Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 June 2017*

(References for a preliminary ruling — Directive 2004/39/EC — Markets in financial instruments — Article 4(1)(2) — Definition of 'investment services' — point 1 of Section A of Annex I — Reception and transmission of orders in relation to one or more financial instruments — Potential inclusion of brokering with a view to concluding a portfolio management contract)

In Case C-678/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 10 November 2015, received at the Court on 16 December 2015, in the proceedings

Mohammad Zadeh Khorassani

v

Kathrin Pflanz,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, C. Vajda (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 16 November 2016,

after considering the observations submitted on behalf of:

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the Polish Government, by B. Majczyna, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and J. Dias Lopes and by M. Rebelo, acting as Agents,

— the United Kingdom Government, by D. Robertson and M. Holt and by V. Kaye, acting as Agents, assisted by B. Kennelly QC, and M. Gray, Barrister,

— the European Commission, by K.-P. Wojcik and I. Rogalski, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 8 February 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4(1)(2) of and point 1 of Section A of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

2 The request has been made in proceedings between Mr Mohammad Zadeh Khorassani and Ms Kathrin Pflanz concerning the brokering by the latter in connection with an asset management agreement concluded by Mr Khorassani and a third party.

Legal context

EU law

Directive 2004/39

3 Recitals 2, 20 and 31 of Directive 2004/39 read as follows:

‘(2) In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of these developments the legal framework of the Community should encompass the full range of investor-oriented activities. To this end, it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. In view of the preceding, [Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27)] should be replaced by a new Directive.

…

(20) For the purposes of this Directive, the business of the reception and transmission of orders should also include bringing together two or more investors thereby bringing about a transaction between those investors.

…

(31) One of the objectives of this Directive is to protect investors …’

4 Article 1(1) of Directive 2004/39 reads as follows:

‘This Directive shall apply to investment firms and regulated markets.’

5 Article 4(1)(1), (2), (4), (5), (9) and (16) of that directive provides:

‘1. For the purposes of this Directive:

(1) “investment firm” means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;

…

(2) “investment services and activities” means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;

…

(4) “investment advice” means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;

(5) “execution of orders on behalf of clients” means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients;

…

(9) “portfolio management” means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments;

…

(16) “limit order” means an order to buy or sell a financial instrument at its specified price limit or better and for a specified size.’

6 Article 21 of the same directive, entitled ‘Obligation to execute orders on terms most favourable to the client’, provides in paragraphs 1 to 3:

‘1. Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction.

2. Member States shall require investment firms to establish and implement effective arrangements for complying with paragraph 1. In particular Member States shall require investment firms to establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result in accordance with paragraph 1.

3. The order execution policy shall include, in respect of each class of instruments, information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution venue. …’

7 Section A of Annex I to that directive mentions by way of services and investment activities:

‘(1) Reception and transmission of orders in relation to one or more financial instruments.

(2) Execution of orders on behalf of clients.

(3) Dealing on own account.

(4) Portfolio management.

(5) Investment advice.

(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis.

(7) Placing of financial instruments without a firm commitment basis.

(8) Operation of Multilateral Trading Facilities.'

Directive 2006/73/EC

8 Recital 81 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2006 L 241, p. 26) states:

'Generic advice about a type of financial instrument is not investment advice for the purposes of Directive 2004/39/EC, because this Directive specifies that, for the purposes of Directive 2004/39/EC, investment advice is restricted to advice on particular financial instruments …'

9 The second paragraph of Article 52 of Directive 2006/73, entitled 'Investment advice', provides that a personal recommendation within the meaning of Article 4(1)(4) of Directive 2004/39 must constitute a recommendation to take one of the following sets of steps:

'(a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;

(b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument'.

German law

10 Under Paragraph 823(2) of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), anybody who infringes a law protecting the interests of other parties shall be liable for damages for the harm caused.

