

JUDGMENT OF THE COURT (Grand Chamber)

9 April 2013 (*)

(Failure of a Member State to fulfil obligations – Taxation – Directive 2006/112/EC – Articles 9 and 11 – National legislation permitting the inclusion of non-taxable persons in a group of persons who may be regarded as a single taxable person for VAT purposes)

In Case C-85/11,

ACTION for failure to fulfil obligations under Article 258 TFEU brought on 24 February 2011,

European Commission, represented by R. Lyal, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, assisted by G. Clohessy, SC, and N. Travers, BL, with an address for service in Luxembourg,

defendant,

supported by:

Czech Republic, represented by M. Smolek and T. Müller, acting as Agents,

Kingdom of Denmark, represented initially by C. Vang, and subsequently by V. Pasternak Jørgensen, acting as Agents, with an address for service in Luxembourg,

Republic of Finland, represented by H. Leppo and S. Hartikainen, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by H. Walker, acting as Agent, and by M. Hall, Barrister,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, J. Malenovský, M. Berger and E. Jarašiūnas (Rapporteur), Presidents of Chambers, E. Juhász, J.-C. Bonichot, M. Safjan, D. Šváby and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 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 requests the Court to declare that, by permitting non-taxable persons to be members of a group of persons regarded as a single taxable person for purposes of value added tax (a 'VAT group' and 'VAT', respectively), Ireland has failed to fulfil its obligations under Articles 9 and 11 of 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 Articles 9 to 13 of the VAT Directive are included in Title III (entitled 'Taxable persons') of that directive.

3 Article 9 of that directive provides:

'1. "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

2. In addition to the persons referred to in paragraph 1, any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the Community, shall be regarded as a taxable person.'

4 Article 10 of the VAT Directive states that the condition that the economic activity be conducted 'independently' is to exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

5 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.'

6 Article 12 of the VAT Directive provides that Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) of that directive, and in particular the supply of a building or of land for construction.

7 Under Article 13 of the VAT Directive, regional and local government authorities and other bodies governed by public law are not, as a general rule, to be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities.

Irish law

8 Section 15 of the Value Added Tax Consolidation Act 2010, which in essence reproduced the provisions of section 8(8) of the Value Added Tax Act 1972, as amended, provides:

‘(1) Subject to subsection (2), where the Revenue Commissioners are satisfied that 2 or more persons established in the State, at least one of whom is a taxable person, are closely bound by financial, economic and organisational links and it seems necessary or appropriate to them for the purpose of efficient and effective administration (including collection) of the tax to do so, then, for the purpose of this Act, the Commissioners may, whether following an application on behalf of those persons or otherwise:

(a) by notice in writing ... to each of those persons deem them to be a single taxable person ... and the persons so notified shall then be regarded as being in [a VAT group] for as long as this subsection applies to them, but section 65 shall apply in respect of each of the members of the [VAT] group, and

(i) one of those persons, who shall be notified accordingly by the Commissioners, shall be responsible for complying with the provisions of this Act in respect of the [VAT] group, and

(ii) all rights and obligations arising under this Act in respect of the transactions of the [VAT] group shall be determined accordingly,

and

(b) make each person in the [VAT] group jointly and severally liable to comply with this Act and regulations (including the provisions requiring the payment of tax) that apply to each of those persons and subject to the penalties under this Act to which they would be subject if each such person was liable to pay to the Commissioners the whole of the tax chargeable, apart from regulations under this section, in respect of each such person.’

The pre-litigation procedure and the proceedings before the Court

9 On 23 September 2008, the Commission sent a letter of formal notice to Ireland drawing the attention of that Member State to the possible incompatibility with Articles 9 and 11 of the VAT Directive of section 8(8) of the Value Added Tax Act 1972, as amended, which was then in force, under which non-taxable persons were able, as section 15 of the Value Added Tax Consolidation Act 2010 now provides, to be part of a VAT group. In accordance with Article 226 EC, the Commission invited Ireland to submit its observations.

10 In their replying letter of 23 January 2009, the Irish authorities maintained that the national provisions at issue were compatible with the VAT Directive.

11 As the Commission was not satisfied with that reply, on 23 November 2009 it issued a reasoned opinion, to which Ireland replied on 27 January 2010, stating that it maintained the position expressed in its reply to the letter of formal notice.

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

13 By orders of the President of the Court of 4 July 2011 and of 27 September 2011, the Czech Republic, the Kingdom of Denmark and the Republic of Finland, on the one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other, were granted leave to intervene in support of the form of order sought by Ireland.

14 By letter of 27 January 2012, Ireland requested, on the basis of the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, that the case be decided by the Grand Chamber.

