Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 12 May 2022 [1]

Case C-250/21

Szef Krajowej Administracji Skarbowej
v
O. Fundusz lnwestycyjny Zamknięty reprezentowany przez O S.A.

(Request for a preliminary ruling from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Taxation of the services for consideration – Direct link between the services supplied and the consideration received by the taxable person – Article 135(1)(b) – Exemption for the 'granting … of credit' – Synthetic securitisation – Sub-participation agreement)

1. In the present case, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) has asked the Court about the treatment for value added tax (VAT) of a transaction that is to be carried out under a sub-participation agreement.

2. Stated schematically, according to the sub-participation agreement envisaged by the taxable person at issue in the main proceedings, investment fund A pays bank B an upfront amount upon conclusion of that agreement. In return for that payment, bank B ('the originator'), which has lent money to C ('the principal debtor'), agrees to pay investment fund A ('the sub-participant') the proceeds obtained by the originator under the original loan agreement with the principal debtor. While the cash flow and the risk are removed from the originator's balance sheet and transferred to the investment fund concerned in the present case, the originator maintains legal ownership of the assets.

3. More specifically, the Court is being asked to determine whether the services provided by an investment fund under the sub-participation agreement at issue constitute 'the granting and … negotiation of credit and the management of credit by the person granting it', within the meaning of Article 135(1)(b) of Directive 2006/112/EC. [2] If so, those services would fall within the exemption from VAT laid down in that provision. In my view, that question has important practical implications for the law related to securities, since the answer the Court provides may affect the performance and attractiveness of such financial transactions, making this case of a sensitive nature.

[1] Original language: English.

[2] Directive of 28 November 2006 on the common system of [VAT] (OJ 2006 L 347, p. 1).

I. Legal framework

A. European Union law

4. Under Article 2(1)(a) and (c) of Directive 2006/112, 'the supply of goods for consideration within the territory of a Member State by a taxable person acting as such' and 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such', respectively, are to be subject to VAT.

5. Article 9(1) of that directive provides the definition of a 'taxable person'.

6. Article 135(1) of that directive provides:

'Member States shall exempt the following transactions:

…

(b) the granting and the negotiation of credit and the management of credit by the person granting it;

…

(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

…

(f) transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2);

…'

B. Polish law

1. The Law on VAT

7. Article 43(1)(38) of the ustawa o podatku od towarów i usług (Law on the Tax on Goods and Services)[3] ('the Law on VAT') provides that the services of granting credits or financial loans and brokerage services relating to the granting of credits or financial loans, as well as the management of credit or financial loans by the entity granting such credits or financial loans are to be exempt from VAT. Article 43(1)(39) of the same law exempts, in essence, the negotiation of collateral, guarantees and any other security for financial and insurance transactions and the management of credit guarantees by the granting entity.

[3] Law on the Tax on Goods and Services of 11 March 2004, in the version applicable to the dispute in the main proceedings (Dz. U. of 2011, No 177, item 1054).

2. The Law on Investment Funds

8. Article 183(4) of the ustawa o funduszach inwestycyjnych i zarządzaniu alternatywnymi funduszami inwestycyjnymi[4] ('the Law on Investment Funds') concerns sub-participation agreements. That provision states:

'An agreement to remit to the fund all benefits received by the originator of the securitisation or the beneficiary of the securitised receivables from a specified pool of receivables or from specified receivables (a sub-participation agreement) should include an obligation on the part of those entities to remit to the fund:

(1) the proceeds from the securitised receivables in full;

(2) the principal amounts of the securitised receivables;

(3) the amounts obtained from realising the collateral related to the securitised receivables – where the claims of the securitisation originator or the beneficiary of the securitised receivables were satisfied by way of realising the collateral.'

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

9. The investment fund concerned in the present case is a non-standardised fund within the meaning of Article 183 of the Law on Investment Funds. It is planning to enter into sub-participation contracts with banks or other funds for the purchase of the proceeds of loan receivables in its capacity as a sub-participant. In order to ascertain whether the services included in those contracts are exempt from VAT, the investment fund has requested that the Minister Finansów ('the Minister for Finance') issue a tax ruling concerning the interpretation of Article 43(1)(38) and (39) of the Law on VAT.

10. In its request, the investment fund has stated that the essential characteristics of the sub-participation are the following:

– the originator undertakes to transfer to the sub-participant all the proceeds from the loans specified in the sub-participation agreement;

– in return for that transfer, the sub-participant pays to the originator a contractually agreed amount;

– the loan receivables on which the sub-participation is based remain in the assets of the originator;

– the sub-participation serves a double purpose, providing liquidity for the originator and covering the originator's credit risk in that the risk associated with specific assets is transferred to the investment fund;

[4] Law on Investment Funds and the Management of Alternative Investment Funds of 27 May 2004 (Dz. U. of 2004, No 146, item 1546, as amended).

– the difference between the amount paid to the originator and the amount obtained by the sub-participant in respect of the proceeds of the receivables during the duration of the contract constitutes the sub-participant's remuneration.

11. The investment fund contends that, taking into account the fact that the services provided for under the sub-participation agreement ensure liquidity, they must be treated as a credit or financial loan falling under the exemption laid down in Article 43(1)(38) of the Law on VAT. Alternatively, the predominant function is the hedging of credit risk, in which case those services should fall under the exemption provided for in Article 43(1)(39) of the Law on VAT.

12. By a tax ruling of 30 December 2015, the Minister for Finance rejected the investment fund's contentions. It considered that the transactions described by the applicant in its request for a tax ruling did not fall within any of the VAT exemptions provided for in Article 43(1)(38) and (39) of the Law on VAT. Thus, the services to be provided by the investment fund under the sub-participation agreement were to be subject to VAT at the basic rate of 23%.

