Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

15 April 2021 *

(Reference for a preliminary ruling – Direct insurance other than life assurance – Second Directive 88/357/EEC – Second indent of Article 2(d) – Directive 92/49/EEC – First subparagraph of Article 46(2) – Taxation of insurance premiums – Concept of 'Member State where the risk is situated' – Vehicles of any type – Concept of 'Member State of registration' – Insurance of sea-going vessels – Ships entered in the shipping register maintained by one Member State but flying the flag of another Member State or of a third State under a temporary flagging-out authorisation)

In Case C-786/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Finance Court of Cologne, Germany), made by decision of 22 February 2019, received at the Court on 23 October 2019, in the proceedings

The North of England P & I Association Ltd, as successor in law to Marine Shipping Mutual Insurance Company,

v

Bundeszentralamt für Steuern,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, N Wahl, F. Biltgen, L.S. Rossi and J. Passer, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– The North of England P & I Association Ltd, as successor in law to Marine Shipping Mutual Insurance Company, by C. Möser and U. Grünwald, Rechtsanwälte,

– the German Government, by J. Möller and D. Klebs, acting as Agents,

* Language of the case: German.

– the European Commission, by W. Mölls, D. Triantafyllou and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second indent of Article 2(d) of Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (OJ 1988 L 172, p. 1), and of the first subparagraph of Article 46(2) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC ('third non-life insurance directive') (OJ 1992 L 228, p. 1).

2 The request has been made in proceedings between The North of England P & I Association Ltd ('P & I'), an insurance company established in the United Kingdom, and the Bundeszentralamt für Steuern (Federal Central Tax Office, Germany) ('the BZS') concerning a notice seeking payment of tax on insurance premiums paid with respect to the provision of insurance cover by P & I for various risks linked to the operation of sea-going vessels entered in the shipping register maintained by the Federal Republic of Germany but flying the flag of another Member State or of a third State under a temporary flagging-out authorisation.

Legal context

International law

3 The United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982 ('the Montego Bay Convention') came into force on 16 November 1994. It was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

4 Article 90 of that convention, headed 'Right of navigation', provides that 'Every State, … has the right to sail ships flying its flag on the high seas'.

5 Article 91(1) of that convention, that article being headed 'Nationality of ships', states:

'Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.'

6 Article 92(1) of the Montego Bay Convention, that article being headed 'Legal status of ships', states:

'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. …'

7 Article 94 of that convention, headed 'Duties of the flag State', states:

'1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size;

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea …

…'

European Union law

Second Directive 88/357

8 Article 2(d) of Second Directive 88/357 provided:

'For the purposes of this Directive:

…

(d) "Member State where the risk is situated" means:

– the Member State in which the property is situated, where the insurance relates either to buildings or to buildings and their contents, in so far as the contents are covered by the same insurance policy,

– the Member State of registration, where the insurance relates to vehicles of any type,

– the Member State where the policyholder took out the policy in the case of policies of a duration of four months or less covering travel or holiday risks, whatever the class concerned,

– the Member State where the policyholder has his habitual residence or, if the policyholder is a legal person, the Member State where the latter's establishment, to which the contract relates, is situated, in all cases not explicitly covered by the foregoing indents.'

Directive 92/49

9 Recitals 1, 2 and 30 of Directive 92/49 stated:

'(1) … it is necessary to complete the internal market in direct insurance other than life assurance from the point of view both of the right of establishment and of the freedom to provide services, to make it easier for insurance undertakings with head offices in the [European Union] to cover risks situated within the [European Union];

(2) … [Second Directive 88/357] has already contributed substantially to the achievement of the internal market in direct insurance other than life assurance by granting policyholders who, by virtue of their status, their size or the nature of the risks to be insured, do not require special protection in the Member State in which a risk is situated, complete freedom to avail themselves of the widest possible insurance market;

…

(30) … some Member States do not subject insurance transactions to any form of indirect taxation, while the majority apply special taxes and other forms of contribution, including surcharges intended for compensation bodies; … the structures and rates of such taxes and contributions vary considerably between the Member States in which they are applied; … it is desirable to prevent existing differences leading to distortions of competition in insurance services between Member States; … pending subsequent harmonisation, application of the tax systems and other forms of contribution provided for by the Member States in which risks are situated is likely to remedy that problem and it is for the Member States to make arrangements to ensure that such taxes and contributions are collected'.

