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OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 10 April 2019 (1)

Case C?291/18

Grup Servicii Petroliere SA

v

Agen?ia Na?ional? de Administrare Fiscal? — Direc?ia General? de Solu?ionare a Contesta?iilor

Agen?ia Na?ional? de Administrare Fiscal? — Direc?ia General? de Administrare a Marilor Contribuabili

(Request for a preliminary ruling from the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania))

(Reference for a preliminary ruling — Valued added tax (VAT) — Directive 2006/112/EC — Article 148(a) and (c) — Exemption — Supply of offshore jackup drilling rigs — Vessel — Definition — Condition relating to navigation on the high seas)

1.

Is an offshore ‘jackup’ drilling rig ‘a vessel used for navigation on the high seas …’? This is the principal question which this Court is now required to answer following a reference from the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania).

2.

The present request has been made in proceedings between Grup Servicii Petroliere SA (‘GSP’), a company with its head office in Romania, and the Romanian tax authorities in a case concerning the VAT-exempt supply of three offshore jackup drilling rigs to particular Maltese companies. In that context, the referring court wishes to know whether offshore jackup drilling rigs of this kind are covered by the exemption laid down in Article 148(c) read in conjunction with Article 148(a) 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’).

3.

The effect of these provisions is that Member States are required in particular to exempt the supply of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities. As I have just noted, the essential question for consideration is whether these particular drilling rigs come within this exemption. Before considering this question it is first necessary to set out the relevant provisions of public international law, European Union law and national law.

I. Legal context

A. Public international law

4.

The United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982 (United Nations Treaty Series, Vol. 1833, 1834 and 1835, p. 3; ‘the United Nations Convention on the Law of the Sea’), entered into force on 16 November 1994. This Convention was approved on behalf of the Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

5.

Article 2(1) and (2) of the United Nations Convention on the Law of the Sea, entitled ‘Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil’ provides:

‘1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.’

6.

Article 3 of that convention, entitled ‘Breadth of the territorial sea’ is worded as follows:

‘Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.’

7.

Part V of that convention, entitled ‘Exclusive economic zone’, includes Articles 55 to 75.

8.

Article 56, headed ‘Rights, jurisdiction and duties of the coastal State in the exclusive economic zone’, provides:

‘1. In the exclusive economic zone, the coastal State has:

(a)

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

…

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.'

9.

Paragraph 1 of Article 58 of the United Nations Convention on the Law of the Sea, headed 'Rights and duties of other States in the exclusive economic zone', is worded as follows:

'In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.'

10.

Part VI of the United Nations Convention on the Law of the Sea, entitled 'Continental Shelf', includes Article 76 to Article 85.

11.

Article 77 is headed 'Rights of the coastal State over the continental shelf' and it stipulates at paragraph 1:

'The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.'

12.

Article 78(2) is entitled 'Legal status of the superjacent waters and air space and the rights and freedoms of other States'. It provides:

'The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.'

B. European law

1. The Sixth Directive

13.

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 (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) ('the Sixth Directive') provided in Article 15 thereof:

‘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 such exemptions and of preventing any possible evasion, avoidance or abuse:

…

4. the supply of goods for the fuelling and provisioning of vessels:

(a)

used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

(b)

used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships’ provisions;

…

5. the supply, modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4 (a) and (b) and the supply, hiring, repair and maintenance of equipment — including fishing equipment — incorporated or used therein;

…’

14.

The Sixth Directive was repealed by the VAT Directive, which entered into force on 1 January 2007.

2. The VAT Directive

15.

Recital 3 of the VAT Directive provides:

‘To ensure that the provisions are presented in a clear and rational manner, consistent with the principle of better regulation, it is appropriate to recast the structure and the wording of the Directive although this will not, in principle, bring about material changes in the existing legislation. A small number of substantive amendments are however inherent to the recasting exercise and should nevertheless be made. Where such changes are made, these are listed exhaustively in the provisions governing transposition and entry into force.’

16.