13. The investment fund brought an action against the tax ruling of 30 December 2015 before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) which, by judgment of 25 May 2017, annulled the tax ruling. It considered that the objective of a sub-participation agreement is to ensure that the originator has access to funding, while the originator remains free to use that funding as it sees fit. In return for making the funds available to the bank, the investment fund receives the proceeds of the receivables that are subject to the sub-participation agreement. Those proceeds are similar to interest paid under a loan agreement. Accordingly, that court held that the sub-participation agreement constitutes a financial instrument similar to a loan agreement falling within the scope of the exemption laid down in Article 43(1)(38) of the Law on VAT.

14. The Szef Krajowej Administracji Skarbowej (Head of the National Tax Administration, Poland) ('the tax authority') lodged an appeal against that judgment before the referring court – the Naczelny Sąd Administracyjny (Supreme Administrative Court).

15. According to the referring court, from an economic perspective, there is no doubt that the services provided under the sub-participation agreement at issue constitute a financing instrument, since their main objective is to enable the originator to use the funds made available to it. The originator, in return, is to transfer the proceeds of the receivables subject to that agreement to the sub-participant.

16. In that regard, the referring court emphasises that a sub-participation agreement is similar to a loan agreement, whereby a borrower purchases funds from a lender and undertakes to repay them after a certain period. The consideration that the sub-participant receives under the sub-participation agreement amounts to the difference between the amount it has paid to the originator and the amount it obtains during the term of the contract in the form of the proceeds of the receivables. Conceptually, the economic advantage received by the sub-participant corresponds to the mechanism of interest in a loan agreement.

17. However, the referring court notes that the sub-participation agreement at issue has certain features that distinguish it from a loan agreement, such as the fact that the underlying loans remain in the originator's assets and that the sub-participation agreement clearly defines the

source that will be used in satisfaction of the sub-participant. In addition, in the event of a default by the originator's debtor, the sub-participant has no claim against the originator as regards the remaining amounts due.

18. Consequently, the referring court harbours doubts as to whether the sub-participation agreement at issue can be treated, for VAT purposes, in a similar fashion to a credit or loan agreement.

19. In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 135(1)(b) of [Directive 2006/112] be interpreted as meaning that the exemption which that provision provides for in respect of transactions concerning the granting and the negotiation of credit and the management of credit is applicable to the sub-participation agreement described in the main proceedings?'

III. Procedure before the Court

20. The order for reference, dated 27 October 2020, was received at the Court Registry on 21 April 2021.

21. Written observations were submitted to the Court by the tax authority, the Polish Government and the European Commission. The Court put a number of written questions to the parties to be answered in writing, to which the tax authority and the Commission replied on 24 February 2022. The tax authority, the Polish Government and the Commission presented oral arguments before the Court at the hearing on 24 March 2022.

IV. Assessment

22. By its question, the referring court asks, in essence, whether Article 135(1)(b) of Directive 2006/112 must be interpreted as meaning that the exemption which it lays down for transactions relating to the granting, negotiation and management of credit applies to the supply of services provided under the sub-participation agreement at issue in the main proceedings, whereby the sub-participant agrees to pay to the originator an upfront amount in return for obtaining, throughout the duration of that agreement, the proceeds of the receivables of the principal loan granted to the principal debtor. The referring court is asking, in essence, whether the benefits of the transaction that are gained by the sub-participant fall under one of the exemptions granted by that provision.

23. Before examining that question, I would make the following three observations. First, Article 137(1)(a) of Directive 2006/112 provides that Member States may allow taxable persons a right of option for taxation in respect of the financial transactions referred to in Article 135(1)(b) to (g) of that directive. However, it seems implicit from the preliminary reference that, in the present case, the option for taxation of financial transactions under Article 137(1)(a) of that directive was not exercised. [5]

[5] Article 137(1)(a) of Directive 2006/112 provides that Member States may allow taxable persons a right of option for taxation in respect of the financial transactions referred to in Article 135(1)(b) to (g) of that directive.

24. Second, Article 135(1)(b) of Directive 2006/112 concerns three categories of exemption, namely the granting, the negotiation and the management of credit. Nevertheless, it is common ground that only the exemption listed in that provision relating to the 'granting … of credit' is relevant for present purposes, since it is clear that the transaction at issue involves neither the 'negotiation' nor the 'management of credit'.

25. Third, since the subject matter of the main proceedings concerns a tax ruling in relation to a future transaction, and not to a specific tax claim as regards a past transaction, the request for a preliminary ruling describes the transaction at issue in rather general terms. In their written and oral submissions, the parties referred to the relevant Polish legal framework and to some general aspects of a transaction under that framework. However, for the purposes of this Opinion, it appears that a certain amount of information is lacking, and it is for the referring court to ascertain the exact nature of the transaction at issue.

26. In order to answer the question referred by the national court, it is necessary to establish whether the sub-participation transaction at issue constitutes a transaction subject to VAT. Next, I shall deal with the interpretation of Article 135(1) of Directive 2006/112, by employing the classical methods of interpretation of the Court.

A. Transaction subject to VAT

27. To begin with, I would point out that, according to Article 2(1)(c) of Directive 2006/112, 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. [6]

28. In my opinion, the requirement relating to the taxable person is clearly not an issue in the present case since the investment fund is acting in the course of its economic activity, for the purposes of the first subparagraph of Article 9(1) of Directive 2006/112. [7] As regards the requirement of consideration, while it is not in dispute that the sub-participation transaction envisaged by the investment fund would be carried out 'for consideration', that classification is less apparent in the present case because of the case-law of the Court.

29. In that regard, the Court has already held that a supply of services is effected 'for consideration' within the meaning of Article 2(1)(c) of Directive 2006/112, and is therefore subject to VAT, only if there is a *direct link* between the services supplied and the consideration received by the taxable person. [8]

30. Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration given in return for the service supplied to the recipient. [9] Moreover, the Court has already held that, for the purposes of determining whether a supply of services is effected for consideration, it is irrelevant if the remuneration takes the form of a payment of a commission or specific fees. [10]

6 Article 24(1) of Directive 2006/112 defines the supply of services as 'any transaction which does not constitute a supply of goods'.

7 Pursuant to the first subparagraph of Article 9(1) of Directive 2006/112, a taxable person is understood to mean any person who independently carries out in any place such an economic activity.

