JUDGMENT OF THE COURT (Fourth Chamber)

25 April 2013 (*)

(Failure of a Member State to fulfil obligations – Taxation – Directive 2006/112/EC – Article 11 – National legislation restricting the possibility of forming a group of persons which can be regarded as a single taxable person for VAT purposes to undertakings in the financial and insurance sector)

In Case C-480/10,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 5 October 2010,

European Commission, represented by R. Lyal and K. Simonsson, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Sweden, represented by A. Falk and S. Johannesson, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

Ireland, represented by D. O'Hagan, acting as Agent, assisted by G. Clohessy, SC, and N. Travers, BL,

Republic of Finland, represented by H. Leppo, acting as Agent,

interveners,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting as President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2012,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2012,

gives the following

Judgment

1 By its application, the European Commission asks the Court to rule that, by restricting, in practice, the possibility of forming a group of persons which can be regarded as a single taxable

person for value added tax purposes to suppliers of financial and insurance services (‘a VAT group’ and ‘VAT’ respectively), the Kingdom of Sweden has failed to fulfil its obligations under Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

Legal context

European Union law

2 Article 11 of the VAT Directive provides:

‘After consulting the advisory committee [on VAT] …, each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.’

Swedish law

3 Chapter 6, Paragraph 1, of the Law on value added tax (1994:200) (mervärdeskattelagen (1994:200); ‘the ML’) provides:

‘For the purposes of the application of the provisions of this Law, two or more economic entities may, in the circumstances stated in this chapter, be regarded as a single economic entity (VAT group), and the activity exercised by the VAT group may be regarded as a single activity.’

4 Chapter 6, Paragraph 2, of the ML states:

‘Only the following may be part of a VAT group:

1. economic entities, placed under the surveillance of the finance inspectorate which exercise an activity which is exempt because the turnover from that activity is exempt under Paragraph 9 or Paragraph 10 of Chapter 3,

2. economic entities whose main purpose is to deliver goods or provide services to the economic entities referred to in subparagraph 1 above, or

3. economic entities which are commission agents and principals, and which have a commission link such as that referred to in Chapter 36 of the law on income tax (1999:1229).’

5 Chapter 3, Paragraph 9, of the ML exempts the provision of banking and financial services and operations consisting in trading in stocks and shares or similar transactions.

6 Chapter 3, Paragraph 10, of that law also exempts the provision of insurance and reinsurance services. It follows from all those provisions that, in the main, only undertakings in the financial and insurance sector may form a VAT group.

The pre-litigation procedure and the proceedings before the Court

7 Taking the view that the provisions of the ML run counter to Article 11 of the VAT Directive in so far as they restrict the application of the VAT group scheme to suppliers of financial services and insurance services, on 23 September 2008 the Commission sent a letter of formal notice to the Kingdom of Sweden, requesting it to submit its observations.

8 In their reply of 19 November 2008 to that letter of formal notice, the Swedish authorities argued that the provisions of the ML do not breach the VAT Directive.

9 Not being satisfied with that reply, the Commission, on 20 November 2009, issued a reasoned opinion, to which the Kingdom of Sweden replied on 20 January 2010 stating that it maintained the position expressed in its reply to the letter of formal notice.

10 In those circumstances the Commission decided to bring the present action.

11 By orders of the President of the Court of 15 February and 6 July 2011, the Republic of Finland and Ireland were granted leave to intervene in support of form of order sought by the Kingdom of Sweden.

The action

Admissibility

Arguments of the parties

12 The Kingdom of Sweden notes that the Commission relies, in support of its action, on the principle of equal treatment while, in the reasoned opinion, it stated that its interpretation of Article 11 of the VAT Directive is based upon the principle of fiscal neutrality. It argues, in its rejoinder, that the subject-matter of the dispute has thus been extended and, accordingly, altered.

