today's judgment, 16-9-2021, C-21/20, Balgarska natsionalna televizia, the ECJ has ruled on the right to deduct input VAT on **activities mainly financed from public budgets (susidies).**

The BNT was a legal entity, a national public provider of audiovisual communication services, in accordance with its specific regulations, to all Bulgarian citizens.

BNT did not receive any remuneration from its viewers. Its activity was financed through a subsidy from the state budget, intended for the preparation, creation and dissemination of national and regional broadcasts, the amount of which is determined on the basis of a lump sum per hour of programming, approved by the Council of Ministers. In addition, BNT received other grants for its fixed assets.

BNT's activity was also financed with its own income from advertising and sponsors, income from complementary activities related to television activity, donations and bequests, interest and other income related to television activity.

With this background, what has been discussed has been the scope of the right to deduction.

REASONING (I)

1st. The first question analysed was whether, according to Dir 2006/112 art.2(1)(c), the activity of a national public television provider that consists of providing viewers with audiovisual communication services, which is financed by the State by means of a subsidy and that does not give rise to the payment by viewers of any fee for television broadcasting, constitutes a **provision of services carried out for consideration.**

For this purpose, the ECJ has resorted to the so-called **direct link doctrine**, which characterizes **onerous operations** for these purposes, understanding that this is the case when there is a legal relationship between the person providing the service and the recipient within which reciprocal benefits are exchanged and the remuneration received by the person providing the service constitutes the effective value of an individualizable service provided to the beneficiary (judgments of 8-3-1988, Apple and Pear Development Council, C-102/86, 22-6-2016, Český rozhlas, C- 11/15, and of 22-11-2018, MEO - Serviços de Comunicações e Multimédia, C-295/17, among others).

REASONING (II)

Based on the judgment of 22-6-2016, Český rozhlas, C-11/15 (although this referred to a different financing system, based on a fee for the ownership of television and radio sets), the ECJ has understood that within the framework of the provision of said services, the aforementioned provider and viewers were not bound by a contractual relationship in which a price had been agreed, nor by a legal commitment freely agreed. Likewise, the access of the viewers themselves to the audiovisual communication services provided by the provider was free and the activity in question generally benefited all potential viewers.

The **subsidy**, like the subsidized activity, is **independent of the effective use**, by the viewers, of the audiovisual communication services provided, **of the identity or even of the specific number of viewers for each program.**

REASONING (III)

The situation is **not comparable**, then, with the one that gave rise to the judgment of 27-3-2014, Le Rayon d'Or, C-151/13, as the ECJ itself points out, since **it does not exist** between the State, which pays the subsidy, and the viewers, who enjoy the services, a **relationship analogous** to that between a sickness fund and its insured. Indeed, these services do not benefit people who can be clearly identified, but all potential viewers. Furthermore, the amount of the subsidy is determined on the basis of a statutory lump sum per programming hour, without taking into account the identity and number of users of the service provided.

Based on the foregoing considerations, it has been concluded that the activity of a national public television provider that consists of providing audiovisual communication services to viewers, which is financed by the State through a subsidy and does not give rise to payment by the viewers of any fee for television broadcasting, does not constitute a provision of services made for consideration for VAT purposes.

The possible application of the exemption of the services provided has been ruled out, once their consideration as onerous has been excluded.

REASONING (IV)

Finally, the scope of the **right to deduct** input VAT has been studied, determining whether according to Dir 2006/112 art.168, a national public television provider is entitled to deduct, in whole or in part, borne VAT by acquisitions of goods and services used for the needs of activities that generate the right to deduction and activities not included in the scope of application of VAT.

Based on the relevance of the right to deduction in the correct functioning of the VAT and in the neutrality of the tax, the ECJ has recalled that in order to deduct the input VAT, it is necessary, on the one hand, that the interested party be a "taxable person" to the effects of VAT and, on the other hand, that the goods or services invoked as the basis of this right are used by the taxpayer for the needs of their own taxed operations.

When the goods acquired or the services obtained by the taxable person are related to exempt **operations or that are not included in the scope of application of VAT**, the input tax will not be eligible for deduction (judgments of 14-9-2017, Iberdrola Inmobiliaria Real Estate Investments, C-132/16, and of 3-7-2019, The Chancellor, Masters and Scholars of the University of Cambridge, C - 316/18).

REASONING (V)

Therefore, what justifies the **deduction** of input VAT is the **use** of the goods and services acquired for **taxable operations**. In other words, the method of financing such acquisitions, whether through income from economic activities or subsidies obtained from the State budget, is irrelevant for determining the right to deduct (para. 52).