8 Judgments of 7 October 2010, *Loyalty Management UK and Baxi Group* (C-53/09 and C-55/09, EU:C:2010:590, paragraph 51 and the case-law cited), and of 26 September 2013, *Serebryannay vek* (C-283/12, EU:C:2013:599, paragraph 37).

9 Judgment of 22 October 2015, *Hedqvist* (C-264/14, EU:C:2015:718, paragraph 27 and the case-law cited).

10 Judgment of 14 July 1998, *First National Bank of Chicago* (C-172/96, EU:C:1998:354, paragraph 33).

31. In the case in the main proceedings, it is clear from the file provided to the Court that, under the sub-participation agreement at issue in the main proceedings, there is a reciprocal legal relationship between the sub-participant and the originator.

32. At the stage of the conclusion of that agreement, the reciprocal performance entails the payment of an upfront amount by the sub-participant to the originator, which in return agrees to transfer to the sub-participant the proceeds of the receivables of the principal loan. Therefore, it seems to me that the sub-participant is to be remunerated for providing a service by which it supplies liquidity to the originator and provides protection against credit risk associated with exposure to the underlying loans. The sub-participant's remuneration for the transaction is the difference between the upfront amount it has paid and the amount of the proceeds of the receivables that the originator transfers to the sub-participant. When entering into such an agreement, the sub-participant expects the first of those two amounts to be lower than the second.

33. That being said, I must note that, at the stage of putting that agreement into effect, performance by the originator depends on performance by the principal debtor, which makes those financial flows dependent on a third party that is not directly linked to the sub-participation agreement. [11] However, for the determination of the existence of remuneration, that fact bears no relevance as such.

34. It is worth noting that, regarding the acquisition of receivables, there have been two notable cases: *MKG-Kraftfahrzeuge-Factoring* [12] and *GFKL Financial Services*. [13] In the first case, the Court held that a transaction by which a business purchases debts, assuming the risk of the debtors' default, in return for remuneration, constitutes debt collection and factoring excluded from the exemption laid down by Article 13B(d) of the Sixth Directive (now Article 135(1) of Directive 2006/112). [14]

35. In *GFKL Financial Services*, [15] the Court examined a purchase by an operator of defaulted debts. It held that an operator who, at his own risk, purchases defaulted debts at a price below their face value does not effect a supply of services for consideration and does not carry out an economic activity falling within the scope of the Sixth Directive when the difference between the face value of those debts and their purchase price reflects the actual economic value of the debts at the time of their assignment. [16]

36. In that regard, it is worth noting, as does the tax authority in its answers to the written questions and the parties at the hearing, that the circumstances of the present case are very different from those which gave rise to the judgment in *GFKL Financial Services*. [17]

37. First, the case at hand does not concern the acquisition of a debt, let alone a defaulted debt, by the investment fund acting in the capacity of a sub-participant, but rather a transfer of the proceeds related to the receivables. In other words, unlike the facts in *GFKL Financial*

[11] That issue will be dealt with in point 60 of this Opinion.

[12] Judgment of 26 June 2003 (C-305/01, EU:C:2003:377).

[13] Judgment of 27 October 2011 (C-93/10, EU:C:2011:700). In that judgment, the Court interpreted Article 2(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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 corresponds to Article 2(1)(a) and (c) of Directive 2006/112.

[14] Judgment of 26 June 2003, *MKG-Kraftfahrzeuge-Factoring* (C-305/01, EU:C:2003:377, paragraph 80).

[15] Judgment of 27 October 2011 (C-93/10, EU:C:2011:700).

[16] Paragraph 26 of that judgment.

[17] Judgment of 27 October 2011 (C-93/10, EU:C:2011:700).

Services,[18] the sub-participant does not acquire defaulted debts at a price below their face value. Moreover, in the present case, there is no change in the claim itself, meaning that, under the sub-participation agreement, the originator of a sub-participation remains a creditor of the principal debtor, while the sub-participant acquires from the originator solely a claim for payment of the amounts transferred to the originator by the principal debtor under the original loan relationship.

38. Second, in the present case, as regards the question whether there is a supply of services to the originator, not only does the sub-participant purchase the products (the proceeds of the receivables) of a portfolio of loans, but it also undertakes to bear the risk of the principal debtor's failing to pay, at the same time having no right to claim against the originator for that failure. Consequently, it appears that the originator obtains an advantage which goes beyond the mere receipt of the nominal value of the receivables of a portfolio of loans.

39. Third, the claims that were at issue in the proceedings that gave rise to the judgment in *GFKL Financial Services*[19] constituted defaulted debts, while the object of the sub-participation agreement are loans that are not yet due and thus whose recovery cannot be determined at the time of the execution of the upfront payment by the sub-participant.

40. Therefore, while it is for the national court to ascertain whether there is a direct link between the service supplied and the payment, for the purposes of the foregoing analysis I take the view that there is a specific supply of services provided by the sub-participant under the sub-participation agreement at issue. The originator remunerates the sub-participant by transferring the proceeds of the receivables of the original loans. The transaction at issue entails a supply of services for consideration that has a direct link with that supply for the purposes of Article 2(1)(c) of Directive 2006/112, making it a transaction subject to VAT.

41. I shall now turn to examining whether the services provided by the sub-participant fall under the exemption provided for in Article 135(1)(b) of that directive.

B. Interpretation of Article 135(1)(b) of Directive 2006/112

1. The principles of the interpretation of Article 135(1) of Directive 2006/112

42. First, it should be recalled that the exemptions referred to in Article 135(1) of Directive 2006/112 are autonomous concepts of EU law the purpose of which is to avoid divergences in the application of the VAT system from one Member State to another and which must be placed in the general context of the common system of VAT.[20]

[18] Ibid.

[19] Ibid.

[20] Judgments of 25 July 2018, *DPAS* (C-5/17, EU:C:2018:592, paragraph 28 and the case-law cited), and of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 21).