The action

Admissibility

Arguments of the parties

15 Ireland requests, principally, that the Court dismiss the action as inadmissible. It claims, in that regard, that the subject-matter of the application goes beyond the complaint formulated by the Commission in the administrative procedure. Whereas, in its letter of formal notice and in the reasoned opinion, the Commission alleged that Ireland permitted non-taxable persons to join a VAT group, it now complains that Ireland permits such persons to be members of such a group, which implies that it would be necessary not only to regulate and police the constitution of the existing approved VAT groups but also to police those groups on an ongoing basis in order to ensure that their members could, if their activities were to be assessed independently, continue to qualify as taxable persons in their own right.

16 The Commission, in its reply, contests that plea of inadmissibility, pointing out that it has always stated that the reference to ‘persons’ in Article 11 of the VAT Directive concerns only taxable persons, from which it follows that a non-taxable person may not be a member of a VAT group. Moreover, the Commission submits that, if the Court were to consider that it had widened the subject-matter of the proceedings, there could be only partial inadmissibility.

Findings of the Court

17 According to settled case-law, the subject-matter of the proceedings under Article 258 TFEU is delimited by the pre-litigation procedure provided for in that provision. Accordingly, the application must be based on the same grounds and pleas as the reasoned opinion. However, that requirement cannot go so far as to mean that in every case the formal statement of objections 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, *inter alia*, 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).

18 In the present case, although the Commission used the words ‘to be members of a VAT group’ in the form of order sought in its application, whereas it had used the words ‘to join a VAT group’ in the statement of complaint set out in the reasoned opinion, that in no way altered the subject-matter of the proceedings as defined in the reasoned opinion. The difference between those formulations has no effect on the content of the alleged failure to fulfil obligations, which, as is stated in both the application and the reasoned opinion, lies in the fact that the Irish legislation transposing the VAT Directive permits the inclusion of non-taxable persons in a VAT group in infringement, according to the applicant, of Articles 9 and 11 of that directive.

19 Consequently, the objection of inadmissibility raised by Ireland must be rejected.

Substance

Arguments of the parties

20 In support of its action, the Commission submits that Article 11 of the VAT Directive must be interpreted as meaning that non-taxable persons for VAT purposes cannot be included in a VAT group.

21 It maintains that Article 11 of the VAT Directive allows several persons, taken together, to be regarded as a single taxable person provided that each of those persons is a taxable person for VAT purposes in its own right. That article, it argues, represents an exception to the general rule that each taxable person is to be treated as a separate entity for the application of the VAT rules. It should therefore be interpreted restrictively. Although it is true that that article refers to 'persons', the fact that the persons included in a VAT group are to be treated as 'a single' taxable person implies that each member of that group must itself be a taxable person. Likewise, the concept of 'grouping' implies that the persons concerned belong to the same category for the purposes of the common system of VAT.

22 Furthermore, according to the Commission, if the word 'persons' were to be understood as referring to all persons without restriction, then a VAT group could be composed solely of non-taxable persons, something which would be contrary to the common system of VAT.

23 The Commission submits that its interpretation of Article 11 of the VAT Directive is, moreover, consistent with the objective of that article, which is, as is apparent from the Explanatory Memorandum to the proposal which led to the adoption of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive'), to simplify administration for the taxpayer and tax authorities and to combat abuse by preventing persons which are not truly independent business units from being treated as separate taxable persons. The inclusion of non-taxable persons in a VAT group would neither simplify administration nor prevent abuse.

24 Neither the wording of Article 11 of the VAT Directive nor the preparatory documents relating to that directive state that that provision was intended to alter the concept of a 'taxable person' or to extend the rights and obligations of taxable persons to others. That would, however, be the result, according to the Commission, if non-taxable persons were able to join a VAT group, since, as acquisitions that take place within such a group are regarded as non-existent for VAT purposes, that would permit, first, the supply of goods and the provision of services to non-taxable persons without any charge to VAT, and, secondly, would allow the group in question to recover input VAT in respect of supplies made to such persons, which would result in a net loss of VAT and would be contrary to the common system of VAT.

25 It is therefore necessary, according to the Commission, not to adhere to a literal interpretation of Article 11 of the VAT Directive, but to read it in the light, first, of its immediate context, namely Title III of the VAT Directive and, in particular, Article 9 thereof, which defines a 'taxable person' as any person who carries out any economic activity, and, secondly and more generally, of the scheme of that directive.

26 Although the Court has not hitherto had occasion to rule on the issue raised by the present case, indirect support for the Commission's position is, in its view, to be found in paragraph 19 of

the judgment in Case C-162/07 *Ampliscientifica and Amplifin* [2008] ECR I-4019, and in the Opinion of Advocate General Van Gerven in the case which gave rise to the judgment in Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111.

