Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 September 2017 *

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 132(1)(f) — Exemptions for certain activities in the public interest — Exemption for the supply of services by independent groups of persons for their members — Applicability to insurance)

In Case C-605/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 26 August 2015, received at the Court on 17 November 2015, in the proceedings

Minister Finansów

v

Aviva Towarzystwo Ubezpieczeń na Życie S.A. w Warszawie,

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: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 December 2016,

after considering the observations submitted on behalf of:

– the Minister Finansów, by T. Tratkiewicz, L. Pyszyński and B. Rogowska-Rajda, acting as Agents,

– Aviva Towarzystwo Ubezpieczeń na Życie S.A. w Warszawie, by J. Martini, doradca podatkowy,

– the Polish Government, by B. Majczyna and B. Majerczyk-Graczykowska, acting as Agents,

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

– the Netherlands Government, by M.K. Bulterman and M. Noort, acting as Agents,

– the United Kingdom Government, by D. Robertson and S. Simmons, acting as Agents, assisted by O. Thomas QC,

* Language of the case: Polish.

– the European Commission, by L. Lozano Palacios and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 132(l)(f) 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 the Minister Finansów (Minister of Finance, Poland) and Aviva Towarzystwo Ubezpieczeń na Życie S.A. w Warszawie ('Aviva') concerning an individual opinion addressed to the latter relating to the interpretation of Article 43(1)(21) of the ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. No 54, item 535, 'the Law on VAT'), transposing Article 132(1)(f) of Directive 2006/112.

Legal context

EU law

The Sixth Directive

3 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') was repealed and replaced, as from 1 January 2007, by Directive 2006/112. Article 13 of the Sixth Directive provided:

'A. Exemptions for certain activities in the public interest

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;

…'

Regulation (EEC) No 2137/85

4 Article 3(1) of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985, L 199, p. 1) provides:

‘The purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself.

Its activities must be related to the economic activity of its members and may be only ancillary thereto.’

Directive 2006/112

5 Directive 2006/112 contains a Title IX, entitled ‘Exemptions’, of which Chapter 1 is entitled ‘General Provisions’.

6 Article 132(1)(f) of Directive 2006/112, which appears in Chapter 2, entitled ‘Exemptions for certain activities in the public interest’, of Title IX of that directive, provides:

‘Member States shall exempt the following transactions:

…

(f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;

…’

7 Article 135(1) of Directive 2006/112, which appears in Chapter 3, entitled ‘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;

…’

Polish law

8 Article 43(1)(21) of the Law on VAT states:

‘The following shall be exempt from tax: the supply of services by independent groups of persons to their members who are carrying on an activity which is exempt from tax or in relation to which they are not regarded as taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity which is exempt from tax or not subject to tax, where those groups merely claim from their members the reimbursement of costs equal to each member’s individual share of the general expenses incurred in the common interest by such groups, provided that the exemption does not lead to disturbance of the conditions of competition.’

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

9 Aviva is part of the Aviva Group which is active in the area of insurance and pension protection services in Europe. The main activities of that group are the creation of long-term savings plans, fund management and insurance.

10 As part of a process of integration, the Aviva Group plans to set up a series of shared-services centres in a number of Member States. It is intended that those centres will provide the services which are directly necessary for carrying on the activity of insurance by the entities in that group, in particular services in the area of human resources, financial and accounting services, information technology services, administrative services, customer services and services connected with the creation of new products.

11 Aviva intends to carry on that activity by creating a European Economic Interest Grouping ('EEIG') which will not profit from its activity, in accordance with Article 3 of Regulation No 2137/85. The members of the EEIG will be exclusively companies from the Aviva Group carrying on an economic activity in the area of insurance, including Aviva.

12 Against that background, Aviva submitted a request to the Minister of Finance in order to ascertain whether the activity of the EEIG could benefit from an exemption from value added tax (VAT) on the basis of Article 43(1)(21) of the Law on VAT. Aviva submitted that that should be the case and that, therefore, the members of the EEIG established in Poland, which are companies carrying on an economic activity in the area of insurance, had to be exempted from the obligation to charge and to declare VAT due on the costs passed on by the EEIG.

13 By decision of 14 March 2013, the Minister of Finance considered that Aviva's position was incorrect. It found that the condition to which the exemption under Article 43(1)(21) of the Law on VAT is subject, that the conditions of competition must not be disturbed, had not been fulfilled. According to the Minister of Finance, the application of an exemption to an independent group of persons ('IGP') places it in a privileged position on the market as compared with other entities engaged in the same transactions. It therefore considered that, where entities which are not part of an IGP and which carry on a similar, taxed activity operate on the market in question, it is appropriate to refuse that exemption on the ground that it is liable to infringe the competition rules.

