Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

8 October 2020*

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 135(1)(a) – Exemption of insurance transactions – Supply of pension fund management services to trustees by investment fund managers – Exclusion of any risk indemnity – Occupational pension scheme – National tax practice – Exercise of an insurance activity – Authorised entities – Entities not holding such authorisation – Concept of 'insurance transactions')

In Case C-235/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 5 March 2019, received at the Court on 18 March 2019, in the proceedings

United Biscuits (Pension Trustees) Limited,

United Biscuits Pension Investments Limited

v

Commissioners for Her Majesty's Revenue and Customs

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan, and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– United Biscuits Pension Investments Limited and United Biscuits (Pension Trustees) Limited, by D. Scorey QC, C. Millard, Solicitor, and M. Jones, Barrister,

– the United Kingdom Government, by Z. Lavery, acting as Agent, and by T. Ward QC, and A. Macnab, Barrister,

– the European Commission, by R. Lyal and A. Armenia, acting as Agents,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 14 May 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 135(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between United Biscuits (Pension Trustees) Ltd ('United Biscuits Pension') and United Biscuits Pension Investments Ltd ('UB'), and the Commissioners for Her Majesty's Revenue & Customs (the United Kingdom tax authority) concerning the imposition of value added tax (VAT) on pension fund management services.

Legal context

European Union law

The VAT rules

3 Article 2(1)(c) of Directive 2006/112 provides that 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' is to be subject to VAT.

4 Article 131 of Directive 2006/112, in Chapter 1, entitled 'General provisions', of Title IX thereof, entitled 'Exemptions', of that directive states:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

5 Article 135(1) of Directive 2006/112, in Chapter 3, 'Exemptions for other activities', of Title IX of that directive, provides:

'Member States shall exempt the following transactions:

(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;

…'

6 That provision corresponds to Article 13B(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'), which applied until 31 December 2006.

The rules relating to insurance

7 First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (OJ 1979 L 63, p. 1), as amended by Directive 2002/12/EC of the European Parliament and of the Council of 5 March 2002 (OJ 2002 L 77, p. 11), ('the First Life Assurance Directive') provided, in Article 1:

'This Directive concerns the taking up and pursuit of the self-employed activity of direct insurance carried on by undertakings which are established in a Member State or wish to become established there in the form of the activities defined below:

1. the following kinds of insurance where they are on a contractual basis:

(a) life assurance …;

(b) annuities;

(c) supplementary insurance carried on by life assurance undertakings …;

(d) the type of insurance existing in Ireland and the United Kingdom known as permanent health insurance not subject to cancellation;

2. the following operations, where they are on a contractual basis, in so far as they are subject to supervision by the administrative authorities responsible for the supervision of private insurance:

…

(c) management of group pension funds, i.e. operations consisting, for the undertaking concerned, in managing the investments, and in particular the assets representing the reserves of bodies that effect payments on death or survival or in the event of discontinuance or curtailment of activity;

(d) the operations referred to in (c) where they are accompanied by insurance covering either conservation of capital or payment of a minimum interest;

…

3. Operations relating to the length of human life which are prescribed by or provided for in social insurance legislation, when they are effected or managed at their own risk by assurance undertakings in accordance with the laws of a Member State.'

8 Article 6 of that directive provided:

'The taking-up of the activities covered by this Directive shall be subject to prior official authorisation.'

9 Article 7(2) of the First Life Assurance Directive provided:

'Authorisation shall be granted for a particular class of assurance as listed in the Annex. It shall cover the entire class, unless the applicant wishes to cover only some of the risks pertaining to that class.'

10 Article 8(1) of that directive provided:

'The home Member State shall require every assurance undertaking for which authorisation is sought to:

…

(b) limit its business activities to the activities referred to in this Directive and operations directly arising therefrom, to the exclusion of all other commercial business.'

11 The annex to that directive contained a list of 'Classes of insurance', which referred, in point VII, to 'Management of group pension funds, referred to in Article 1(2)(c) and (d)'.

12 The First Life Assurance Directive was repealed and replaced by Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1). Article 2 of Directive 2002/83 reproduced the provisions set out in Article 1 of the First Life Assurance Directive. Article 5(2) of Directive 2002/83 reproduced the words of Article 7(2) of the First Life Assurance Directive. Annex I to Directive 2002/83 was entitled 'Classes of assurance' and referred, in point VII, to 'management of group pension funds, referred to in Article 2(2)(c) and (d)'.

13 Directive 2002/83 was in turn repealed and replaced by 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) ('the Solvency II Directive'). Article 2(3) of that directive reproduces the content of Article 1 of the First Life Assurance Directive, in essentially the same words.

14 Article 14(1) of the Solvency II Directive, entitled 'Principle of authorisation', provides:

'The taking-up of the business of direct insurance or reinsurance covered by this Directive shall be subject to prior authorisation.'

