Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

6 October 2022 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Supply of services for consideration – Exemptions – Article 135(1)(b) – Granting of credit – Sub-participation agreement)

In Case C?250/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 27 October 2020, received at the Court on 21 April 2021, in the proceedings

**Szef Krajowej Administracji Skarbowej**

v

**O. Fundusz Inwestycyjny Zamkni?ty reprezentowany przez O S.A.,**

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei (Rapporteur), Judges,

Advocate General: L. Medina,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 March 2022,

after considering the observations submitted on behalf of:

– Szef Krajowej Administracji Skarbowej, by B. Ko?odziej, D. Pach and T. Wojciechowski,

– the Polish Government, by A. Kramarczyk-Sza?adzi?ska and B. Majczyna, acting as Agents,

– the European Commission, by A. Armenia, B. Sasinowska and M. Siekierzy?ska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2022,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 135(1)(b) 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’).

2 The request has been made in proceedings between the Szef Krajowej Administracji Skarbowej (Head of the National Tax Administration, Poland) (‘the tax authority’) and O. Fundusz Inwestycyjny Zamkni?ty reprezentowany przez O S.A. (‘Fund O’) concerning the classification, for the purposes of exemption from value added tax (VAT), of services provided under a sub-participation agreement.

## Legal context

### *European Union law*

3 Article 2(1)(c) of the VAT Directive states:

‘The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such’.

4 Article 24(1) of that directive provides:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

5 Under Article 135(1)(b) of that directive:

‘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’.

### *National law*

*The Law on VAT*

6 Article 43(1) of the Ustawa o podatku od towarów i us?ug (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2004, No 54, item 535), in the version applicable to the dispute in the main proceedings (‘the Law on VAT’) provides as follows:

‘The following shall be exempt from tax:

…

(38) the granting and the negotiation of credit and cash loans and the management of credit or cash loans by the granting entity;

(39) services consisting of the provision of collateral, guarantees and any other security for financial and insurance transactions and brokerage services in relation to those services, and the management of credit guarantees by the granting entity.

…’

*The Law on investment funds and the management of alternative investment funds*

7 Article 183(4) of the ustawa o funduszach inwestycyjnych i zarz?dzaniu alternatywnymi funduszami inwestycyjnymi (Law on investment funds and the management of alternative investment funds), of 27 May 2004 (Dz. U. of 2004, No 146, item 1546), in the version applicable to the dispute in the main proceedings, provides as follows:

‘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.’

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

8 Fund O is a non-standardised securitisation fund within the meaning of Article 183 et seq. of the Law on investment funds and the management of alternative investment funds, in the version applicable to the dispute in the main proceedings. Envisaging the conclusion of sub-participation agreements with banks or investment funds, it requested the Polish Minister for Finance to issue a tax ruling concerning the interpretation of Article 43(1)(38) and (39) of the Law on VAT in order to ascertain whether the services which it was to provide as a sub-participant under those agreements could benefit from an exemption from VAT in the light of that provision.

9 According to Fund O, by concluding the sub-participation agreement, the originator undertakes to transfer to the sub-participant all the proceeds from the receivables specified in that agreement in exchange for a contractually agreed financial contribution which he or she receives from the sub-participant as soon as that agreement is concluded. The debt securities remain in the assets of the originator. The difference between the financial contribution paid to the originator and the amount obtained, during the term of the agreement, by the sub-participant constitutes the sub-participant’s remuneration. The mechanism of the sub-participation thus fulfils a dual function, namely, first, that of a credit instrument, the originator receiving liquidity in advance in exchange for his or her commitment to transfer the proceeds from the receivables concerned to the sub-participant and, second, that of risk cover, in so far as that liquidity is released from the credit risk attached to those receivables.

10 Therefore, in the opinion of Fund O, the services provided under sub-participation agreements are exempt from VAT on the basis of Article 43(1)(38) and (39) of the Law on VAT, either as financial instruments similar to credit agreements or as services hedging the risk of the debtors’ insolvency.