43. Second, the terms used to describe the exemptions envisaged by Article 135(1) of Directive 2006/112 must be given a strict interpretation, since they constitute derogations from the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.[21] However, that rule of strict interpretation does not mean that the terms used to specify those exemptions should be construed in such a way as to deprive them of their intended effect.[22]

44. Third, the interpretation of the abovementioned exemptions must be consistent with the objectives pursued by the exemptions provided for in Article 135(1) of Directive 2006/112 and must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT.[23] It follows from the latter principle that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their transactions excluded from the exemption provided for in that provision.[24]

45. It is in the light of the foregoing considerations that the question whether the services provided under the sub-participation agreement at issue fall within the scope of the exempt transactions referred to in Article 135(1)(b) of Directive 2006/112 must be examined.

2. The notion of the 'granting … of credit' for the purposes of Article 135(1)(b) of Directive 2006/112

46. According to settled case-law, for the purposes of interpreting a provision of EU law, 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.[25] It is therefore necessary to undertake a literal, systematic and teleological interpretation of Article 135(1)(b) of Directive 2006/112, taking into account the Court's existing case-law relating to that article and the principles of interpretation governing the common system of VAT.[26]

(a) Literal interpretation

(1) The case-law concerning the expression 'granting … of credit' within the meaning of Article 135(1)(b) of Directive 2006/112

47. It is well-established case-law that the expression 'granting … of credit' within the meaning of Article 135(1)(b) of Directive 2006/112 must be interpreted broadly so that its scope cannot be limited to loans and credits granted by banking and financial institutions only.[27]

[21] See, to that effect, judgments of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 37), and of 8 October 2020, *United Biscuits (Pensions Trustees) and United Biscuits Pension Investments* (C-235/19, EU:C:2020:801, paragraph 29).

[22] See, inter alia, judgments of 18 November 2004, *Temco Europe* (C-284/03, EU:C:2004:730, paragraph 17); and of 21 February 2013, *Žamberk* (C-18/12, EU:C:2013:95, paragraph 19).

[23] Judgment of 13 January 2022, *Termas Sulfurosas de Alcafache* (C-513/20, EU:C:2022:18, paragraph 25 and the case-law cited).

[24] Judgment of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 50 and the case-law cited).

[25] Judgment of 10 September 2014, *Ben Alaya* (C-491/13, EU:C:2014:2187, paragraph 22 and the case-law cited).

[26] See points 42 to 45 above.

[27] See, in particular, judgments of 15 May 2019, *Vega International Car Transport and Logistic* (C-235/18, EU:C:2019:412, paragraph 44), and of 18 October 2018, *Volkswagen Financial Services (UK)* (C-153/17, EU:C:2018:845, paragraph 35).

48. Moreover, in *Muys' en De Winter's Bouw- en Aannemingsbedrijf*,[28] the Court held that the abovementioned expression encompassed a credit granted by a supplier of goods in the form of a deferral of payment.[29] Subsequently, the Court considered in the same vein[30] that the 'granting … of credit' consists, inter alia, in the provision of capital against remuneration.[31] The Court has noted that if such remuneration is secured by the payment of interest, other forms of consideration cannot be excluded. Thus, it has been held that the advance financing of the purchase of goods in return for an increase in the amount reimbursed by the recipient of that financing falls under the said exemption.[32] Furthermore, the Court has ruled that a grant of 'credit' consists 'in making available an amount of capital, duly remunerated by the payment of interest, or in a deferred payment in the purchase price of goods agreed by a supplier in return for payment of interest remunerating that credit'.[33]

49. In that connection, I must emphasise that the Court has held that the transactions exempt under Article 135(1) of Directive 2006/112, including those falling under point (b), are defined in terms of the *nature* of the services provided and not in terms of the person supplying or receiving the service, so that the application of those exemptions is not dependent on the status of the entity providing those services.[34] In other words, the exemption is not subject to the requirement that the transaction at issue be carried out by a certain type of institution or legal person, but to the requirement that such a transaction be, by its very nature, a granting or a negotiation of credit.

50. To summarise, for the purposes of exempting a transaction under Article 135(1)(b) of Directive 2006/112, there must be two cumulative elements satisfied: capital and remuneration for making that capital available, without which the exemption does not apply.

(2) The relationship between the services described

51. It is apparent from the information provided to the Court that the transaction at issue is of a composite nature, which consists of the making available of capital by the sub-participant to the originator and of the latter transferring the proceeds of the receivables and the risk of a credit default to the sub-participant. Those elements appear to be indispensable for the implementation of the overall transaction and are intertwined.

52. Therefore, it is necessary to carry out an analysis of whether the proceeds of the receivables which the sub-participant obtains from the originator constitute consideration for the provision of capital.[35] It is apparent from the order for reference that the sub-participant's remuneration

[28] Judgment of 27 October 1993 (C-281/91, EU:C:1993:855).

[29] Ibid., paragraph 13. See also judgments of 29 April 2004, *EDM* (C-77/01, EU:C:2004:243), and of 8 December 2016, *Stock'94* (C-208/15, EU:C:2016:936).

[30] It is important to note that in paragraph 38 of the judgment of 17 October 2019, *Paulo Nascimento Consulting* (C-692/17, EU:C:2019:867), the Court cites point 61 of the Advocate General's Opinion, which refers to paragraph 12 et seq. of the judgment in *Muys' en De Winter's Bouw- en Aannemingsbedrijf* of 27 October 1993 (C-281/91, EU:C:1993:855).

[31] See, to that effect, judgment of 17 October 2019, *Paulo Nascimento Consulting* (C-692/17, EU:C:2019:867, paragraph 38).

[32] See, to that effect, judgment of 15 May 2019, *Vega International Car Transport and Logistic* (C-235/18, EU:C:2019:412, paragraphs 47 and 48).

[33] See, to that effect, judgment of 17 October 2019, *Paulo Nascimento Consulting* (C-692/17, EU:C:2019:867, paragraph 38 and the case-law cited).

[34] Judgment of 15 May 2019, *Vega International Car Transport and Logistic* (C-235/18, EU:C:2019:412, paragraph 43 and the case-law cited).