13 The Republic of Finland is of the opinion that the pre-litigation procedure and the present action do not enable a clear determination of whether the Commission is complaining of an infringement of the principle of fiscal neutrality or an infringement of the principle of equal treatment by the Kingdom of Sweden. It points out that, in accordance with the case-law of the Court, firstly, the elements of fact and of law on which a case is based are to be indicated coherently and intelligibly in the application itself and, secondly, the issue of the dispute is confined by the pre-litigation procedure and must therefore be based on the same grounds and pleas in law as the reasoned opinion.

14 In response to that argument, the Commission submits that the elements of fact and of law on which its case is based are indicated coherently and intelligibly in its application. Not disputing that Swedish undertakings carrying on their activities in the financial and insurance sector are not in competition with other Swedish undertakings active in other sectors, it accepts that the principle of fiscal neutrality which it raised in the pre-litigation procedure is not applicable to the present case. However, it is of the opinion that it has not extended or altered the subject-matter of the dispute as compared with the reasoned opinion by putting forward, in support of its action, an argument alleging infringement of the principle of equal treatment.

Findings of the Court

15 It must be borne in mind that the essential points of law and of fact on which a case is based must be indicated coherently and intelligibly in the application itself (see, inter alia, Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 36 and the case-law cited). In the present case, the Commission's application, from which it is clear that the Commission relies, in support of its action, not on an infringement of the principle of fiscal neutrality, but on an infringement of the principle of equal treatment, meets that requirement.

16 It must also be borne in mind that, in accordance with settled case-law, the subject-matter of proceedings under Article 258 TFEU is delimited by the pre-litigation procedure governed by that

provision. Accordingly, the action must be based on the same grounds and pleas in law as those raised in the reasoned opinion. However, that requirement cannot be stretched so far as to mean that in every case the statement of the objections expressly set out in the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered (see Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraphs 18 and 19, and Case C-458/08 *Commission* v *Portugal* [2010] ECR I-11599, paragraphs 43 and 44).

17 Furthermore, it is settled case-law that the principle of fiscal neutrality was intended to reflect, in matters relating to VAT, the general principle of equal treatment, which requires that comparable situations must not be treated differently unless such treatment is objectively justified. However, although infringement of the principle of fiscal neutrality may be envisaged only as between competing traders, infringement of the general principle of equal treatment may be established, in matters relating to tax, by other kinds of discrimination which affect traders who are not necessarily in competition with each other but who are nevertheless in a similar situation in other respects (see, to that effect, Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraphs 49 and 51).

18 It follows that the principle of equal treatment, in matters relating to tax, does not coincide with the principle of fiscal neutrality. Accordingly, by submitting in its application, in particular, that the ML, by restricting the possibility of forming a VAT group to undertakings in the financial and insurance sectors, is incompatible with the principle of equal treatment, when it relied in that regard on the principle of fiscal neutrality in the reasoned opinion, the Commission has extended the subject-matter of the dispute.

19 Consequently, the Commission’s action is inadmissible in so far as it is based on an infringement of the principle of equal treatment. The remainder of it is admissible.

Substance

Arguments of the parties

20 The Commission is of the opinion that the provisions of the ML are contrary to Article 11 of the VAT Directive, in so far as their scope is restricted to the financial and insurance sector.

21 It submits out that a national VAT grouping scheme must apply to all the undertakings established in the Member State concerned, whatever their type of activity. It maintains that, since the common VAT system is a uniform system, the introduction of a special scheme within that system must, as a rule, be of general application.

22 That interpretation of Article 11 of the VAT Directive is supported by the very wording of that provision, in which there is nothing to suggest that a Member State may restrict application of the scheme provided for to certain undertakings in a given sector. It is also consistent with the objective of that provision, as stated in the Commission’s Explanatory Memorandum which resulted in the adoption of the 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), which is to enable Member States, for the purpose of simplifying administration or combating abuse, not to consider separately taxable persons whose independence is merely a legal technicality.