Article 146(1) of the VAT Directive, in Chapter 6 headed ‘Exemptions on exportation’, provides:

‘Member States shall exempt the following transactions:

(a)

the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

(b)

the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use;

…

(d)

the supply of services consisting in work on movable property acquired or imported for the purpose of undergoing such work within the Community, and dispatched or transported out of the Community by the supplier, by the customer if not established within their respective territory or on behalf of either of them;

(e)

the supply of services, including transport and ancillary transactions, but excluding the supply of services exempted in accordance with Articles 132 and 135, where these are directly connected with the exportation or importation of goods covered by Article 61 and Article 157(1)(a).'

17.

Article 148 of the VAT Directive, in Chapter 7, headed 'Exemptions related to international transport', of Title IX, is worded as follows:

'Member States shall exempt the following transactions:

(a)

the supply of goods for the fuelling and provisioning of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities, or for rescue or assistance at sea, or for inshore fishing, with the exception, in the case of vessels used for inshore fishing, of ships' provisions;

…

(c)

the supply, modification, repair, maintenance, chartering and hiring of the vessels referred to in point (a), and the supply, hiring, repair and maintenance of equipment, including fishing equipment, incorporated or used therein;

…'

18.

Article 156 of that directive is contained in Chapter 10 which is headed 'Exemptions for transactions relating to international trade'. It provides:

‘1. Member States may exempt the following transactions:

(a)

the supply of goods which are intended to be presented to customs and, where applicable, placed in temporary storage;

(b)

the supply of goods which are intended to be placed in a free zone or in a free warehouse;

(c)

the supply of goods which are intended to be placed under customs warehousing arrangements or inward processing arrangements;

(d)

the supply of goods which are intended to be admitted into territorial waters in order to be incorporated into drilling or production platforms, for purposes of the construction, repair, maintenance, alteration or fitting-out of such platforms, or to link such drilling or production platforms to the mainland;

(e)

the supply of goods which are intended to be admitted into territorial waters for the fuelling and provisioning of drilling or production platforms.

2. The places referred to in paragraph 1 shall be those defined as such by the Community customs provisions in force.’

3. Council Implementing Regulation (EU) No 282/2011

19.

Article 38 of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1), provides:

‘1. “Means of transport” as referred to in Article 56 and point (g) of the first paragraph of Article 59 of Directive 2006/112/EC shall include vehicles, whether motorised or not, and other equipment and devices designed to transport persons or objects from one place to another, which might be pulled, drawn or pushed by vehicles and which are normally designed to be used and actually capable of being used for transport.

2. The means of transport referred to in paragraph 1 shall include, in particular, the following vehicles:

…

(d)

vessels;

…’

C. National law

20.

Article 143 of Legea No 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), headed ‘Exemptions for exports or other similar transactions, for intra-Community supplies of goods and international and intra-Community transport’, provides in the version in force in May 2008:

‘(1) The following shall be exempt from the tax: …

(h)

in the case of vessels used for maritime navigation, the international carriage of persons and/or goods, for the purpose of fishing or for any other economic activities or for rescue or assistance at sea:

1.

the supply, modification, repair, maintenance, chartering, lease and hiring of vessels, and the supply, lease, hiring, repair and maintenance of equipment, including fishing equipment, incorporated or used therein; …

21.

Article 144 of Law No 571/2003 establishing the Tax Code, headed ‘Special exemptions linked to international goods traffic’, specifies:

‘(1) The following shall be exempt from the tax:

(a)

the supply of goods intended to be: …

7.

admitted into territorial waters

–

in order to be incorporated into drilling or production platforms, for purposes of the construction, repair, maintenance, alteration or development of such platforms, or to link such drilling or production platforms to the mainland,

–

for the fueling and provisioning of drilling or production platforms.’

22.

Article 23 of Ordonan?a Guvernului No 42/1997 privind transportul maritim ?i pe c?ile navigabile interioare (Government Ordinance No 42/1997 on Maritime and Inland Waterway Transport),

provides:

‘For the purposes of this Ordinance, the following are vessels:

(a)

sea and inland navigation vessels of all kinds, with or without propulsion, which navigate on the surface or by immersion, designed to carry goods and/or persons, to fish, to tow or to push;

(b)

floating installations, such as dredges, floating elevators, floating cranes, floating clamshell buckets, etc., with or without propulsion;

(c)

floating structures that are not normally intended for movement, such as floating docks, floating jetties, pontoons, floating boat sheds, drilling platforms and others, floating lighthouses;

(d)

pleasure craft.’