10 The first subparagraph of Article 46(2) of Directive 92/49 provided:

'Without prejudice to any subsequent harmonisation, every insurance contract shall be subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State in which the risk is situated as defined in Article 2(d) of [Second Directive 88/357] …'

Directive 2009/138

11 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1), as amended by Directive 2012/23/EU of the European Parliament and of the Council of 12 September 2012 (OJ 2012 L 249, p. 1) ('Directive 2009/138'), repealed Second Directive 88/357 and Directive 92/49 as from 1 January 2014.

12 Article 13(13)(b) of Directive 2009/138 states that the 'Member State in which the risk is situated' is defined as the 'Member State of registration, where the insurance relates to vehicles of any type'.

13 Article 13(14) of that directive is worded as follows:

'For the purposes of this Directive, the following definitions shall apply:

…

(14) "Member State of the commitment" means the Member State in which either of the following is situated:
(a) the habitual residence of the policy holder;
(b) if the policy holder is a legal person, that policy holder's establishment, to which the contract relates.'

14 Article 157(1) of Directive 2009/138, that article being headed 'Taxes on premiums', provides that 'without prejudice to any subsequent harmonisation, every insurance contract shall be subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State in which the risk is situated or the Member State of the commitment'.

15 However, at the material time in the main proceedings, Second Directive 88/357 and Directive 92/49 remained applicable, and consequently the answer to the request for a preliminary ruling must relate solely to those directives.

German law

The VersStG

16 Paragraph 1 of the Versicherungssteuergesetz (Law on insurance tax) of 10 January 1996 (BGBl. I, p. 22) ('the VersStG') provides:

'(1) Tax shall be payable on insurance premiums paid on the basis of an insurance relationship resulting from a contract or from some other source.

(2) If the insurance relationship is with an insurer who is established in the territory of the Member States of the [European Union] or of other signatory States to the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3)], liability to tax shall arise, where the policyholder is a natural person, only if, at the time he pays the insurance premium, he has his domicile or habitual residence in the territory in which the present law applies, or, where the policyholder is not a natural person, if, at the time the premium is paid, the undertaking, permanent establishment or equivalent site to which the insurance relationship relates is located in the territory in which the present law applies. The tax liability is also conditional, where the following are insured:

…

2. risks related to vehicles of any type, provided the vehicle is entered in an official or officially recognised register in the territory in which the present law applies and has an identification number;

…'

The SchRegO

17 Paragraph 1(1) of the Schiffsregisterordnung (Regulation governing registers of ships), in the version applicable in the main proceedings ('the SchRegO'), provides that registers of ships are to be maintained by the Amtsgerichte (district courts, Germany).

18 Paragraph 3(2) of the SchRegO provides that merchant vessels and other vessels intended for seafaring (seagoing vessels) are to be entered in the shipping register, when they are required or entitled to fly the German flag under Paragraph 1 or Paragraph 2 of the Gesetz über das Flaggenrecht der Seeschiffe und die Flaggenführung der Binnenschiffe (Flaggenrechtsgesetz) (Law on the right of seagoing and inland waterway vessels to fly the flag (Law on the right to fly the flag), in the version applicable to the main proceedings ('the FlaggRG').

19 The first sentence of Paragraph 10(1) of the SchRegO states that the owner of a sea-going vessel must register such a vessel where the ship is required to fly the German flag under Paragraph 1 of the FlaggRG.

20 Paragraph 14(1) of the SchRegO provides that a vessel may not be registered in a German shipping register while it is registered in a foreign shipping register.

21 If authorisation is granted for a vessel to flag out, Paragraph 17(2) of the SchRegO imposes the obligation to record in the shipping register the prohibition on exercising the right to fly the German flag and the duration of that prohibition and provides that, if that authorisation is withdrawn, an application must be made to the shipping register for authorisation again to exercise the right to fly the German flag.

The FlaggRG

22 Paragraph 1(1) of the FlaggRG provides that all merchant vessels and other vessels intended for seafaring (seagoing vessels) whose owners are German nationals and are domiciled in the territory coming within the scope of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) are required to fly the German flag.

23 Paragraph 6(1) of the FlaggRG provides that seagoing vessels which are required to fly the German flag under Paragraph 1 of that law are not authorised to fly other flags as their national flag.