14 Aviva brought an action before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland), seeking, inter alia, annulment of that decision of the Minister of Finance. It claimed that that decision, according to which the services purchased by Aviva from the EEIG could not benefit from the exemption from VAT at issue, amounted to an infringement of Article 43(1)(21) of the Law on VAT.

15 By judgment of 30 December 2013, the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw) annulled the decision of the Minister of Finance of 14 March 2013. It held that the proposed EEIG satisfied all of the conditions permitting the application of the exemption under Article 43(1)(21) of the Law on VAT. That court took the view that distortions of competition could be raised only if there existed, on the market for ancillary services, entities other than the IGP concerned which were ready to offer services similar to those provided by that IGP and if, moreover, the current purchasers of the services, who are members of that IGP, were interested in purchasing those services from an entity outside of that group. According to that court, it would be difficult to find on the market an economic entity which would provide, as a shared-services centre, services to entities established in 12 Member States, without making profits and by operating exclusively within the structure of the group at issue in the main proceedings.

16 The Minister of Finance brought an appeal on a point of law before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland). That court considered that the exact interpretation which needed to be made of the provisions of Directive 2006/112, in particular of Article 132(1)(f), was not clear cut and that the case-law of the Court of Justice did not make it possible to remove any doubts in that respect.

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

‘(1) Is a provision of national law concerning the exemption from VAT of an [IGP] which does not lay down any criteria or procedures governing the fulfilment of the condition on distortion of competition compatible with Article 132(1)(f) of [Directive 2006/112] in conjunction with Article 131 of Directive 2006/112, and also with the principles of effectiveness, of legal certainty and of the protection of legitimate expectations?

(2) What criteria should be applied in assessing whether the condition on distortion of competition laid down in Article 132(1)(f) of Directive 2006/112 is fulfilled?

(3) Is the answer to the second question above affected by the fact that the [IGP] provides the services to members which fall within the jurisdiction of different Member States?’

Consideration of the questions referred

18 As a preliminary point, it should be observed that Aviva plans to create an IGP whose members are companies from the Aviva Group carrying on an economic activity in the area of insurance and whose services are directly necessary for the carrying on of that activity.

19 In that context, the questions referred concern the interpretation of Article 132(1)(f) of Directive 2006/112 which provides for an exemption of the supply of services by independent groups of persons, which are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons for the purpose of rendering their members the services directly necessary for the exercise of that activity.

20 Before replying to those questions it is necessary to examine the issue whether that provision applies in circumstances such as those in the main proceedings which concern services provided by an IGP whose members carry on an economic activity in the area of insurance.

21 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with all those elements for the interpretation of EU law which may be of assistance in adjudicating on the case pending before it, whether or not the referring court has specifically referred to them in its question (judgment of 20 October 2016, *Danqua*, C-429/15, EU:C:2016:789, paragraph 37 and the case-law cited).

22 In those circumstances, it is also necessary to provide the referring court with guidance on the issue whether Article 132(1)(f) of Directive 2006/112 is intended to apply to the services provided by an IGP whose members carry on an economic activity in the area of insurance services which are directly necessary for the exercise of that activity.

23 In that regard, it should be pointed out that the terms of that provision, which refer to an exempt activity of the members of an IGP, do not preclude the possibility of that exemption being applied to the services of an IGP whose members carry on an economic activity in the area of insurance, inasmuch as Article 135(1)(a) of that directive exempts insurance transactions.

24 However, according to settled case-law, it is necessary, when interpreting a provision of EU law, 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 (judgments of 26 April 2012, *Able UK*, C-225/11, EU:C:2012:252, paragraph 22, and of 4 April 2017, *Fahimian*, C-544/15, EU:C:2017:255, paragraph 30 and the case law cited).

25 As regards the context of Article 132(1)(f) of Directive 2006/112, it should be pointed out that that provision is included in Chapter 2, entitled 'Exemptions for certain activities in the public interest', of Title IX of that directive. That heading indicates that the exemption provided for in that provision refers only to those IGPs whose members carry on activities in the public interest.