[35] See points 48 to 50 of this Opinion.

consists of the difference between the estimated value of the receivables, which appears to correspond to their nominal value, and the upfront amount paid by the sub-participant to the originator.

53. However, it is worth noting that the case-law does not specify whether the consideration at issue should be analysed from the perspective of the originator, the sub-participant, or both. For example, while the originator may wish to decrease its risk exposure, diversify its loan portfolio and/or release regulatory capital, the objective of the sub-participant may be to obtain proceeds from the principal debts without being the actual owner of those debts and without having any relationship with a particular principal debtor, thus avoiding management of the performance of the loan.

54. In my opinion, since the wording of Article 135(1)(b) of Directive 2006/112 suggests that the emphasis should be put on the nature of the transaction,[36] it is the economic and commercial realities that constitute a fundamental criterion for the application of the common system of VAT.[37] Therefore, in order for the supply of a service, such as the one carried out by the sub-participant, to be regarded as a grant of 'credit', exempt under that provision, that supply must form a distinct whole which has the effect of fulfilling the specific and essential functions of such a transaction.[38] Moreover, it is well-established case-law that the Court takes into account *both* the economic objective of that transaction and the interests of the recipients of the supplies.[39]

55. In that regard, it should be observed that the referring court states that the service supplied by the sub-participant has a two-fold economic purpose, which is the funding of the original loans and the transfer of credit risk.

(3) The funding of the original loans

56. The referring court notes that the transaction at issue serves to fund the original loans.[40] In my view, the expression 'granting … of 'credit' within the meaning of Article 135(1)(b) of Directive 2006/112 is sufficiently broad to encompass a payment made by an originator to a sub-participant, if that payment may constitute remuneration in return for the provision of capital. Moreover, whether that payment constitutes interest or another form of consideration is immaterial for the purposes of such a determination. I find it significant that the order for reference states that, in principle, the amount paid by the sub-participant is less than the amount it receives through the subsequent transfers of the proceeds made by the originator. Subject to verification by the referring court, it seems that the difference between those two amounts indeed constitutes remuneration received by the sub-participant for making its capital available and can thus be considered a 'grant' of 'credit', as interpreted by the Court. However, if that remuneration also includes the service of assuming the credit risk for certain kinds of exposure, it could be argued that the objective purpose of the transaction is more than just to fund the originator.

36 See, by way of analogy, the cases cited by Advocate General Szpunar in his Opinion in *Volkswagen* (C-153/17, EU:C:2018:305, points 68 to 74).

37 See, to that effect, judgment of 22 November 2018, *MEO – Serviços de Comunicações e Multimedia* (C-295/17, EU:C:2018:942, paragraph 43 and the case-law cited).

38 See, by way of analogy, judgment of 17 December 2020, *FRANCK* (C-801/19, EU:C:2020:1049, paragraph 45).

39 See, to that effect, judgment of 8 December 2016, *Stock'94* (C-208/15, EU:C:2016:936, paragraph 29 and the case-law cited).

40 It should be noted that the material presented to the Court does not state clearly whether the original loans are future or present loans. The hearing did not solve that conundrum.

(4) The transfer of risk in relation to an underlying loan

57. From the perspective of the originator, to whom the services are provided and whose interests are a fundamental criterion,[41] the transaction at issue constitutes a tool for transferring a credit risk in relation to an underlying loan or loan portfolio to the sub-participant.

58. In that connection, the referring court observes that the sub-participation agreement operates as a mechanism for transferring credit risk from the originator to the sub-participant since the latter agrees to bear the risk of a potential loss to the originator in relation to the original loans.[42] It could therefore be considered that the essential purpose of the transaction at issue is to transfer the risk related to the original loans.[43] In that connection, it is important to note that, in exchange for an upfront payment by the sub-participant, the originator agrees to transfer the proceeds of the receivables to the sub-participant, which would eventually bear *all* the losses in the event of a default in payment.[44] Since the original loans are not sold and remain on the balance sheet of the originator, one could even argue that, from the perspective of the originator, the purposes of the sub-participation agreement at issue are primarily credit and capital risk management. In general, it is widely accepted that securitisation, to which the sub-participation transaction is similar, constitutes, along with loan sales or reinsurance, a risk management mechanism.[45]

59. In the present case, it is for the referring court to determine, taking into account all the circumstances of the transaction at issue, whether risk management may be considered as constituting the essential element of the services provided by the sub-participant.

60. In that regard, I find it significant that the payment made by the originator under the sub-participant agreement depends on the performance of the principal debtor. If the latter defaults, the former cannot transfer the payment to the sub-participant, which, in turn, will not receive the amount agreed when the agreement was entered into. In that connection, two elements distinguish the transaction at issue from a 'traditional' credit agreement. First, it is the absence of a claim against the principal debtor by the sub-participant that characterises the triangular nature of the transaction at issue, since the sub-participant has no right to pursue the defaulted loan. Second, under a 'traditional' credit agreement, it is common for the debtor to have to provide guarantees and collateral. In general, banks' lending decisions tend to be based on the amount of collateral available.[46] However, in the transaction at issue, there are no guarantees to minimise the risk of loss for a sub-participant in the event of default by the principal debtor.[47]

41 See point 54 above.

42 See Article 183(4) of the Law on Investment Funds.

43 Some of the methods of loan transfer can be novation, assignment and participation or sub-participation, which can be either funded or unfunded.

44 Such a transfer takes place since Article 183(4) of the Law on Investment Funds provides for an obligation to remit to the sub-participant all the proceeds from the securitised receivables, the principal amounts of the securitised receivables and the amounts received from realising the collateral related to the securitised receivables.

45 OECD, *Facilitating Access to Finance – Discussion Paper on Credit Guarantee Schemes*, OECD Publishing, 2010.

46 Ibid.

47 That assessment is supported by the definition of a 'credit agreement' under Article 3(4) of Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (OJ 2021 L 438, p. 1), which is 'an agreement as originally issued, modified or replaced, whereby a credit institution grants a credit in the form of a deferred payment, a loan or other similar financial accommodation'. It follows that the concept of 'credit agreement', defined by that provision, is particularly broad. Such a definition could, in my opinion, cover an agreement such as the one at issue in the present proceedings, which provides for capital in return for deferred payments. However, again, it does not include the transfer of risk, which is part and parcel of the sub-participation agreement at issue.