24 Under Paragraph 7(1)(1) of the FlaggRG, the Bundesamt für Seeschifffahrt und Hydrographie (Federal Maritime and Hydrographic Agency, Germany; 'the BSH') may, in certain circumstances, on the application of the owner or the operator of a sea-going vessel entered in the shipping register, grant, for a maximum period of two years and subject to certain conditions, a revocable authorisation to fly, instead of the German flag, another national flag the flying of which is permitted by the applicable foreign law, without prejudice to rights and obligations under EU law.

25 Under Paragraph 7a(3) of the FlaggRG, for the duration of the period that an authorisation to flag out is valid a vessel may not fly the German flag.

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

26 P & I is an insurance company established in the United Kingdom, which offers marine insurance worldwide and which, since 2 November 2011, is the successor in law of the Marine Shipping Mutual Insurance Company, the undertaking that concluded the insurance contracts at issue in the main proceedings.

27 Those contracts were concluded with 14 companies and provide insurance cover for various risks linked to the operation of sea-going vessels owned by those companies. Those contracts concern, in particular, civil liability, legal protection, so-called 'casco' insurance cover (various kinds of damage to ships) and war risks.

28 Those companies are established in Germany and are entered in the register of companies maintained by the Amtsgericht Hamburg (District Court, Hamburg, Germany) as limited liability companies governed by German law (GmbH).

29 The sea-going vessels concerned are all entered in the shipping register maintained by the Amtsgericht Hamburg (District Court, Hamburg).

30 The shipping undertaking whose business is the management of those 14 companies and whose fleet includes all the seagoing vessels at issue in the main proceedings, as well as bareboat charterers established in Liberia and Malta, are also parties to the insurance contracts at issue in the main proceedings, as policyholders or co-insured.

31 Under Paragraph 7(1) of the FlaggRG, the BSH authorised the ships of the companies concerned in the main proceedings to fly a national flag other than the German flag, namely the flag of Malta or the flag of Liberia. During the flagging-out period, those vessels remained registered, however, in the German shipping register.

32 Under the insurance contracts at issue in the main proceedings, P & I received payment in the form of insurance premiums which were not declared in Germany for the purposes of the insurance tax.

33 Following a tax inspection carried out in 2012, the BZS issued a notice for recovery of tax, dated 11 November 2014, claiming from P & I, in respect of the month of December 2009, payment of insurance tax amounting to EUR 13 374.57.

34 By decision of 15 January 2016, the BZS dismissed the objection made by P & I to that notice for recovery of tax.

35 P & I then brought an action before the referring court challenging that decision, claiming, inter alia, that the insurance premiums at issue in the main proceedings are not taxable in Germany since the risks associated with the ships insured are not situated in that Member State.

36 P & I considers, in that regard, that the State of registration, referred to in the second indent of Article 2(d) of Second Directive 88/357, which has the power to tax those insurance premiums, is the State that has certified that the ship concerned is fit for use. More specifically, that is the State whose flag is flown by the ship, since it is that State that determines the quality standards to be met by ships flying its flag and which therefore bears responsibility for the risk constituted by those ships.

37 The BZS contends, on the other hand, that the payment of insurance premiums at issue in the main proceedings is taxable in Germany, since it is apparent from point 2 of the second sentence of Paragraph 1(2) of the VersStG that the German legislature correctly transposed the second indent of Article 2(d) of Second Directive 88/357 by connecting liability to pay the insurance tax not to the 'registration' of the ship concerned, in the sense of the official grant of authorisation for its operation, but to the fact of it being entered in an official register and the attribution to that ship of an identification number. Only the shipping register whose essential function is to prove ownership of the ship concerned can constitute such an official register.

38 The referring court considers that, applying exclusively the domestic law and, in particular, Paragraph 1(2) of the VersStG, the insurance premiums collected by P & I should be taxed in Germany since, inter alia, the sea-going vessels at issue in the main proceedings are registered in Germany in an 'official or officially recognised register' within the meaning of that provision, namely the shipping register.