11 Paragraph 1 of the Kreditwesengesetz (Law on the financial sector), of 9 September 1998 (BGBl. 1998 I, p. 2776), as amended by the Law of 16 July 2007 (BGBl. 2007 I, p. 1330) ('the KWG'), provides in subparagraph 1a:

'… Financial services are:

1. the brokering of business involving the purchase and sale of financial instruments (investment brokering);

1a. the provision of personal recommendations to clients or their representatives, in respect of transactions relating to specific financial instruments, provided that the recommendation is based on a consideration of the personal circumstances of the investor or is presented as suitable for him and is not issued exclusively through distribution channels or to the public (investment advice) …'

12 Paragraph 32(1) of the KWG provides:

‘Any person intending to provide financial services in the national territory commercially or on a scale requiring a commercially organised business must obtain written authorisation from the Bundesanstalt [für Finanzdienstleistungsaufsicht (Federal Office for the Supervision of Financial Services, Germany)] …’

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

13 In November 2007, Ms Pflanz, who does not hold the authorisation for providing financial services pursuant to Article 32(1) of the KWG, recommended to Mr Khorassani an investment called the ‘Grand-Slam’. In that context, she advised him to sign a service agreement with GSS AG, and a portfolio management agreement with D. AG as well, both of these companies being established in Liechtenstein. It is apparent from the order for reference that the latter contract provides for the purchase and sale as well as the management of financial instruments constituting a finance portfolio management activity.

14 Mr Khorassani committed himself to a one-off payment of EUR 20 000 and to monthly instalment payments of EUR 1 000, each with a 5% premium. In December 2007 the applicant paid EUR 27 000 in total, from which the amount of EUR 19731.60 was deducted as an administration charge to be paid in advance and the amount of EUR 1285.71 was deducted as a premium. Mr Khorassani subsequently cancelled the agreements and sought repayment of the amounts paid and damages.

15 The Landgericht Berlin (Regional Court, Berlin, Germany) ruled the action brought against the two undertakings established in Liechtenstein inadmissible on the grounds that it lacked international jurisdiction, and held that the action brought against Ms Pflanz was unfounded.

16 After he obtained repayment in the amount of EUR 6803.03, Mr Khorassani’s appeal seeking repayment of the remainder of the amounts claimed was dismissed by the Kammergericht Berlin (Higher Regional Court, Berlin, Germany). That court considered that Ms Pflanz had not provided financial services within the meaning of points 1 and 1a of the second sentence of Paragraph 1(1a) of the KWG, for which an authorisation must be held pursuant to Paragraph 32(1) of the KWG, as both the investment advice and the investment brokering provided by her did not relate to a transaction involving the purchase and sale of financial instruments but rather an asset management agreement which, whilst serving subsequently as a basis for the purchase and the sale of specific financial instruments, was not itself a financial instrument. That court accordingly found that Mr Khorassani was not entitled to damages under the combined provisions of Article 823(2) of the BGB and Article 32(1) of the KWG.

17 The Bundesgerichtshof (Federal Court of Justice, Germany), before which an action in revision (appeal on a point of law) was brought, considers that the Kammergericht Berlin (Higher Regional Court, Berlin) was correct in holding that Ms Pflanz had not provided Mr Khorassani with investment advice within the meaning of point 1a of the second sentence of Paragraph 1(1a) of the KWG since, pursuant to Article 4(1)(4) of Directive 2004/39, read in conjunction with Article 52 of Directive 2006/73, that provision covers the provision of personal recommendations in relation to specific financial instruments and not portfolio management activities. Consequently, in so doing Ms Pflanz had not infringed Article 32(1) of the KWG.

18 On the other hand, the question whether, in causing Mr Khorassani to sign an asset management agreement, Ms Pflanz had provided him with investment brokering services within the meaning of point 1 of the second sentence of Paragraph 1(1a) of the KWG turns on the interpretation to be given to Article 4(1)(2) of and point 1 of Section A of Annex I to Directive 2004/39.