Located within the economic activities, the execution of exempt operations together with others, not exempt, lead to the application of the pro rata rule, Dir 2006/112 articles 173 to 175, according to reiterated jurisprudence.

The foregoing does not imply that the right to deduct is full. Thus, the VAT corresponding to expenses related to activities that, given their non-economic nature, are not included within the scope of the VAT Directive, are not deductible.

REASONING (IV)

In the case of **mixed activities**, **within and outside the concept of economic activity**, the determination of the methods and criteria for the distribution of input VAT between economic activities and non-economic activities belongs to the **scope of the discretion of the Member States**, taking into account the purpose and structure of the Directive and establishing a calculation method that objectively reflects the part of the expenses incurred that is actually **attributable** to each of these two activities (judgments of 6-9-2012, Portugal Telecom, C -496/11, and of 25-7-2018, Gmina Ryjewo, C - 140/17), in order to guarantee that the deduction is only made with respect to the part of the VAT proportional to the amount corresponding to the operations with right to deduction (judgments of 03-13-2008, Securenta, C - 437/06, and of 11-12-2020,Sonaecom, C-42/19).

In exercising this discretion, the Member States are authorized to apply any appropriate distribution criterion, such as an apportionment criterion that takes into account the nature of the operation, without being obliged to limit themselves to a single particular method (judgment of 13 -3-2008, Securenta, C-437/06).

CONCLUSION

According to art.168 of the VAT Directive, the national public television provider is empowered to deduct the VAT borne by acquisitions of goods and services used for the needs of activities that generate the right to deduction and is not empowered to deduct the VAT borne by acquisitions of goods and services used for the needs of its activities not included in the scope of application of VAT. It is the responsibility of the Member States to determine the methods and criteria for the distribution of input VAT quotas between operations subject to tax and operations that are not included in the scope of VAT, taking into account the purpose and structure of this Directive within respect for the principle of proportionality.

RELATED TOPICS (I)

1st. **Far from being new**, the issue now resolved had already been analysed by the ECJ on other occasions.

According to settled jurisprudence (judgments of 6-10-2005, Commission vs. Spain, C-204/03, or Commission vs. France, C-243/03, 23-4-2009, PARAT Automotive Cabrio, C-74/08, or 2-16-2012, Varzim Sol, C-25/11), the receipt of subsidies by itself cannot limit the taxpayers' right to deduct.

Ultimately, the issue now analysed refers to the same problem, activities financed with public subsidies and their possible limitation of the right to deduction, which is now admitted. It will not be a change of criteria, but it looks a lot like it.

RELATED TOPICS (II)

2nd. The ECJ analyses the issue from a different perspective, since it starts from the premise that **there is a non-economic activity**, from which it draws the conclusion that we have just exposed. This has **two different aspects**:

a) Determining **who the BNT's clients are**, the individuals who attend the programs or the public authorities that finance them. From a hasty reading of the judgments of 29-10-2015, Saudaçor, C-174/14, or 22-2-2018, C-182/17, and even that of 27-3-2014, Le Rayon d'Or , C-151/13, to which reference is made in today's judgment to rule out its equivalence, it could be concluded that, since there is a legal link between BNT and the State that finances its expenses, there is an onerous provision of services to the VAT effects, with all that this implies. This does not seem to be the conclusion of the ECJ, which rather understands that there is a public service made available to all citizens financed with public funds. The distinction between this situation and the one analysed in the judgments that we have just mentioned should reasonably be made on a case-by-case basis. It does not seem like a simple question.

RELATED TOPICS (III)

2nd. b) Underlying the above is **the very concept of activity**, since precisely because public programming is classified as an activity and it is understood that it is not economic as it does not include onerous operations, the ECJ reaches the conclusion we are commenting on. Nor does it seem easy to establish the criteria to determine when there is an activity that, as such, justifies the denial of the right to deduction and when there are public funds that finance the entire economic activity. Presumably, elements such as the differentiation in the activities themselves, the distinction of the engaged material and human resources, the goods and services offered in their development, etc. could be relevant elements for these purposes.

3rd. Ultimately, underlying this ruling is the **tension** between the **tax authorities**, VAT collectors, and **the rest of the public bodies**, which assume it as an expense when it is not deductible.

The VAT Directive is not clear in its criteria and the nuances that the ECJ introduces in its jurisprudence are not helpful either.