39 However, that court is uncertain whether, with respect to insurance relating to 'vehicles of any type', referred to in the second indent of Article 2(d) of Second Directive 88/357, the '*Zulassungsmitgliedstaat*', namely the Member State of certification' or 'the Member State of registration', that concept not being defined, could refer to the State whose flag is flown by the ship, namely the State that determines the legal rules applicable to the operation of a sea-going vessel in the general course of trade and, and therefore, the conditions governing use of that ship.

40 Last, the referring court seeks to ascertain, with reference to the case-law of the Court (judgments of 14 June 2001, *Kvaerner*, C-191/99, EU:C:2001:332, and of 17 January 2019, *A*, C-74/18, EU:C:2019:33), to what extent it is possible, when interpreting the second indent of Article 2(d) of Second Directive 88/357, to rely solely on the entering of a vehicle in a register while not taking any account of the certification of that vehicle as fit for use.

41 In those circumstances, the Finanzgericht Köln (Finance Court, Cologne, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the second indent of Article 2(d) of [Second Directive 88/357], read in conjunction with the first clause of Article 25(1) [of that directive] and/or Article 46(2) of [Directive 92/49] to be interpreted, with regard to the determination of the Member State where the risk is situated, as meaning that, in the case of insurance cover for risks associated with the operation of a seagoing vessel, the State concerned is the State in whose territory a seagoing vessel is entered in an official register for the purposes of proof of ownership, or the State whose flag is flown by that vessel?'.

Consideration of the question referred

42 By its question, the referring court seeks, in essence, to ascertain whether the first subparagraph of Article 46(2) of Directive 92/49, read together with the second indent of Article 2(d) of Second Directive 88/357, must be interpreted as meaning that, when insurance contracts concern the provision of insurance cover for risks linked to the operation of sea-going vessels that are entered in the shipping register maintained by a Member State but that fly the flag of another Member State or of a third State under a temporary flagging-out authorisation, the State that must be considered to be the 'Member State of registration' of the ship concerned and, therefore, as the 'Member State where the risk is situated', within the meaning of those provisions, holding the

exclusive power to tax premiums paid with respect to those insurance contracts, is the Member State that maintains the shipping register in which the primary purpose of entering the ship is to prove ownership of that ship, or is the Member State or third State whose flag that ship flies.

43 It is apparent from reading together the first subparagraph of Article 46(2) of Directive 92/49 and the second indent of Article 2(d) of Second Directive 88/357 that, when an insurance contract relates to 'vehicles of any type', the contract is 'subject exclusively to the indirect taxes and parafiscal charges on insurance premiums' in the 'Member State of registration' of the vehicle concerned since that State is considered to be the 'Member State where the risk is situated'.

44 The peculiarity of the main proceedings resides in the fact that the ships in question were entered in the shipping register maintained by the Amtsgericht Hamburg (District Court, Hamburg) and continue to be registered there, even though, following the grant of flagging-out authorisation made by BSH, which is the responsible German authority, those ships temporarily fly the flag of another Member State or of a third State.

45 It is in that exceptional situation that the question arises whether the 'Member State of registration' within the meaning of the second indent of Article 2(d) of Second Directive 88/357, and, therefore, the 'Member State where the risk is situated', within the meaning of the first subparagraph of Article 46(2) of Directive 92/49, is the State which maintains the shipping register in which the primary purpose of entering the ship concerned is to prove ownership of that ship, or rather the State whose flag is flown by that ship, where that ship can also be entered in a register.

46 As a preliminary matter, it must be recalled, first, that the Court has previously held that, as EU law currently stands, it is for the Member States to determine, in accordance with the general rules of international law, the necessary conditions to permit the registration of ships in their registers and to grant to those ships the right to fly their flag, and that, in the exercise of that power, the Member States must have due regard to the rules of EU law (see, to that effect, judgment of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraphs 13 and 14), though, in accordance with Article 91(1) of the Montego Bay Convention, which the Court has jurisdiction to interpret (judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349, paragraph 46 and the case-law cited), there must exist a 'genuine link' between the State and the ships concerned, whether for the purposes of their registration in the territory of that State or for the grant of the right, or option, for those ships to fly the flag of that State.

47 Second, it must be stated that the Member State which has the power to tax the insurance premiums under the combined provisions of the first subparagraph of Article 46(2) of Directive 92/49 and the second indent of Article 2(d) of Second Directive 88/357 is the Member State in the territory of which the vehicle is registered on the date of payment of those premiums and not the Member State in the territory of which the vehicle was registered when the insurance contract was concluded, since a 'dynamic' interpretation of those provisions must be adopted (see, to that effect, judgment of 21 February 2013, *RVS Levensverzekeringen* (C-243/11, EU:C:2013:85, paragraph 53).