11 By a tax ruling of 30 December 2015, the Polish Minister for Finance took the view, on the contrary, first, that a sub-participation agreement could not be treated in the same way as a credit agreement in so far as, first, the receivables forming the subject matter of the agreement remain in the assets of the originator, secondly, the sub-participation agreement contains, unlike a credit agreement, a clear specification of the source of the funds which will be used to satisfy the sub-

participant's claims and, thirdly, in the event of the debtor's insolvency, the sub-participant does not enjoy a claim on the originator for repayment of the remaining amounts. Therefore, a sub-participation agreement, the object of which is a right to a share in specific payments which the originator undertakes to transfer to the sub-participant, does not include activities identical to those referred to in Article 43(1)(38) of the Law on VAT.

12 Secondly, in the opinion of the Polish Minister for Finance, where the sub-participant provides its services, no collateral, guarantee or any other security is provided to the originator, with the result that its activities are also not covered by Article 43(1)(39) of the Law on VAT.

13 Consequently, according to the Polish Minister for Finance, the transactions described by Fund O 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 and had to be subject to the basic rate of 23%.

14 Fund O brought an action before the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) against the tax ruling of 30 December 2015.

15 By judgment of 25 May 2017, that court annulled that tax ruling. It held that the sub-participation agreement constituted a financial instrument similar to credit agreements, the main object of which is to finance the originator and to ensure him or her immediate access to capital with the obligation to repay it. The fact that the receivables remain in the assets of the originator is irrelevant in the light of the economic objective of the agreement. In return for the transfer of funds to the originator, the sub-participant enjoys an economic advantage in the form of income exceeding the amount of the capital employed. Such a transaction is exempt from VAT under Article 43(1)(38) of the Law on VAT on the ground that it satisfies the essential elements of a grant of credit. On the other hand, in so far as, under a sub-participation agreement, no collateral, guarantee or other security is provided to the originator, the exemption provided for in Article 43(1)(39) of the Law on VAT does not apply in the present case.

16 The tax authority brought an appeal against that judgment before the referring court, the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland).

17 That court states that Article 43(1)(38) of the Law on VAT transposes Article 135(1)(b) of the VAT Directive into Polish law.

18 According to that court, from an economic point of view, a sub-participation agreement, such as that at issue in the main proceedings, constitutes a financing service of which the essential objective is to ensure that the originator can use the funds made available to him or her, in return for the payment to the sub-participant of the amounts corresponding to the value of the proceeds from the receivables concerned. The sub-participation agreement is thus similar in nature to a credit agreement by which the borrower purchases funds from the lender which he or she is entitled to use in any way he or she wishes and undertakes to repay them over the duration of the agreement. Like a lender, a sub-participant will receive, in addition to the financing paid, an advantage in the form of cash flow, over and above the capital employed.

19 Nevertheless, the referring court submits that the sub-participation agreement has certain particular features which distinguish it from a credit agreement and which are, in essence, those highlighted by the Polish Minister for Finance in the tax ruling. It asks, therefore, whether those particular features are such that they prevent, for VAT purposes, sub-participation agreements being classified as 'credit agreements'.

20 In those circumstances, the Naczelny S?d 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 [the VAT Directive] 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?’

**Consideration of the question referred**

21 As a preliminary point, it should be noted that although the question referred formally sets out the three transactions exempt from VAT under Article 135(1)(b) of the VAT Directive, namely the granting, negotiation and management of credit, it is apparent from the order for reference that the referring court’s doubts relate essentially to the possible classification of a sub-participation agreement as a ‘granting of credit’ within the meaning of that provision.