23 Furthermore, although the Commission accepts that the principle of fiscal neutrality does not appear to apply in the present case, it argues that the Swedish VAT group scheme none the less runs counter to the principle of equal treatment. That scheme favours undertakings in the financial

and insurance sector over those active in other sectors. The Kingdom of Sweden fails to show that the undertakings in the financial and insurance sector are not in a situation comparable to that of undertakings in other sectors, or that the restriction of the scope of that scheme to those undertakings is objectively justified.

24 The Kingdom of Sweden contests the allegation that it has failed to fulfil its obligations. It maintains that the provisions of the ML do not infringe Article 11 of the VAT Directive.

25 As a preliminary point, it states that, on the basis of Article 11 of the VAT Directive, during 1998 it made it possible for undertakings in the financial and insurance sector to form VAT groups. Since it considered that that was a derogation from the principle that all taxable transactions are taxed, it restricted that option to areas which it regarded as most important. Thus, it was decided that credit institutions, investment undertakings, insurance undertakings, undertakings carrying on an exempted financial activity and undertakings which primarily supply goods or services to financial undertakings could be part of a VAT group.

26 In the view of the Kingdom of Sweden, offering that possibility to the financial and insurance sector was considered particularly appropriate since the activity of that sector is often split between a number of separate legal persons. Since transactions carried out between undertakings in the same group are common and financial undertakings carry out, in the main, exempted activities, VAT operations internal to the group are particularly onerous in that sector. Those undertakings are particularly exposed to competition from undertakings established in other Member States. Moreover, in order to prevent tax evasion and avoidance, in accordance with the second paragraph of Article 11 of the VAT Directive, the possibility of forming a VAT group was restricted to those undertakings which are placed, directly or indirectly, under the supervision of the Finance Inspectorate and which are therefore covered by a public monitoring system.

27 Unlike the Commission, the Kingdom of Sweden considers that Article 11 of the VAT Directive is to be interpreted as permitting a national VAT group scheme to apply only to undertakings belonging to certain specified sectors.

28 As the common system of VAT is a uniform system, based on the fundamental principle of a general and universal VAT, Article 11 of the VAT Directive is a derogating provision, since it provides that transactions carried out within a group of undertakings can be exempted. That article must therefore be interpreted strictly.

29 It does not follow, in the submission of the Kingdom of Sweden, either from the wording or the objectives of Article 11 of the VAT Directive that the application of that provision by a Member State implies that the possibility of being a member of a VAT group is available to all undertakings established in its territory. On the one hand, the lack of precision in that provision confirms, in that regard, the discretion which the Member States have to decide more precisely to which persons established in their territory this possibility should be available. On the other, the objectives of administrative simplification and combating abuse are not relevant to all undertakings and making the possibility of forming a VAT group generally available would increase the risks of abuse, which would run counter to one of the objectives pursued.

30 Furthermore, the ML is not in conflict with either the principle of fiscal neutrality or the principle of equal treatment. Firstly, that Law does not distort competition, since the undertakings in the financial and insurance sector are in competition only between themselves. Secondly, those undertakings are not in a situation comparable to that of undertakings in other sectors. Moreover, the restriction of the possibility of forming a VAT group is based on objective grounds.

31 Like the Kingdom of Sweden, the Republic of Finland is of the view that there is nothing in

the wording of Article 11 of the VAT Directive to allow that provision to be interpreted as meaning that the VAT group scheme must be of general application. It takes the view that the ML is more compatible with the objective of uniformity of the common system of VAT than the Commission's interpretation of Article 11, since that objective requires that the scope of individual schemes permitted by the VAT Directive which derogate from its general principles must be as restricted as possible. The restriction of the scope of the VAT group scheme cannot, in its view, be made subject to any condition other than that of complying with the principle of fiscal neutrality. The restriction of that scheme to undertakings in the financial and insurance sector does not contradict that principle or, in any event, the principle of equal treatment.