48 As regards the interpretation of the concept of 'Member State of registration', within the meaning of the second indent of Article 2(d) of Second Directive 88/357, in accordance with settled case-law, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given

an independent and uniform interpretation throughout the European Union, having regard not only to the wording of that provision but also to the context of the provision and the objective pursued by the legislation of which it forms part (see, to that effect, inter alia, judgments of 21 February 2013, *RVS Levensverzekeringen*, C-243/11, EU:C:2013:85, paragraph 23, and of 19 December 2013, *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 42 and the case-law cited). The legislative history of a provision of EU law might also, as stated, in particular, by the European Commission, be of relevance to its interpretation (judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 37 and the case-law cited).

49 It is clear that the concept of 'Member State of registration', within the meaning of the second indent of Article 2(d) of Second Directive 88/357, has not been defined by the EU legislature and that that provision makes no express reference to the law of the Member States for the purpose of determining its meaning and scope. That concept must, therefore, be given an autonomous and uniform interpretation.

50 In this instance, that uniform interpretation is all the more important when the sole objective of that provision is to identify the Member State which has the exclusive power to tax insurance premiums under the first subparagraph of Article 46(2) of Directive 92/49.

51 As regard, first, the wording of the second indent of Article 2(d) of Second Directive 88/357, the doubts experienced by the referring court as regards the interpretation of that provision are due, in particular, to the ambiguity inherent in the German language version of that provision, in that that version uses the term '*Zulassungsmitgliedstaat*' which, depending on the context in which the term is used, refers either to the Member State of registration of the vehicle or to the Member State that certifies that vehicle as fit for use or authorises its operation.

52 P & I relies on the term '*Zulassungsmitgliedstaat*' in the sense of the Member State that certifies the vehicle as fit for use or authorises its operation in support of its claim that the concept of 'Member State of registration', within the meaning of the second indent of Article 2(d) of Second Directive 88/357, should be understood as the State which certifies the vehicle, in this case a ship, as fit for use or authorises its operation, as attested by its registration. Since, unlike other vehicles such as motor vehicles, motorcycles or airplanes, there is no legislation at EU level on the certification of ships as fit for use or authorisation of their operation, P & I claims that reference should be made to the State whose flag is flown by the ship, since it is that State that lays down the rules and standards applicable to the use of that ship, which is linked to the risk attached to the ship when it is being used.

53 However, as also noted by the Advocate General in point 49 of his Opinion, all language versions of the second indent of Article 2(d) of Second Directive 88/357 other than the German language version use either the concept of Member State 'of registration' or the concept of Member State 'where entered in a register'.

54 In accordance with settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given preference over other language versions (judgment of 12 September 2019, *A and Other*s, C-347/17, EU:C:2019:720, paragraph 38 and the case-law cited).

55 In that regard, it must be observed that the term '*Zulassungsmitgliedstaat*', understood in one of its two senses, namely the sense of being the Member State of registration or where entered in a register, is consistent with the terminology used in all other language versions of the second indent of Article 2(d) of Second Directive 88/357.

56 The fact that, for ships, unlike other vehicles that are the subject of that provision, there does not exist any legislation at EU level on such certification as fit for use or authorisation of operation also militates against an interpretation of that provision as referring to the Member State of such certification or authorisation.

57 Accordingly, from the perspective of examining solely the wording of the second indent of Article 2(d) of Second Directive 88/357, it must be held that that provision, construed in the light of all the language versions, refers to the Member State of registration of that ship or where it is entered in a register, rather than to the Member State of its authorisation or certification as fit for use, which only the German language version of that provision might be capable of sustaining by virtue of one of the two senses of the term '*Zulassungsmitgliedstaat*'.

58 It must be added that, as they are usually understood, the concepts of where a ship is 'registered' or 'entered in a register' are interchangeable for the purposes of the second indent of Article 2(d) of Second Directive 88/357, as is apparent moreover from the various language versions of that provision, other than the German language version, which, as stated above in paragraph 53 of the present judgment, use one or other of those two concepts.