23.

Point 1 of Decizia No 3/2015 a Comisiei fiscale centrale (Decision No 3/2015 of the Central Tax Commission), mentions:

‘From 1 January 2007 to 31 December 2013: in the case of vessels intended for navigation at sea, used for the international transport of persons and/or goods, for fishing or for any other economic activity at sea, the VAT exemptions provided for in Article 143(1)(h), … of the Tax Code … shall apply if the vessel is used effectively and predominantly for navigation at sea. In determining whether a vessel is used effectively and predominantly at sea, objective criteria alone, such as the length or tonnage of the vessel, cannot be taken into account, but these criteria could be used to exclude from the scope of the exemptions vessels which, in any event, do not fulfil the conditions laid down in Article 143(1)(h) of the Tax Code, namely those which are not suitable for navigation at sea. … The concept of “sea” navigation, within the meaning of [the VAT Directive] and Article 143(1)(h) of the Tax Code, covers any part of the sea outside the territorial waters of any State which is beyond the 12 nautical mile limit measured from baselines established in accordance with the international law of the sea (United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982).’

II. The main proceedings and the questions referred for a preliminary ruling

24.

In May 2008 GSP sold three offshore jackup drilling rigs, operating in the Black Sea (more precisely, according to the information contained in the request of the referring court, in Romanian territorial waters) to certain Maltese purchasers for the purpose of carrying out drilling activities. Jackup rigs, or self-elevating units, are mobile platforms which consist of a buoyant hull which has been fitted with several movable legs. The existence of the hull enables the drilling unit and all attached machinery to be transported to the proposed drilling site with its legs up and the hull floating on the water. When the rig arrives at the location, the legs are then extended (‘jacked’) into the water. The legs thus anchor the rig on to the sea-bed and the hull platform is then elevated

well above the surface of the sea. When the rig is in this extended (or ‘jacked-up’) position it forms a static platform. It is not until the legs are withdrawn at the end of the drilling operation that the hull can float again.

25.

It appears from the case file sent to the Court that the three rigs at issue are not self-propelled, but manoeuvred by towing. This was confirmed at the hearing . While the Court was also informed at the hearing that the platform supports a crew, that there is a log book and that the platform can be manoeuvred by its engines to deal with ocean currents and sea drift, it would seem — although these are facts ultimately for the referring court to verify — that even when floating the platform is transported from location to location by a tugboat.

26.

On the occasion of that sale, GSP issued invoices, applying the VAT exemption scheme provided for by the national legislation (Article 143(1)(h) of the Tax Code) transposing Article 148(c) of the VAT Directive in respect of the supply of these platforms. After the sale, GSP continued to operate these platforms in the Black Sea pursuant to the terms of a bare boat charter.

27.

On 23 May 2016, following the adoption of a tax inspection report, the Romanian tax administration issued a VAT adjustment notice on the grounds that, although the drilling rigs could be considered as vessels within the meaning of the national legislation and are suitable for unlimited use at sea, they do not navigate during drilling activity but are rather in a parked position: their columns are in a low position and rest on the seabed in order to lift the pontoon (the floating part) above the sea, from a height of some 60 to 70 metres. For a supply of platforms to fall within the exemption provided for in Article 143(1)(h) of the Tax Code, it was necessary to establish that the vessel in question is navigating effectively and predominantly on the high seas. The Romanian tax administration considered, however, that the evidence showed that the actual and preponderant use of the platforms occurs when they are in a parked position for the purpose of drilling activity and not when they navigate, which is only an activity subsidiary to drilling.

28.

GSP submitted a complaint against this notice which was rejected by a decision of the Romanian national tax administration on 24 November 2016.

29.

The applicant appealed its opposition to the tax assessment notice, the tax inspection report and the decision on the complaint to the referring court.

III. The request for a preliminary ruling and the procedure before the court

30.