19 In that regard, the referring court observes that the German-language version of the latter provision, 'Annahme und Übermittlung von Aufträgen, die ein oder mehrere Finanzinstrument(e) zum Gegenstand haben' (reception and transmission of orders in relation to one or more financial instruments), seems to suggest that only the brokering of contracts in relation to the purchase or the sale of a specific financial instrument is covered, whilst other versions of the provision, in Spanish ('en relación con'), English ('in relation to') and French ('portant sur') suggest a broader interpretation of the provision, under which only an indirect link is required between the brokered transaction and the purchase or sale of a financial instrument.

20 The referring court observes, in relation to the overall scheme of Directive 2004/39, that the clarifications given for the definition of 'investment advice' in recital 81 and Article 52 of Directive 2006/73 tend to support the abovementioned restrictive interpretation, as those clarifications state that investment advice must relate to 'particular' (specific) financial instruments, which could be based on general legal reasoning that is also applicable to investment brokering activities.

21 That court takes the view that the purpose of Directive 2004/39, consisting in investor protection, may not require including in the service referred to in point 1 of Section A of Annex I to that directive the brokering of a portfolio management agreement, since portfolio managers are themselves subject to the requirements of that directive. However, there might still be a lacuna in investor protection when a contract is concluded with a portfolio manager established in a non-EU country.

22 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is the reception and transmission of an order which relates to a portfolio management (Article 4(1)(9) of [Directive 2004/39] an investment service within the meaning of the first sentence of Article 4(1)(2) in conjunction with point 1 of Section A of Annex I to [that directive]?'

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 4(1)(2) of Directive 2004/39, read in conjunction with point 1 of Section A of Annex I to that directive, must be interpreted as meaning that the investment service consisting in the reception and transmission of orders in relation to one or more financial instruments includes brokering with a view to concluding a contract covering portfolio management services.

24 Article 4(1)(2) of Directive 2004/39 defines services and investment activities as being any of the services and activities listed in Section A of Annex I thereto relating to any financial instrument listed in Section C of that annex.

25 The services and investment activities listed in Section A include, in point 1 thereof, the reception and transmission of orders in relation to one or more financial instruments.

26 In order to answer the question referred, for the purpose of interpreting the latter provision it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, to that effect, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 31).

27 Regarding the wording of point 1 of Section A of Annex I to Directive 2004/39, although the referring court observes a certain divergence between the different language versions of the terms 'in relation to' which, depending on the case, may suggest a more or less direct link between the orders and the financial instrument(s) referred to in that provision, it should be noted that the term 'order', the

reception and transmission of which constitute the service or investment activity covered by that provision, remains the same in the language versions cited by the referring court, being the German-, Spanish-, English- and French-language versions.

28 Moreover, even if that term is not defined per se in Directive 2004/39, it should be noted that the words 'in relation to one or more financial instruments' merely serve to specify which type of order is being referred to, that is to say, the orders relating to the purchase or the sale of such financial instruments.

29 This interpretation of the term 'order' is confirmed by the context of which it forms a part. More specifically, it must be interpreted in the light of point 2 of Section A of Annex I to that directive, which refers to investment services consisting in the '[e]xecution of orders on behalf of clients'.

30 As observed by the Advocate General in point 42 of his Opinion, there is a close link between the investment service referred to in point 1 of Section A of Annex I to that directive ('[r]eception and transmission of orders') and the one referred to in point 2 of Section A ('[e]xecution of orders'), the former being provided upstream from the latter and in general leading to the provision of the latter, be it by the same or a different investment firm.

31 Moreover, the investment service referred to in point 2 of Section A of Annex I to Directive 2004/39, consisting in the '[e]xecution of orders on behalf of clients', is defined in Article 4(1)(5) of that directive as being 'acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients'.

32 It follows that the orders covered by the investment service referred to in point 1 of Section A of Annex I to that directive are orders for the purchase or sale of one or more financial instruments.

33 This interpretation is confirmed by other provisions of Directive 2004/39. In that regard, 'limit order' is defined in Article 4(1)(16) thereof as being 'an order to buy or sell a financial instrument at its specified price limit or better and for a specified size'.