59 That said, and again in relation to only the wording of the second indent of Article 2(d) of Second Directive 88/357, it does not a priori appear to be inconceivable that the concepts of 'Member State of registration' or 'Member State where entered in a register' might also encompass, in addition to the State which maintains the register in which the ships are registered for the purposes of proving ownership of those ships and, in some case, other rights *in rem* registered against those ships, including securities over those ships, the State whose flag the ship flies, given that it is also the case that, as provided by Article 94(2)(a) of the Montego Bay Convention, every State is obliged to enter the ships flying its flag in the national flag register.

60 As regards, second, the legislative history of the second indent of Article 2(d) of Second Directive 88/357, it must be observed that the initial proposal of the Commission, submitted on 30 December 1975 (COM(1975) 516 final) (OJ 1976 C 32, p. 2), which gave rise to that directive, provided that the 'Member State where the risk is situated' should be understood as being either 'the Member State of registration, where insurance covers land vehicles' or 'the Member State in which the policy-holder habitually resides, in so far as he is the owner of the vehicle, has a financial interest therein, or operates the said vehicle, or failing this, the Member State in which the vehicle is registered, where the insurance covers railway rolling stock, aircraft or sea, lake, river and canal vessels'.

61 In the amended proposal for a directive, of 16 February 1978 (COM(1978) 63 final), those two connecting criteria had been retained but their order was reversed, so that the connection to the Member State of habitual residence of the policy-holder was applicable only in the situation covered by the default criterion of the vehicle not being registered.

62 As regards the final version of the second indent of Article 2(d) of Second Directive 88/357, mention is made only of the 'Member State of registration', and that with respect to all vehicles, including ships.

63 While the criterion of connection to the Member State of habitual residence or where the policy-holder is established to be found in the residual rule in the last indent of Article 2(d) of Second Directive 88/357, that rule is not applicable to insurance relating to vehicles of any type, since that insurance is specifically referred to in the second indent of that provision. Accordingly, that residual rule has no direct effect on the interpretation of the wording used in the second indent of that provision.

64 The fact remains, as submitted by the Commission, that the legislative history of the second indent of Article 2(d) of Second Directive 88/357 seems to be capable of suggesting that the criterion of connection to the 'Member State of registration' refers by implication to the link that exists between a person or a company that has a right of property in the ship concerned or a financial interest in that ship and the State which maintains the shipping register in which that ship is entered, as evidence of the ownership of that ship.

65 However, it must be acknowledged that the legislative history of that provision can also be construed as meaning that the fact that the EU legislature ultimately adopted the single criterion of connection to the 'Member State of registration' suggests that the alternative criterion referring to where the policy–holder who is the owner of the vehicle concerned, who has a financial interest in that vehicle or who is the operator of that vehicle is habitually resident, should be of no relevance in relation to the second indent of Article 2(d) of Second Directive 88/357, but relevant at most in relation to the last indent of that provision.

66 Accordingly, that legislative history does not allow any conclusion as to which interpretation should be adopted of the concept of the 'Member State of registration', within the meaning of the second indent of Article 2(d) of Second Directive 88/357.

67 As regards, last, the context and objectives of the provisions of the first subparagraph of Article 46(2) of Directive 92/49 and the second indent of Article 2(d) of Second Directive 88/357, it must be recalled that it is clear from Article 2(d) of the latter directive that the EU legislature intended to propose, for all types of insured risks, a solution enabling the State where the risk is situated to be determined on the basis of concrete and physical, rather than legal, criteria. The aim was that there should be a concrete factor corresponding to each risk which would allow it to be located in a specific Member State (judgment of 14 June 2001, *Kvaerner*, C-191/99, EU:C:2001:332, paragraph 44).

68 By virtue, for example, of the second indent of Article 2(d) of Second Directive 88/357, if the contract relates to a vehicle, the Member State where the risk is situated is the Member State in which that vehicle is registered, even if that is not the Member State in which that vehicle is used (see, to that effect, judgment of 14 June 2001, *Kvaerner*, C-191/99, EU:C:2001:332, paragraph 45).