15 Article 15(2) of the Solvency II Directive is worded as follows:

'Subject to Article 14, authorisation shall be granted for a particular class of direct insurance as listed in Part A of Annex I or in Annex II. It shall cover the entire class, unless the applicant wishes to cover only some of the risks pertaining to that class.'

16 Annex II to the Solvency II Directive, entitled 'Classes of life insurance', refers, in point VII, to 'management of group pension funds, referred to in point (b)(iii) and (iv) of Article 2(3)'.

United Kingdom law

17 The order for reference indicates that, in accordance with the rules of the United Kingdom on the authorisation of insurance companies, the supply of pension fund management services, including those relating to defined benefit occupational pension schemes, fall within a branch of 'insurance' when executed by an authorised insurer in accordance with the Insurance Companies Act ('insurers').

18 The insurers were also subject to supervision by the administrative authorities responsible for supervision of private insurance. It was also possible for supplies of pension fund management services to be offered by operators authorised under other legislation ('non-insurers').

19 As regards the VAT payable in respect of those services, it is apparent from the file submitted to the Court that, during the relevant period, the United Kingdom tax authority applied different rules according to whether the services were provided by insurers or by non-insurers. Before 1 January 2005, that difference in treatment resulted from the legislative provisions which confined the benefit of the exemption for insurance transactions to suppliers who were authorised in their capacity as insurers. As a result of a legislative amendment effective from that date, the tax authority continued, according to the referring court, to restrict the benefit of that exemption to supplies of pension fund management services provided by insurers, although that limitation was no longer in accordance with the law.

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

20 United Biscuits Pension is the trustee of a defined benefit occupational pension scheme for employees of United Biscuits (UK) Ltd. UB is the former trustee of a collective investment fund in which the assets of that scheme were invested from 1989 to 2006

21 The successive trustees of those funds had recourse to management services, which were supplied by both insurers and non-insurers.

22 Of the services provided, it was not possible, under the rules or practices in force in the United Kingdom, for those billed by non-insurers to be exempted from VAT, which the claims brought by United Biscuits Pension and UB concern.

23 The latter, in their capacity as trustees, inter alia, of pension funds, unsuccessfully asked the United Kingdom tax authority for reimbursement of the VAT at issue, and then brought an action before the High Court of Justice (England & Wales), Chancery division, United Kingdom.

24 By a judgment of 30 November 2017, that court rejected their action on the basis of the absence of an exemption in national law for the period in question.

25 Hearing an appeal against that judgment, the referring court wonders whether EU law allows supplies of pension fund management services to be exempt from VAT.

26 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are supplies of pension fund management services provided to the [applicants] by (a) insurers and/or (b) non-insurers “insurance transactions” within the meaning of Article 135(l)(a) of the [Directive 2006/112]?’

Consideration of the question referred

27 As a preliminary matter, it must be recalled that, while the period of taxation at issue in the main proceedings was covered successively by the Sixth Directive and by Directive 2006/112, since Article 135(1)(a) of Directive 2006/112 is identical to Article 13B(a) of the Sixth Directive, it is possible to answer the question referred solely on the basis of the most recent of those two provisions, which is in force as at the date of this judgment.

28 By its question, the referring court asks, in essence, whether Article 135(1)(a) of Directive 2006/112 must be interpreted as meaning that investment fund management services supplied for an occupational pension scheme, which do not provide any indemnity from risk, may be classified as 'insurance transactions', within the meaning of that provision and, thus, fall within the VAT exemption laid down in that provision in favour of such transactions.

29 In that regard, it must be recalled that the terms used to specify the exemptions covered by Article 135(1) of Directive 2006/112 are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person acting as such (judgment of 17 March 2016, *Aspiro*, C-40/15, EU:C:2016:172, paragraph 20).

30 As regards the insurance transactions referred to in that provision, the essentials of such transactions are, as generally understood and according to settled case-law, that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded (see judgment of 17 March 2016, *Aspiro*, C-40/15, EU:C:2016:172, paragraph 22 and the case-law cited).

31 In the present case, the referring court indicates, and this was confirmed at the hearing, that the services contractually provided to the applicants in the main proceedings consisted of fund management solely for their account, to the exclusion of any indemnity from risk.

32 It is common ground that such supplies of services do not meet the criteria referred to in paragraphs 29 and 30 of this judgment, since the exemption provided for in Article 135(1)(a) of Directive 2006/112 is, in essence, justified by the difficulty of determining the correct amount of VAT for insurance premiums relating to the coverage of risk.

33 Contrary to the submissions made by the applicants in the main proceedings, no other criterion connected with the concept of 'insurance transactions', within the meaning of Article 135(1)(a) of Directive 2006/112, may be derived from the case-law of the Court or EU law in the matter of insurance.

34 As regards the case-law of the Court, the applicants in the main proceedings cite paragraph 18 of the judgment of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93), and paragraph 30 of the judgment of 8 March 2001, *Skandia* (C-240/99, EU:C:2001:140).