27 Disputing all of those arguments, Ireland maintains that the Commission's interpretation of Article 11 of the VAT Directive is not consistent with its literal sense. It argues that the use of the word 'persons' in the English-language version, and not 'taxable persons', is a deliberate choice on the part of the European Union legislature. The argument set out in the reasoned opinion that the word 'taxable' was omitted to eschew repetition is, Ireland argues, implausible in view of the fact that, when that directive was adopted, the word 'any' was added in the English-language version thereof between the term 'single taxable person' and the word 'persons'.

28 The purpose of Article 11 of the VAT Directive, Ireland submits, is to permit Member States to regard several persons as a single taxable person provided that certain minimum conditions are satisfied, which involves an assessment on the part of the Member States. A single taxable person exists, for the purposes of the application of the VAT rules, only if it carries out an economic activity, in accordance with Article 9 of that directive, which provides a general definition of a taxable person. Contrary to what the Commission claims, Article 11 of the VAT Directive, which features in Title III thereof, in no way appears to be a derogation from that definition. Moreover, the concept of 'grouping' cannot form the basis for the interpretation of the aforementioned Article 11, since it is not part of the wording of that article and the persons referred to in that provision do not form a group, but cease to exist individually for the purposes of administering VAT and become a single taxable person.

29 Whilst a VAT group may include one or more non-taxable persons, that does not, according to Ireland, mean that a Member State would be entitled to regard a group comprising only such persons as a single taxable person, which would be meaningless and precluded by the Irish legislation.

30 Ireland takes issue with the Commission's claim that the latter's interpretation of Article 11 of the VAT Directive is consistent with the objectives of that article. Ireland states that, although administrative simplification and the combatting of abuse are among those objectives, they are not the only objectives of that article, as is apparent from the second paragraph of Article 11. In any event, the objectives pursued do not make it possible to determine how the term 'persons' is to be interpreted. Contrary to the Commission's assertion, the inclusion of non-taxable persons in a VAT group may, in particular circumstances, be not only consistent with the promotion of administrative simplification and the prevention of abuse, but also necessary for such purposes.

31 Ireland submits that the Commission's argument that the concept of a 'taxable person' may not be extended is unfounded because permitting a non-taxable person to be part of a VAT group, like permitting a taxable person who does not engage in taxable supplies to be part of such a group, does not alter the scope of that concept. Although Article 11 of the VAT Directive may, in certain circumstances, operate to extend the rights and obligations of a member of a VAT group, that is, in fact, the very purpose of that provision, namely the single tax treatment of all persons who are part of a duly recognised VAT group. Furthermore, the second paragraph of Article 11 of the VAT Directive permits Member States to adopt measures against tax evasion and avoidance which may be carried out by a VAT group.

32 Ireland adds that, once the VAT group is recognised, the entity which was a non-taxable person is included in that group for VAT purposes, while remaining a separate legal person for other purposes. It states that, while it is true that no VAT will be charged if that group receives goods or services from another group member, its non-economic activities will be taken into account in determining the entitlement of that group to deduct, in the same way as if the

undertaking had been organised as a single legal person. Precluding a non-taxable person, such as a holding company, from being a member of a VAT group, would, Ireland submits, be to deny deductibility on the basis of how the entity is structured in relation to corporate law.

33 Lastly, Ireland points out that, contrary to what the Commission claims, the case-law of the Court provides no support for the Commission's interpretation of Article 11 of the VAT Directive.

34 Like Ireland, the Czech Republic, the Kingdom of Denmark, the Republic of Finland and the United Kingdom take the view that the Commission's position is not supported by the wording and objectives of Article 11 of the VAT Directive, the common system of VAT or the case-law of the Court.

Findings of the Court

35 It should 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 (Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 23 and the case-law cited).

36 In the present case, 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, in particular to the condition that those persons could themselves, individually, have had the status of a taxable person within the meaning of Article 9(1) of the VAT Directive. As it uses the word 'persons' and not the words 'taxable persons', the first paragraph of Article 11 of the VAT Directive does not make a distinction between taxable persons and non-taxable persons.

37 It must be pointed out that Article 11 of the VAT Directive derives from the second subparagraph of Article 4(4) of the Sixth Directive. Whereas point 2 of Annex A to Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16), which introduced the concept of a VAT group into European Union law, permitted Member States 'not to consider as separate taxable persons, but as one single taxable person', persons who are organically linked to one another by economic, financial or organisational relationships, the words 'as separate taxable persons' were abandoned in the drafting of the second subparagraph of Article 4(4) of the Sixth Directive.

38 Furthermore, although the wording of the second subparagraph of Article 4(4) of the Sixth Directive was repeated in similar terms in the majority of the language versions of Article 11 of the VAT Directive, in the English-language version of that article the word 'any' was added, with the result that the relevant passage of that provision reads as follows: 'each Member State may regard as a single taxable person any persons established in the territory of that Member State'.