22 In those circumstances, the question referred must be understood as seeking, in essence, to ascertain whether Article 135(1)(b) of the VAT Directive must be interpreted as meaning that the services provided by a sub-participant under a sub-participation agreement, consisting of making available to the originator a financial contribution in exchange for the transfer to the sub-participant of the proceeds from the receivables specified in that agreement, those receivables remaining in the assets of the originator, fall within the concept of ‘granting of credit’ within the meaning of that provision.

23 In order to provide a useful answer to the referring court, it is necessary to examine, in the first place, whether such supplies fall within the scope of the VAT Directive.

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

25 In that regard, it must be borne in mind that a supply of services is effected ‘for consideration’ within the meaning of Article 2(1)(c) of the VAT Directive, and is therefore subject to VAT, only if there is a direct link between the service supplied and the consideration received by the taxable person. 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 (judgment of 22 October 2015, *Hedqvist*, C?264/14, EU:C:2015:718, paragraph 27 and the case-law cited).

26 In the present case, it is apparent from the information in the file submitted to the Court that, in the context of a sub-participation agreement, the sub-participant and the originator undertake, in the case of the former, to make a financial contribution available to the originator and, in the case of the latter, to transfer to the sub-participant the proceeds from the receivables specified in that agreement, while retaining the debt securities in his or her assets. The originator receives a service in return for consideration which corresponds to the difference between the estimated value of the proceeds from the receivables and the amount of the financial contribution paid by the sub-participant.

27 Consequently, it must be held, as found by the Advocate General in point 40 of her Opinion, that the services provided by a sub-participant under a sub-participation agreement, such as that at issue in the main proceedings, constitute supplies of services effected ‘for consideration’, within the meaning of Article 2(1)(c) of the VAT Directive.

28 It is irrelevant, for the purposes of determining whether a supply of services is effected for

consideration, that the remuneration does not take the form of a payment of a commission or specific fees (judgment of 22 October 2015, *Hedqvist*, C?264/14, EU:C:2015:718, paragraph 29 and the case-law cited).). It follows that, in the present case, the form of the remuneration paid to the sub-participant has no bearing on whether its service is provided for consideration.

29 Furthermore, although the Court has indeed held that an operator who, at his or her own risk, purchases defaulted debts at a price below their face value does not effect a supply of services ‘for consideration’ within the meaning 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), 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 (judgment of 27 October 2011, *GFKL Financial Services*, C?93/10, EU:C:2011:700, paragraph 26), the fact remains that, in the case in the main proceedings, the sub-participant does not purchase at its own risk defaulted debts at a price below their face value. Moreover, as the tax authority also states in its answer to the questions put by the Court, having regard to the specific features of the sub-participation agreement, the amount of the financial contribution made available to the originator is generally determined differently from the price paid by an assignee for the assignment of claims.

30 In the second place, it is necessary to examine whether the services provided by the sub-participant fall within the concept of ‘granting of credit’ within the meaning of Article 135(1)(b) of the VAT Directive. In that regard, it must be recalled at the outset that the exemptions referred to in Article 135(1) of the VAT Directive constitute autonomous concepts of EU law which are intended to avoid divergences in the application of the VAT system of one Member State to another (judgment of 17 December 2020, *Franck*, C?801/19, EU:C:2020:1049, paragraph 30 and the case-law cited).

31 The terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (judgment of 17 December 2020, *Franck*, C?801/19, EU:C:2020:1049, paragraph 31 and the case-law cited).

32 Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (judgment of 17 December 2020, *Franck*, C?801/19, EU:C:2020:1049, paragraph 32 and the case-law cited).

33 As regards, in particular, Article 135(1)(b) of the VAT Directive, it must be recalled that the granting of credit, within the meaning of that provision, consists, inter alia, in the provision of capital against remuneration (judgment of 17 December 2020, *Franck*, C?801/19, EU:C:2020:1049, paragraph 36 and the case-law cited).