69 Further, in the light of recital 30 of Directive 92/49, it appears that the aim of the first subparagraph of Article 46(2) of that directive is to reduce the risk that differences in the structure and rates of indirect taxes on insurance transactions might result in distortion of competition between Member States as regards insurance services (see, to that effect, judgment of 14 June 2001, *Kvaerner*, C-191/99, EU:C:2001:332, paragraph 49).

70 The decision to choose the place where the risk is situated as the criterion for determining the State having the power to tax is apt to eliminate distortion of competition between the undertakings of different Member States offering insurance services (judgment of 14 June 2001, *Kvaerner*, C-191/99, EU:C:2001:332, paragraph 50).

71 That choice also allows both the danger of double taxation and the possibility of tax avoidance to be ruled out, since there is an establishment, and therefore a Member State, corresponding to each risk (see, to that effect, judgment of 14 June 2001, *Kvaerner*, C-191/99, EU:C:2001:332, paragraph 51).

72 It follows that the interpretation of the provisions of the first subparagraph of Article 46(2) of Directive 92/49 and of the second indent of Article 2(d) of Second Directive 88/357 must take due account of the objective of eliminating distortion of competition between the undertakings of different Member States offering insurance services, which implies ruling out the danger both of double taxation and of tax avoidance, by preferring an interpretation which ensures that the risk concerned is located in a single Member State and which relies on an understanding of the criterion for the location of the risk that is based on concrete and physical factors, rather than on legal criteria.

73 The question that arises, therefore, having regard to the objectives of those provisions, is whether it follows therefrom that the concept of 'Member State of registration', within the meaning of the second indent of Article 2(d) of Second Directive 88/357, must be interpreted as referring to the Member State which maintains a register, such as the shipping register, in which ships are entered for the purpose of identifying them as the property of their owners, who are responsible for those ships, or rather the State whose flag those ships fly, that State being a State which, under Article 94 of the Montego Bay Convention, 'shall maintain a register of ships containing the names and particulars of ships flying its flag', 'shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships', and is to take 'measures … necessary to ensure safety at sea'.

74 As regards the objective of avoiding double taxation, it must be recalled that, as has already been stated in paragraph 46 of the present judgment, as EU law currently stands and in accordance with international law, each Member State must determine the necessary conditions governing the registration of ships in their territory and the grant to those ships of the right to fly their flag and therefore, governing whether those ships have its nationality, though, in accordance with Article 91(1) of the Montego Bay Convention, there must exist a 'genuine link' between the State and the ships in question.

75 It is therefore not inconceivable, in the absence of any harmonisation at EU level of the rules on the registration of ships, that a ship might be registered in more than one Member State provided that there exist genuine links between that ship and more than one Member State, which could lead to multiple taxation.

76 However, first, as stated by the Advocate General in point 75 of his Opinion, legislation in the majority of Member States precludes multiple registration that might lead to multiple taxation.

77 In this instance, Paragraph 14(1) of the SchRegO provides that a ship cannot be entered in a German shipping register while it is entered in a foreign shipping register.

78 Second, it is clear that Article 92(1) of the Montego Bay Convention provides that 'Ships shall sail under the flag of one State only', which, if the criterion of connection to the flag State were adopted for the purposes of the second indent of Article 2(d) of Second Directive 88/357, would be capable of precluding double registration and, therefore, double taxation.

79 In this instance, Paragraph 6(1) of the FlaggRG provides that sea-going vessels which must fly the German flag under Paragraph 1 of the FlaggRG are not permitted to fly other flags as their national flag.

80 That said, to have recourse to the flag State in order to locate the risk for the purposes of the second indent of Article 2(d) of Second Directive 88/357 fails to rule out the danger of tax avoidance, which is another objective of the first subparagraph of Article 46(2) of Directive 92/49 and the second indent of Article 2(d) of Second Directive 88/357, as is shown precisely by the case at issue in the main proceedings, where the ships concerned have been flagged out, albeit with the permission from the outset of the State in which those ships were and continue to be registered, and where another flag State has been chosen that has links with those ships that are manifestly less direct and concrete than has the Member State in which they are registered for the primary purpose of proving their ownership.

81 It follows, as also stated by the Advocate General in point 73 of his Opinion, that having recourse to the State which maintains the shipping register in which the ships are entered in order to locate the risk for the purposes of the second indent of Article 2(d) of Second Directive 88/357 best serves all the objectives of that directive, namely to avoid the risks of double taxation and tax avoidance.