39 It is not apparent from those successive drafting amendments that the European Union legislature intended, when adopting the Sixth Directive and, subsequently, the VAT Directive, to preclude non-taxable persons from being included in a VAT group and that the word 'persons' was used instead of the words 'taxable persons' in order to avoid repetition. The fact that other provisions of the VAT Directive, which do not come under Title III thereof dealing with the concept of a 'taxable person', use the term 'persons' to designate taxable persons cannot result in any different finding, as that term is used in a different context to that of Article 11 of the VAT Directive.

40 Furthermore, it must be pointed out that, contrary to what the Commission argues, it cannot

be inferred from the words 'as a single taxable person' that Article 11 of the VAT Directive seeks solely to permit a number of taxable persons to be dealt with as a single entity, as those words relate, not to a condition for the application of that article, but to its outcome, which is that a number of persons are regarded as a single taxable person. In addition, there is no basis in the wording of that article for the Commission's argument that it represents an exception to the general rule that each taxable person must be treated as a separate entity, with the result that that article is to be interpreted restrictively, or for the argument that the concept of grouping implies that all of the persons concerned belong to the same category, as the word 'grouping' does not appear in that article.

41 Consequently, it is not apparent from the wording of Article 11 of the VAT Directive that non-taxable persons cannot be included in a VAT group.

42 The Commission, however, submits that, going beyond the wording of Article 11 of the VAT Directive, its interpretation of that article must prevail in view of its context, its objectives and the case-law of the Court. It is for that reason necessary to examine whether the arguments put forward by the Commission in support of this position show that Article 11 of the VAT Directive must be interpreted as meaning that non-taxable persons cannot be included in a VAT group.

43 It must be pointed out, firstly, that the case-law of the Court to which the Commission refers as regards that issue cannot usefully be relied on in the present case since that issue is not the subject-matter of the abovementioned judgments in *Polysar Investments Netherlands* and *Ampliscientifica and Amplifin*.

44 As regards, secondly, the context of Article 11 of the VAT Directive, it is necessary to point out that Article 9(1) of that directive contains a general definition of the concept of a 'taxable person'. Article 9(2) and Articles 10, 12 and 13 of that directive provide details in respect of that concept, either by including in it, or by permitting Member States to include in it, persons who do not satisfy that general definition, such as persons who carry out certain transactions on an occasional basis, or by excluding other persons from it, such as employed persons or public authorities. Consequently, it cannot be inferred from the scheme of Title III of the VAT Directive that a person who does not satisfy that general definition is necessarily excluded from being one of the persons referred to in Article 11 thereof.

45 As regards the relationship, within Title III of the VAT Directive, between Articles 9(1) and 11 of that directive, it must be stated that a combined reading of those articles does not support the conclusion, drawn by the Commission, that the persons referred to in Article 11 must individually satisfy the general definition of a taxable person set out in Article 9(1) of that directive. A comparison of those two provisions does not preclude the interpretation that, as submitted by Ireland and the interveners, it is those persons, taken together and closely bound to one another by financial, economic and organisational links, who must collectively satisfy that definition.

46 Consequently, it is not possible to uphold the Commission's arguments that, having regard to the context of Article 11 of the VAT Directive, that article must be interpreted as meaning that non-taxable persons cannot be included in a VAT group.

47 As regards, thirdly, the objectives pursued by Article 11 of the VAT Directive, it is apparent from the Explanatory Memorandum to the proposal which resulted in the adoption of the Sixth Directive (COM(73) 950) 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.

48 It is not evident that the possibility for Member States to regard as a single taxable person a group of persons including one or more persons who may not individually have the status of a taxable person runs counter to those objectives. It is, on the contrary, conceivable that, as Ireland and the interveners have submitted, the presence, within a VAT group, of such persons contributes to administrative simplification both for the group and for the tax authorities and makes it possible to avoid certain abuses, and that that presence may even be indispensable to that end if it alone establishes the close financial, economic and organisational links which must exist between the persons constituting that group in order for it to be regarded as a single taxable person.

49 In addition, it must be pointed out that, if such a possibility might itself give rise to abuse, the second paragraph of Article 11 of the VAT Directive permits Member States to adopt any measures needed to prevent tax evasion or avoidance through the use of the first paragraph of Article 11.

50 Consequently, the Commission has not established that the objectives of Article 11 of the VAT Directive militate in favour of an interpretation according to which non-taxable persons cannot be included in a tax group.

51 In view of all of the foregoing considerations, the Commission's action must be dismissed.

Costs

52 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ireland has applied for costs and the Commission has been unsuccessful, the Commission 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 Czech Republic, the Kingdom of Denmark, the Republic of Finland and the United Kingdom are to bear their own respective costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**
2. **Orders the European Commission to pay the costs;**
3. **Orders the Czech Republic, the Kingdom of Denmark, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own respective costs.**

[Signatures]

* Language of the case: English.