61. Given the two-fold purpose of the transaction at issue and its main characteristics, I am of the opinion that the sub-participation transaction at issue is to be distinguished from the transaction that was at issue in *FRANCK*.[48] That transaction concerned a commercial company engaged in the processing of tea and coffee, which made funds available to a retail chain through the simultaneous conclusion of three types of contracts. Since the economic objective of that transaction was to satisfy that retail chain's capital requirements,[49] the Court considered, subject to verification by the national court, that the main benefit was the making available to that retail chain of the funds that the commercial company had obtained from a factoring company. The Court ruled that the other services provided by the company in the execution of the three types of contracts were ancillary to that main service, not having any different purpose. It is clear that the transaction at issue in *FRANCK*, unlike the transaction at issue in the present case, did not involve a transfer of risk, but may have constituted, subject to verification by the national court, a 'granting … of credit' within the meaning of Article 135(1)(b) of Directive 2006/112.

(5) Interim conclusion

62. The two-fold purpose of the transaction at issue – the funding of the principal loan and the management of credit risk by the originator – are indivisible services and, subject to verification by the referring court, none of those services can be regarded as constituting either a principal or ancillary service. While both of those services can be offered separately, it is clear that under the sub-participation agreement at issue the payment of the upfront amount constitutes remuneration for obtaining the proceeds of the receivables that are subsequently transferred by the originator to the sub-participant. The originator may also agree to transfer those proceeds in return for the risk that is transferred to the sub-participant. Consequently, I am of the opinion that the sub-participation transaction at issue, since it serves as a means of funding and as a risk transfer method in relation to the original loans, should be taken into account for VAT purposes only as a whole.[50]

63. Accordingly, I take the view that, although the service of the financing of loans may fall within the wording of the 'granting … of credit' and thus the exemption laid down by Article 135(1)(b) of Directive 2006/112, the same, by contrast, is not true of the service provided by the sub-participant consisting in assuming the risk in the event of a default by the principal debtor. Nevertheless, since nothing in the wording of Article 135(1)(b) of Directive 2006/112 suggests whether a service consisting in assuming the credit risk transferred by the originator to the sub-participant constitutes a grant of 'credit', that point must be clarified with reference to the scheme and objectives of that provision.

(b) Systematic interpretation

(1) The scheme of Article 135(1) of Directive 2006/112

64. From a systematic point of view, it should be noted that Article 135(1) of Directive 2006/112 refers to a series of different financial and banking transactions and dealings concerning credits, negotiable instruments and securities, which may give some indication as to how one should construe the expression 'granting … of credit' within the meaning of point (b) of that provision.

48 Judgment of 17 December 2020 (C-801/19, EU:C:2020:1049).

49 Paragraph 28 of the judgment in *FRANCK*.

50 See, by way of analogy, judgment of 19 July 2012, *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 43).

Namely, while point (d) of that paragraph refers to 'transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments', point (f) mentions 'transactions … in … debentures and other securities'. In my view, points (a), (c) and (e) of that paragraph can be excluded from the present analysis, since they concern areas, transactions or persons that are not relevant for classifying the transaction at issue.

65. When analysing the scope of points (b), (d) and (f) of Article 135(1) of Directive 2006/112, I have reached the conclusion that their respective scope and purposes are somewhat different. [51]

66. First, with regard to the 'granting … of credit' within the meaning of Article 135(1)(b) of Directive 2006/112, as I have already observed, the Court has held that that consists in the making available of an amount of capital, duly remunerated by the payment of interest, or in a deferred payment of the purchase price of goods agreed by a supplier in return for the payment of interest in remuneration of that credit. [52]

67. Second, as regards the transactions listed in Article 135(1)(d) of Directive 2006/112, the Court has held that the transactions concerning 'deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments' fall within the field of financial transactions and concern, in particular, payment instruments whose mode of operation involves a transfer of money. [53] In a recent judgment, the Court found that bills of exchange issued by a company were to be considered as 'negotiable instruments' within the meaning of that provision, in so far as they contained an obligation on that company, as issuer, to pay the specified amount to the holder on their maturity. [54]

68. Third, with regard to the exemption laid down by Article 135(1)(f) of Directive 2006/112, it suffices to recall that the latter provision covers, inter alia, transactions in 'shares, interests in companies or associations, debentures and other securities'. The Court has held that securities confer a property right over legal persons and that 'other securities' have to be regarded as being comparable in nature to the other securities specifically mentioned in that provision. [55] Moreover, the Court has ruled that transactions in shares and other securities encompass transactions on the market in marketable securities and that trade in securities involves acts which alter the legal and financial situation as between the parties. [56] The words 'transactions … in other securities' within the meaning of that provision refer, therefore, to transactions which are liable to create, alter or extinguish parties' rights and obligations in respect of securities. [57]

[51] The differences may be seen in the wording of those points. While point (b) deals with the 'granting … of credit', point (d) refers to transactions 'concerning' certain banking operations and point (f) includes transactions 'in' certain rights and securities (see Opinion of Advocate General Kokott in *Aspiro* (C-40/15, EU:C:2015:850, point 26); see, also, judgment of 17 March 2016, *Aspiro* (C-40/15, EU:C:2016:172, paragraph 29)).

[52] Point 48 above.

[53] See, to that effect, judgments of 12 June 2014, *Granton Advertising* (C-461/12, EU:C:2014:1745, paragraphs 36 to 38); of 22 October 2015, *Hedqvist* (C-264/14, EU:C:2015:718, paragraph 40); and of 26 May 2016, *Bookit* (C-607/14, EU:C:2016:355, paragraph 40).

[54] Judgment of 17 December 2020, *FRANCK* (C-801/19, EU:C:2020:1049, paragraph 42).