32 Ireland, admitted to submit oral observations, argued at the hearing that Article 11 of the VAT Directive does not establish an exception and that it does not impose obligations on the Member States.

Findings of the Court

33 Since the existence of the Kingdom of Sweden's failure, alleged by the Commission, to fulfil its obligations depends on the interpretation to be made of Article 11 of the VAT Directive, on which the parties have stated divergent views, it must be borne in mind at the outset that, in determining the scope of a provision of European Union law, its wording, context and objectives must all be taken into account. Furthermore, it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union (Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraphs 23 and 24).

34 It is especially important for the uniform application of the VAT Directive that the notion of 'taxable person', defined in Title III thereof, is given an autonomous and uniform interpretation. In that context, such an interpretation is necessary for Article 11 of the VAT Directive, despite the optional nature, as regards the Member States, of the scheme for which it provides, in order to avoid differences in application of that scheme between one Member State and another when it is implemented.

35 In that regard, it is apparent from the wording of the first paragraph of Article 11 of the VAT Directive that that directive permits each Member State to regard a number of persons as a single taxable person if they are established in the territory of that Member State and if, although they are legally independent, they are closely bound to one another by financial, economic and organisational links. The application of that article is not, according to its wording, made subject to other conditions (Case C-85/11 *Commission* v *Ireland* [2013] ECR, paragraph 36). Nor does it provide that the Member States are able to impose other conditions on economic operators in order to form a VAT group, such as carrying out a certain type of activity or being part of a particular sector of activity.

36 It is not apparent from either the wording of Article 11 of the VAT Directive or the context of that article, namely Title III of that directive, that the article is a derogating or special provision which must be interpreted narrowly, as suggested by the Kingdom of Sweden and the Republic of Finland.

37 As regards the objectives pursued by Article 11 of the VAT Directive, it is apparent from the Commission Proposal which resulted in the adoption of Directive 77/388 that, by adopting the second subparagraph of Article 4(4) of the Sixth Directive, which was replaced by Article 11 of the VAT Directive, the European Union legislature intended, either in the interests of simplifying

administration or with a view to combating abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that Member States would not be obliged to treat as taxable persons those whose ‘independence’ is purely a legal technicality (*Commission* v *Ireland*, paragraph 47).

38 The second paragraph of Article 11 of the VAT Directive also permits Member States to adopt any measures needed to prevent tax evasion or avoidance through the use of the first paragraph of the article. Such measures may, however, be taken only in compliance with European Union law. Thus, with that reservation, it is permissible for Member States to restrict the application of the scheme provided for under Article 11 to combat tax evasion or avoidance.

39 In the present case, as has been stated in paragraph 26 of this judgment, the Kingdom of Sweden submits that, in order to prevent tax evasion and avoidance, in accordance with the second paragraph of Article 11 of the VAT Directive, it decided to restrict the possibility of forming a VAT group to those undertakings which are placed, directly or indirectly, under the supervision of the Finance Inspectorate and which are therefore covered by a public monitoring system. The Commission has failed to show convincingly that, in the light of the need to combat tax evasion and avoidance, that measure is not well founded.

40 It is therefore clear that the Commission has failed to show that the restriction of the application of the scheme provided for in Article 11 of the VAT Directive to undertakings in the financial and insurance sector was contrary to European Union law.

41 In consequence and since the action is inadmissible in so far as it is based on an infringement of the principle of equal treatment, the Commission’s action must be dismissed.

Costs

42 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party’s pleadings. Since the Kingdom of Sweden has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of those Rules of Procedure, under which Member States which have intervened in the proceedings are to bear their own costs, it must be held that the Ireland and the Republic of Finland are to bear their own respective costs.

On those grounds, the Court (Fourth Chamber) hereby

1. **Dismisses the action;**

2. **Orders the European Commission to pay the costs;**

3. **Orders Ireland and the Republic of Finland to bear their own costs.**

[Signatures]

* Language of the case: Swedish.