34 Furthermore, Article 21 of that directive concerns, as evidenced by its title, the obligation to execute orders on terms most favourable to the client, which includes, as provided for in paragraph 1 thereof, obtaining the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement. Under Article 21(2) and (3), in particular Member States are to require investment firms to establish and implement an order execution policy that includes, for each category of instruments, information on the different systems in which the investment firm executes its clients' orders and the factors influencing the choice of execution system.

35 Consequently, it follows from the terms of point 1 of Section A of Annex I to Directive 2004/39, interpreted in the light of the context of which that provision forms a part, that the service referred to therein does not encompass brokering with a view to concluding a contract covering portfolio management services. Even if the conclusion of that contract may subsequently serve as a basis for the reception and transmission of order for the purchase or sale of financial instruments by the portfolio manager as part of its management activities, the purpose of the contract itself is not the reception or transmission of orders.

36 That conclusion is not contradicted by the fact, relied on by the United Kingdom Government, that recital 20 of Directive 2004/39 states that, for the purposes thereof, the business of the reception and transmission of orders should also include bringing together two or more investors thereby bringing about a transaction between those investors.

37 As observed by the Advocate General in point 44 of his Opinion, that recital refers to bringing together two or more investors only in the context of the reception and transmission of orders. That recital therefore covers the scenarios of bringing together for the purpose of completing transactions in relation to one or more financial instruments, which excludes brokering with a view to concluding a contract covering portfolio management services.

38 The German and United Kingdom Governments further observe that 'investment advice', defined in Article 4(1)(4) of Directive 2004/39 and listed in point 5 of Section A of Annex I thereto, consists, according to the wording of Article 52 of Directive 2006/73, in recommending the completion of a transaction in relation to a particular financial instrument. They infer therefrom that the lack of reference to a 'particular' financial instrument in point 1 of Section A of Annex I to Directive 2004/39 indicates that the scope of that provision is not limited to the reception and transmission or orders relating directly to a particular financial instrument.

39 That argument cannot be accepted.

40 According to the definition set out in Article 4(1)(4) Directive 2004/39, 'investment advice' consists in the provision of personal recommendations to a client in relation to transactions involving financial instruments. Recital 81 of Directive 2006/73 states that generic advice about a type of financial instrument is not investment advice for the purposes of Directive 2004/39, which advice must be restricted to advice on particular financial instruments, and this clarification is implemented in Article 52 of Directive 2006/73. Neither that recital nor that article has any bearing whatsoever on the scope of 'investment service' referred to in point 1 of Section A of Annex I to Directive 2004/39.

41 The purpose of Directive 2004/39 does not require a different interpretation of that provision. It is true that inter alia recitals 2 and 31 of that directive indicate that one of its objectives is to guarantee investor protection (see, to that effect, judgment of 30 May 2013, *Genil 48 and Comercial Hostelera de Grandes Vinos*, C-604/11, EU:C:2013:344, paragraph 39).

42 However, that objective by itself cannot justify allowing a particularly broad meaning to be attached to the definition of 'investment service' as laid down in point 1 of Section A of Annex I to Directive 2004/39, to the point of encompassing brokering with a view to concluding a contract covering portfolio management services.

43 Such a meaning would run counter to the interpretation of that provision resulting, in particular, from the context of which it forms a part.

44 In the light of all the foregoing considerations, the answer to the question referred is that Article 4(1)(2) of Directive 2004/39, read in conjunction with point 1 of Section A of Annex I to that directive, must be interpreted as meaning that the investment service consisting in the reception and transmission of orders in relation to one or more financial instruments does not include brokering with a view to concluding a contract covering portfolio management services.

Costs

45 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 (Fourth Chamber) hereby rules:

Article 4(1)(2) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, read in conjunction with point 1 of Section A of Annex I to that directive, must be interpreted as meaning that the investment service consisting in the reception and transmission of orders in relation to one or more financial instruments does not include brokering with a view to concluding a contract covering portfolio management services.

[Signatures]