[55] Judgment of 12 June 2014, *Granton Advertising* (C-461/12, EU:C:2014:1745, paragraph 27).

[56] See, to that effect, judgment of 5 June 1997, *SDC* (C-2/95, EU:C:1997:278, paragraphs 72 and 73).

[57] Judgments of 13 December 2001, *CSC Financial Services* (C-235/00, EU:C:2001:696, paragraph 33); of 29 October 2009, *AB SKF* (C-29/08, EU:C:2009:665, paragraph 48); and of 5 July 2012, *DTZ Zadelhoff* (C-259/11, EU:C:2012:423, paragraph 23).

69. In my opinion, it follows from the scheme of the abovementioned points of Article 135(1) of Directive 2006/112 that point (d) thereof deals with payments and negotiable instruments,[58] while point (f) covers, inter alia, investments[59] and transactions in securities, which might include a transfer of risk, such as the one at issue in the main proceedings. By contrast, point (b) covers more traditional credit operations that entail making capital available against remuneration. Therefore, it seems that the transactions falling under Article 135(1)(b) of Directive 2006/112 may cover certain types of credit operations, but do not encompass transactions involving the transfer of credit risk, which appears to constitute an essential element of the transaction at issue.

70. In that connection, it is for the referring court, taking into account all the circumstances of the case, to determine how the sub-participation transaction is structured and, namely, whether the underlying debt portfolio is divided into tranches according to the risk level the loans are expected to contain.[60] At the hearing, the parties did not rule out the possibility that such a division occurs, in which case the amounts of the upfront payment and/or of the proceeds of the receivables are dependent on the quality of the loan portfolio and on the credit-risk exposure transferred to the sub-participant.[61]

71. As I have already noted in points 55 to 57 of this Opinion, it appears, subject to verification by the referring court, that the services provided by the sub-participant under the sub-participation agreement consist of two intertwined elements that are on an equal footing, namely, the funding of the original loans and the transfer of credit risk in relation to the original loans to the sub-participant. Bearing in mind the general scheme of Article 135(1) of Directive 2006/112 and the credit-risk transfer component, making the transaction similar to a securitisation transaction, I take the view that the sub-participation transaction at issue does not fall within the concept of the 'granting … of credit' within the meaning of point (b) of that paragraph. If that were not the case, one could harbour doubts as to the rationale of point (f) of that paragraph, since all the transactions listed therein require some sort of funding. In my opinion, that conclusion is supported by way of an intertextual interpretation of other EU acts concerning securitisation.

(2) The relationship between Article 135(1)(b) of Directive 2006/112 and EU law on securitisation

72. In finance, securitisation is a technique that allows the conversion of loans into marketable securities and the sale of those securities to investors.[62] Under securities law, there is a distinction between 'true sale' (traditional) securitisation and synthetic securitisation. Synthetic securitisation, unlike true sale securitisation, involves loans that are not sold by the bank but remain on the originating bank's balance sheet.[63] The credit risk relating to those loans is transferred to the investment fund. Synthetic securitisation takes place 'where the transfer of risk

58 Judgment of 17 December 2020, *FRANCK* (C-801/19, EU:C:2020:1049).

59 Judgment of 6 February 1997, *Harnas & Helm* (C-80/95, EU:C:1997:56, paragraphs 16 and 18).

60 A tranche is a portion of a structured finance instrument with particular risks, rewards and/or maturity. There may be a hierarchy of claims relating to each tranche.

61 For example, when an originator acquires credit protection for the 'junior tranche' (the so-called first loss tranche, which has a high-risk and high-reward profile), such securitisation aims at reducing capital requirements for the originating bank in exchange for a transfer of risk to investors, instead of creating liquidity.

62 See, for example, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/securities-markets/securitisation. For an EU legal definition of the term 'securitisation', see Article 4(1)(61) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

63 The order for reference defines the transaction at issue as a 'synthetic securitisation', while the Commission, at the hearing, pointed to the fact that, unlike the transaction at issue in the main proceedings, such securitisation, under current EU law, does not involve funding on behalf of the investor.

is achieved by the use of credit derivatives or guarantees, and the exposures being securitised remain exposures of the originator institution'.[64] The transaction provided by the sub-participation agreement at issue has certain characteristics of a funded synthetic securitisation[65] or at least appears to be similar conceptually to it.

73. In EU law, Regulation (EU) 2017/2402[66] established a general framework for securitisation. Its objective is to create simple, transparent and standardised securitisations ('the STS framework') in order to make credit more accessible in the European Union and to protect investors. The abovementioned distinction between the two types of securitisation is present in that regulation. Synthetic securitisation is defined in Article 2(1)(10) of that regulation as a securitisation where the transfer of risk is achieved by the use of credit derivatives or guarantees, and the exposures being securitised remain exposures of the originator. However, initially, such securitisation was excluded from the STS framework.[67]

74. On 31 March 2021, Regulation 2017/2402 was amended[68] in order to include certain types of synthetic securitisations in the STS framework for the purposes of increasing liquidity and to facilitate access to finance in the context of the COVID-19 crisis. With the adoption of Regulation 2021/557, the EU legislature recognised balance sheet synthetic transactions – a category which the sub-participation transaction at issue seems to fall under or to which it appears to be similar conceptually.[69]

75. It is true that the new provisions have been applicable only since 9 April 2021, while the tax ruling at issue in the main proceedings was issued on 30 December 2015, a period in which synthetic securitisations were not covered by specific provisions of EU law. Nevertheless, the provisions of Regulation 2021/557 may give an indication of the characteristics of synthetic securitisations and explain how to classify the sub-participation agreement under EU legislation on securitisations.