82 Further, the concept of 'Member State of registration' within the meaning of the second indent of Article 2(d) of Second Directive 88/357, must also be interpreted having regard to the objective of that provision, mentioned above in paragraph 67 of the present judgment, that consists in determining the State where the risk is situated on the basis of concrete and physical criteria, so that there should be a concrete factor corresponding to each risk which would allow the risk to be located in a specific Member State (see, to that effect, judgment of 14 June 2001, *Kvaerner*, C-191/99, EU:C:2001:332, paragraph 44).

83 The shipping register, in that its primary purpose is to identify the owner of the ship registered in it, the owner being the person primarily responsible for the risks linked to that ship and its operation, which is why the owner takes out an insurance contract providing cover for those risks in order to protect his or her financial interests in that ship, makes it possible to locate the risks linked to that ship in a specific Member State on the basis of a concrete and physical factor, namely the link that exists between the owner of that ship and the Member State in which that ship is registered, which can be further defined, in some cases, as the Member State of which that owner is a national and/or in which that owner is resident or is established.

84 Such a connecting criterion also makes it possible to encompass complex situations which are common in the area of maritime insurance, as witnessed in the main proceedings, in that maritime insurance necessitates providing cover for very diverse risks arising from the operation of ships and the involvement of shipping companies and bareboat charterers.

85 Moreover, that criterion can be applied uniformly to 'vehicles of any type', such as those referred to in the second indent of Article 2(d) of Second Directive 88/357.

86 Conversely, as also observed by the Commission, there is not a priori any concrete and direct connection between the State whose flag the ship flies and the responsibility for the risk linked to the ship that makes it possible to locate that risk in the territory of that State.

87 While it is true that the State whose flag the ship flies is to exercise control over that ship and to take measures to ensure its safety at sea, those considerations do not, as such, have any bearing on the risk inherent in the use of that ship that is linked to its owner, who has the primary interest in insuring that ship in order to protect his or her financial interests in it.

88 Last, it must be recalled that, in order to identify the Member State where the risk is situated, within the meaning of Article 2(d) of Second Directive 88/357, it is necessary to identify, in particular, the precise activity whose risks are covered by the various insurance contracts at issue in the main proceedings (see, to that effect, judgment of 17 January 2019, *A*, C-74/18, EU:C:2019:33, paragraph 31).

89 As also stated, in essence, by the Advocate General in point 85 of his Opinion, it is clear, subject to verification by the referring court, that, in this instance, the location in Germany of the various risks linked to the operation of the ships concerned is confirmed by the fact that the insurance contracts at issue in the main proceedings, providing cover for those risks, as entered into by, in particular, the ship-owner companies who primarily bear responsibility for those ships and their operation, seem to have remained unaltered notwithstanding the temporary flagging-out of those ships.

90 In the light of all the foregoing, the answer to the question referred is that the first subparagraph of Article 46(2) of Directive 92/49, read together with the second indent of Article 2(d) of Second Directive 88/357, must be interpreted as meaning that, where insurance contracts concern the provision of cover for various risks linked to the operation of sea-going vessels which are entered in the shipping register maintained by a Member State but which fly the flag of another Member State or of a third State under a temporary flagging-out authorisation, the State that must be considered to be the 'Member State of registration' of the ship concerned and therefore, to be 'the Member State where the risk is situated', within the meaning of those provisions, holding the exclusive power to tax premiums paid with respect to those insurance contracts, is the Member State which maintains the shipping register in which the primary purpose of entering that ship is to prove ownership of that ship.

Costs

91 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 (Third Chamber) hereby rules:

The first subparagraph of Article 46(2) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC ('third non-life insurance directive'), read together with the second indent of Article 2(d) of Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, must be interpreted as meaning that, where insurance contracts concern the provision of cover for various risks linked to the operation of sea-going vessels which are entered in the shipping register maintained by a

Member State but which fly the flag of another Member State or of a third State under a temporary flagging-out authorisation, the State that must be considered to be the 'Member State of registration' of the ship concerned and therefore, to be 'the Member State where the risk is situated', within the meaning of those provisions, holding the exclusive power to tax premiums paid with respect to those insurance contracts, is the Member State which maintains the shipping register in which the primary purpose of entering that ship is to prove ownership of that ship.

[Signatures]