26 That interpretation is also confirmed by the structure of Title IX of that directive relating to 'Exemptions'. Within Directive 2006/112, Article 132(1)(f) is included, not in Chapter 1, entitled 'General Provisions', of that title, but in Chapter 2. Moreover, in that title, a distinction is made between Chapter 2, entitled 'Exemptions for certain activities in the public interest', and Chapter 3, entitled 'Exemptions for other activities', a distinction which indicates that the rules laid down in Chapter 2 for certain activities in the public interest do not apply to the other activities referred to in Chapter 3.

27 Chapter 3 includes, in Article 135(1)(a), an exemption for 'insurance and reinsurance transactions'. It is thus clear from the general scheme of Directive 2006/112 that the exemption provided for in Article 132(1)(f) of Directive 2006/112 does not apply to insurance and reinsurance transactions and that, accordingly, the services provided by IGPs whose members are active in the area of insurance and reinsurance do not come within that exemption.

28 As regards the aim of Article 132(1)(f), within Directive 2006/112, it is necessary to recall the purpose of all of the provisions of Article 132 of that directive, which is to exempt from VAT certain activities in the public interest with a view to facilitating access to certain services and the supply of certain goods by avoiding the increased costs that would result if they were subject to VAT (judgment of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraph 30 and the case-law cited).

29 Thus, the services provided by an IGP come within the exemption provided for in Article 132(1)(f) of Directive 2006/112 where the provision of those services contributes directly to the exercise of activities in the public interest referred to in Article 132 of that directive (see, by analogy, judgment of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraphs 31 to 33).

30 In addition, it must be recalled that the scope of the exemptions referred to in Article 132 of Directive 2006/112 is 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 (see, to that effect, judgment of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraph 34 and the case-law cited).

31 It follows, therefore, that the supply of services which do not contribute directly to the exercise of activities in the public interest referred to in Article 132, but to the exercise of other exempt activities, in particular those referred to in Article 135 of that directive, cannot come under the exemption provided for in Article 132(1)(f) of Directive 2006/112.

32 Accordingly, Article 132(1)(f) of Directive 2006/112 should be interpreted to the effect that the exemption provided for in that provision relates only to IGPs whose members carry on activities in the public interest referred to in that article. Therefore, services provided by IGPs, whose members carry on an economic activity in the area of insurance, which does not constitute an activity in the public interest, are not entitled to that exemption.

33 In that regard, it should be pointed out that, unlike what it is doing in the present case, the Court, in the judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621), did not resolve the question whether the exemption provided for in Article 13A(1)(f) of the Sixth Directive (corresponding to Article 132(1)(f) of Directive 2006/112) was limited to the services provided by an IGP whose members carried on activities in the public interest.

34 However, it is clear from the information in the documents before the Court that the Court's interpretation of the exemption provided for in Article 13A(1)(f) of the Sixth Directive in its judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621), led to some Member States exempting services supplied by IGPs made up of entities such as insurance companies.

35 In that regard, it should, however, be noted that national authorities could not reopen tax periods which have been definitively closed, on the basis of Article 132(1)(f) of Directive 2006/112, as interpreted in paragraph 32 above (see, by analogy, judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 37, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68).

36 As regards tax periods which have not yet been definitively closed, it must be recalled that, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual (see, inter alia, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 30 and the case-law cited). Thus, national authorities cannot rely on Article 132(1)(f) of Directive 2006/112, as interpreted in paragraph 32 above, in order to withhold that exemption from IGPs made up of entities such as insurance companies and, therefore, in order to refuse to exempt the supply of services by those IGPs from VAT.

37 In addition, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 100).

38 Therefore, the interpretation which the national court must give to the relevant rules of national law implementing Article 132(1)(f) of Directive 2006/112 must abide by the general principles of EU law, in particular the principle of legal certainty.

39 In view of the foregoing, there is no need to reply to the first to third questions.

40 In the light of all of the foregoing, the answer to the request for a preliminary ruling is that Article 132(1)(f) of Directive 2006/112 must be interpreted to the effect that the exemption provided for in that provision relates only to IGPs whose members carry on an activity in the public interest referred to in Article 132 of that directive and that, therefore, the services supplied by IGPs whose members carry on an economic activity in the area of insurance, which does not constitute such an activity in the public interest, are not entitled to that exemption.

Costs

41 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:

In the light of all of the foregoing, the answer to the request for a preliminary ruling is that Article 132(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted to the effect that the exemption provided for in that provision relates only to independent groups of persons whose members carry on an activity in the public interest referred to in Article 132 of that directive and that, therefore, the services supplied by independent groups of persons whose members carry on an economic activity in the area of insurance, which does not constitute such an activity in the public interest, are not entitled to that exemption.

[Signatures]