35 It is true that those paragraphs confirm, in essence, that there is no reason to justify a different interpretation of the term 'insurance' according to whether it appears in insurance directives or in directives relating to VAT.

36 However, as the Advocate General noted in points 71 to 75 of his Opinion in this case, those paragraphs, read in the specific context of the judgments in which they appear, refer, in fact, to the detailed arrangements for providing insurance, such as benefits in kind or the existence of an intermediary between the insurer and the insured. However, the Court, which referred to the term 'insurance' in general and not to the concept of 'insurance transactions', within the meaning of the common system of VAT, did not intend to establish the necessary and intrinsic link between the latter and possible legal categories which appear in the directives on insurance. Thus, both the judgments referred to by the applicants in the main proceedings take and apply the criteria referred to in paragraphs 29 and 30 of this judgment without calling those criteria into question or adding to them in the light of EU law on insurance matters.

37 Furthermore, a detailed analysis of the relevant provisions of the directives does not support the idea that supplies of pension fund management services, such as those at issue in the main proceedings, fall within the scope of Article 135(1)(a) of Directive 2006/112.

38 Under the wording of Article 1 of the First Life Assurance Directive, repeated in essence in the directives that replaced it, the life insurance activity covered by that provision is, either 'insurance' referred to in paragraph 1 of that article, or 'operations' referred to in paragraphs 2 and 3 of that article.

39 Included among those 'operations' is that of the 'management of group pension funds'.

40 As the Advocate General observed, in essence, in point 58 of his Opinion, while the 'insurance' referred to in paragraph 1 of that article constitutes insurance activities in the normal meaning of the term, the 'operations' are related activities closely linked to those insurance activities. They are therefore ancillary transactions, which are covered by the First Life Assurance Directive and the legislation replacing it, but do not constitute 'insurance' within the meaning of the directives on insurance matters.

41 Thus, the EU legislature intended, for the purpose of the application of the directives on insurance matters, supplies such as those at issue in the main proceedings to be regarded as not being 'insurance'.

42 Contrary to the submissions advanced by the applicants in the main proceedings, that conclusion is not undermined by the wording of the annexes to the directives on insurance matters, in so far as those annexes refer to the management of pension funds as insurance activities.

43 It is, in that regard, correct to say that ambiguity may result from the fact that some of those annexes employ the terms 'Classes of insurance' and 'Classes of life insurance'.

44 However, that ambiguity does not stand up to a contextual analysis of the provisions in question.

45 As regards the title in the English-language version of the annex to the First Life Assurance Directive, it should be observed, as the Advocate General pointed out in point 60 of his Opinion, that only the Danish- and English-language versions describe the classes as 'classes of insurance' whilst the German-, French-, Italian- and Dutch-language versions refer only to 'classes' of activity, giving the impression that the 'management of group pension funds' in point VII of that annex is a class of activity rather than a class of insurance.

46 In accordance with the settled case-law, provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of an EU text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment of 8 December 2005, *Jyske Finans*, C-280/04, EU:C:2005:753, paragraph 31).

47 In that regard, and this applies equally to the title of Annex I to Directive 2002/83 and Annex II to the Solvency II Directive, it should be recalled that the reason that the classification is made in the annex to those directives is to determine, inter alia, the activities that are the object of the compulsory authorisation provided for in those texts for access to activities in the territory of a Member State.

48 As is clear from a combined reading of Articles 1 and 6 of the First Life Assurance Directive, unchanged in substance in the subsequent directives, that authorisation is required for 'activities referred to in this directive'.

49 However, as has been observed in paragraph 38 et seq. above, those annexed activities consist of both 'insurance' and 'operations', which includes the management of pension funds.

50 Therefore, in the light of the general scheme of the directives in the matter of insurance, it is consistent for the classification of activities laid down by those directives in their annexes to include insurance and pension fund management activities, without it being possible to interpret that classification as treating those operations as insurance.

51 Having regard to all the foregoing considerations, the answer to the question referred is that Article 135(1)(a) of Directive 2006/112 must be interpreted as meaning that investment fund management services supplied for an occupational pension scheme, which do not provide any indemnity from risk, cannot be classified as 'insurance transactions', within the meaning of that provision, and thus do not fall within the VAT exemption laid down in that provision in favour of such transactions.

Costs

52 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 (First Chamber) hereby rules:

Article 135(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that investment fund management services supplied for an occupational pension scheme, which do not provide any indemnity from risk, cannot be classified as 'insurance transactions', within the meaning of that provision, and thus do not fall within the value added tax (VAT) exemption laid down in that provision in favour of such transactions.

Bonichot Bay Larsen Toader

Safjan Jääskinen

Delivered in open court in Luxembourg on 8 October 2020.

A. Calot Escobar
Registrar

J.-C. Bonichot
President of the First Chamber