76. In that regard, it is interesting to note that recital 11 of that regulation, which deals with synthetic securitisations, explains the abovementioned two-fold purpose of the transaction, emphasising that the investor sells protection, while the originator purchases credit protection from the investor and commits to pay a credit protection premium, which generates the return for investors. Recital 13 of Regulation 2021/557 explains that 'in synthetic securitisations, the risk transfer is achieved via a credit protection agreement instead of a sale of the underlying assets'. As the Commission contended at the hearing, it is true that, unlike the synthetic securitisation provided for by that regulation, in the transaction at issue in the main proceedings, the sub-participant makes an initial payment to the originator. However, that fact is of no relevance when the objectives of the two transactions are compared, since it is clear that both transactions involve a credit protection purpose.

64 Article 242(11) of Regulation No 575/2013.

65 Synthetic securitisation can be funded or unfunded (see, for example, https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583848/EPRS_BRI%282016%29583848_EN.pdf).

66 Regulation of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ 2017 L 347, p. 35).

67 See, to that effect, recital 24 of Regulation 2017/2402.

68 Regulation (EU) 2021/557 of the European Parliament and of the Council of 31 March 2021 amending Regulation 2017/2402 to help the recovery from the COVID-19 crisis (OJ 2021 L 116, p. 1).

69 See the definition in recital 9 of Regulation 2021/557.

77. Moreover, in recital 5 of Regulation 2021/557, the EU legislature states that synthetic securitisation is one way of moving risks away from the systemically important parts of the financial system and of allowing lenders to strengthen their capital positions and raise new own funds. Therefore, I take the view that the rationale for making synthetic securitisation more available pursues the same two-fold objective as the sub-participation agreement at issue, that is to say, the two-fold purpose explained in points 55 to 61 of this Opinion.

78. Accordingly, while the EU provisions on securitisations do not preclude the transactions at issue in the main proceedings from being regarded as transactions or dealings covered by Article 135(1) of Directive 2006/112, they seem to indicate that those transactions fall under point (f) of that provision. For the reasons I have explained in points 63 and 71 of this Opinion, I consider that only one part of the transactions at issue in the main proceedings falls under Article 135(1)(b) of Directive 2006/112, while the other part – the transfer of credit risk, which might be considered as being an equal yet essential part of the transaction – may fall under point (f) of that paragraph. The question as to whether the latter provision applies to the transaction concerned is not at issue in the question referred by the national court and thus is not the subject matter of the present proceedings.

3. Teleological interpretation

79. The starting point for a teleological interpretation of Article 135(1)(b) of Directive 2006/112 is to weigh the requirement of a strict interpretation of the exemptions set out in that article [70] against the broad interpretation given to the expression 'granting … of credit'. [71] That latter interpretation is a result of the objective of Directive 2006/112 to secure equal treatment for taxable persons. [72]

80. The recitals of Directive 2006/112 do not explain the reasons that led the EU legislature to exempt financial services, including the granting of credit.

81. As regards Article 13B(d) of the Sixth Directive (now Article 135(1)(c) of Directive 2006/112), the Court has already held that the purpose of the exemption for financial transactions is to alleviate the difficulties connected with determining the tax base and the amount to be exempted [73] and to avoid an increase in the cost of consumer credit. [74] By way of analogy, the objective of Article 135(1)(b) of Directive 2006/112 is to alleviate the difficulties connected with determining the tax base and the amount to be exempted and to reduce the cost of funding. In the case at hand, regarding the matter of reduction, the question remains whether the transaction executed under the sub-participation agreement would actually reduce the cost of the credit acquired by the originator.

[70] See point 43 above.

[71] See point 47 above. See, also, judgment of 17 December 2020, *FRANCK* (C-801/19, EU:C:2020:1049, paragraph 35).

[72] See, in particular, judgment of 15 May 2019, *Vega International Car Transport and Logistic* (C-235/18, EU:C:2019:412, paragraphs 44 and 45).

[73] As Advocate General Szpunar has pointed out, in the literature, it is generally acknowledged that those services, which relate only to financial movements, are too difficult to tax because of the difficulty in determining the taxable amount (see Opinion in *Volkswagen*, C-153/17, EU:C:2018:305, point 80).

[74] Judgment of 19 April 2007, *Velvet & Steel Immobilien* (C-455/05, EU:C:2007:232, paragraph 24).

82. First, as regards the objective concerning the difficulties connected with determining the tax base, as mentioned by the tax authority at the hearing, there is no difficulty in carrying out that determination, since the difference between the two amounts at issue – the upfront amount paid by the sub-participant and the proceeds of the receivables – can be objectively established. Therefore, the first objective is not met by the transaction at issue.

83. Second, in relation to the question of avoiding an increase in or the reduction of a credit cost, the question remains whether the transaction executed under the sub-participation agreement would actually reduce the cost of the credit acquired by the originator. In my view, while securitisation is a tool that can create more possibilities for banks to provide funding, diversify their portfolio or allow them to manage their risk, it is highly doubtful whether it actually reduces the cost of funding, since such a transaction entails a risk transfer from the originator to the sub-participant. Such a risk transfer nevertheless comes, in principle, at a cost, which probably either reduces the amount paid by the sub-participant and/or increases the payment in the form of proceeds made by the originator. However, it is for the referring court to carry out such a factual analysis in order to determine whether the cost of funding is actually reduced by the transaction at issue and whether that purpose of Article 135(1)(b) of Directive 2006/112 is attained.

84. In conclusion, I take the view that a transaction such as that at issue in the main proceedings is clearly not one of the VAT-exempt financial transactions relating to the granting of 'credit' set out in Article 135(1)(b) of Directive 2006/112. It is possible, however, that such a transaction may fall under other provisions, such as point (f) of that paragraph, given the essential component of risk management provided by the sub-participant.

V. Conclusion

85. I propose that the Court reply as follows to the question referred by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) for a preliminary ruling:

Article 135(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the exemption which it lays down for transactions relating to the granting, negotiation and management of credit does not apply to the supply of services provided under the sub-participation agreement at issue in the main proceedings, whereby the sub-participant agrees to pay to the originator an upfront amount in return for obtaining throughout the duration of that agreement the proceeds of the receivables of the principal loan granted to the principal debtor, since point (b) does not cover the credit risk transferred by the originator to the sub-participant, which, subject to verification by the referring court, is an essential part of that transaction.