34 In that regard, it follows from the case-law that, although that remuneration is as a rule ensured in return for the payment of interest, other forms of consideration cannot prevent a transaction from being classified as the granting of credit within the meaning of Article 135(1)(b) of the VAT Directive. The Court has already held that the advance financing of the purchase of goods in return for an increase in the amount reimbursed by the beneficiary of that financing constitutes a financial transaction similar to the granting of credit and therefore, exempt from VAT under that provision (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).

35 Moreover, the transactions exempted under that provision 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. Therefore, the scope of the expression ‘granting … credit’ in Article 135(1)(b) of the VAT Directive cannot be limited to loans and credits granted by banking and financial institutions only (judgment of 17 December 2020, *Franck*, C?801/19, EU:C:2020:1049, paragraphs 34 and 35 and the case-law cited).

36 In the present case, it appears, subject to verification by the referring court, that the service provided by the sub-participant to the originator under the agreement concluded between them is made up of a single supply which consists, essentially, in a payment of capital in return for remuneration. It is necessary to examine whether, viewed overall, such a supply is in the nature of a ‘granting of credit’ within the meaning of Article 135(1)(b) of the VAT Directive.

37 In that regard, as has been stated in paragraph 26 of the present judgment, the sub-participation agreement gives rise, from the moment it is concluded, to the making available, by the sub-participant, of capital to the originator in return for remuneration which consists of the difference between the capital paid to the originator and the amounts received by the sub-participant over the term of the sub-participation agreement in respect of the proceeds from the receivables specified in that agreement. Since the debt securities remain in the originator’s assets, the sub-participant does not have a right of action against the latter in the event of the insolvency of the debtors of the receivables concerned.

38 The fact that the sub-participant is exposed to potential losses and thus bears the credit risk is inherent in any grant of credit, regardless of whether that risk stems from non-payment by the debtors of the receivables from which the proceeds are transferred to it or from the insolvency of its direct co-contractor.

39 Similarly, the absence of guarantees provided in favour of the sub-participant is not decisive for the classification of the sub-participation agreement at issue as a transaction granting credit. The measures taken to mitigate the credit risk, which generally consist of the provision of guarantees, real estate or other services, may vary according to the type of financing and are not essential for such a classification, that classification being subject only to the combination of the two factors referred to in paragraph 33 of the present judgment, namely the provision of capital and the payment of remuneration.

40 Accordingly, the fact that the sub-participant has no legal remedy against the originator in the event of default by the debtors of the receivables from which the proceeds are transferred to it and the fact that the debt securities remain in the originator’s assets, or that the source of the capital which will be used to satisfy the sub-participant’s claims is mentioned in the sub-participation agreement, does not affect the essential nature of a sub-participation transaction, consisting of financing the initial loans.

41 Such an interpretation of the concept of ‘granting of credit’ within the meaning of Article 135(1)(b) of the VAT Directive, which does not call into question the principle of fiscal neutrality inherent in the common system of VAT, is consistent with the objective pursued by that provision, which consists, inter alia, in avoiding an increase in the cost of consumer credit (see, by analogy, judgment of 10 March 2011, *Skandinaviska Enskilda Banken*, C?540/09, EU:C:2011:137, paragraph 21 and the case-law cited).

42 Having regard to all the foregoing considerations, the answer to the question referred is that Article 135(1)(b) of the VAT Directive must be interpreted as meaning that the services provided

by a sub-participant under a sub-participation agreement, consisting of making available to the originator a financial contribution in exchange for payment of the proceeds from the receivables specified in that agreement, those receivables remaining in the assets of the originator, fall within the concept of ‘granting of credit’ within the meaning of that provision.

**Costs**

43 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. The costs incurred in submitting observations to the Court, other than those of the parties to the main proceedings, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**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 services provided by a sub-participant under a sub-participation agreement, consisting of making available to the originator a financial contribution in exchange for payment of the proceeds from the receivables specified in that agreement, those receivables remaining in the assets of the originator, fall within the concept of ‘granting of credit’ within the meaning of that provision.**

[Signatures]

* Language of the case: Polish.