The referring court considers that it is necessary to clarify, first, whether the exemption laid down by Article 148(c), read in combination with Article 148(a) of the VAT Directive, applies to the supply of offshore jackup drilling rigs, i.e., whether such a platform falls within the concept of a ‘vessel’ as defined in that provision. Second, and if the answer to the former question is affirmative, the referring court wishes to know whether the exemption provided for in Article 148(c) read in combination with Article 148(a) of the VAT Directive is subject to the condition that the activity of

navigation on the high seas is predominant as compared with that of drilling.

31.

Under those circumstances, the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest) has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1)

Must Article 148(c) of [the VAT Directive], in conjunction with Article 148(a) of that regulation, be interpreted as meaning that the exemption from value added tax applies, in some circumstances, to the sale of offshore jackup drilling rigs, that is to say, are offshore jackup drilling rigs covered by the term “vessels” within the meaning of that provision of EU law, given that, according to the title of Chapter 7 of that directive, that provision lays down rules governing “exemptions related to international transport”?

(2)

If the answer to the first question is in the affirmative, must Article 148(c) of [the VAT Directive], in conjunction with Article 148(a) of that directive, be interpreted as meaning that an essential condition for applying the exemption from value added tax to an offshore jackup drilling rig, which has navigated into international waters, is that it must in fact be in a state of movement while it is being used (for commercial/industrial activities), floating or moving at sea from place to place, for a longer period than the period during which it is stationary or immobile, as a result of carrying out drilling activities at sea — that is to say, that navigation must in fact predominate via-à-vis drilling activities?’

32.

Written observations were submitted by Grup Servicii Petroliere, the Belgian, Italian and Romanian Governments and by the European Commission. In addition, Grup Servicii Petroliere, the Romanian Government and the European Commission presented oral arguments at the hearing on 28 February 2019.

IV. Analysis

A. Preliminary observation

33.

It may first be observed that recital 3 of the VAT Directive specifies that the adoption of that directive has not in principle brought about any material changes in the existing legislation on the common system of VAT with the exception of a small number of substantive amendments listed exhaustively in the provisions governing transposition and the entry into force of the directive. Accordingly, this Directive may be regarded essentially as in the nature of a consolidating legislative measure.

34.

As none of the provisions governing transposition and entry into force of the VAT Directive, which are set out in Article 411 to 414 of that directive, refer to Article 148(a) or (c), the latter must be considered as having the same meaning as Article 15(4) of the Sixth Directive which was similarly worded. (2) It follows, accordingly, that the existing case-law relating to Article 15(4) of the Sixth

Directive must be taken into consideration to interpret Article 148(a) and (c) of the VAT Directive. (3)

35.

Regarding Article 15(4) of the Sixth Directive, the Court has held that transactions covered by this provision are exempted because they are ‘equated with exports’. (4) In other words, these transactions must be treated as if they have occurred outside EU territory. (5)

36.

In its judgment of 3 September 2015, Fast Bunkering Klaip?da (C?526/13, EU:C:2015:536, paragraph 26), the Court has confirmed that a transaction covered by Article 148(a) and (c) is exempted because such a transaction is equated with exports.

37.

It is in the light of this objective that the two questions raised may thus be examined.

B. As regards the two questions

38.

By its two questions, the referring court asks, in essence, whether Article 148(c) of the the VAT Directive, read in conjunction with Article 148(a) of that directive, must be interpreted as meaning that the exemption laid down in this first provision is applicable to offshore jackup drilling rigs.

39.

As a starting point, it must be recalled that under Article 148(c) of the VAT Directive, the supply of vessels referred to in point (a) of that article is VAT exempt. In order, therefore, to determine whether the supply of offshore jackup drilling rigs is covered by this exemption, it is necessary to determine, first, what is meant by the use of the word ‘vessel’ in Article 148(c) and, second, what characteristics a vessel must present in order to fall within the scope of Article 148(a) of the VAT Directive so that its supply can be exempted.

1. The common meaning of the terms ‘vessel’ and ‘navigation’

40.

Regarding the concept of what constitutes a vessel, much, of course, depends on the specific context of the provision in question.

41.

It is true that under international law, it is, perhaps, no surprise, for example, that the International Convention for the Prevention of Pollution from Ships (1973) (MARPOL) (as amended by the Protocol of 1978) (London) defined a ship as ‘a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms’. (6) However, since this convention aims at preventing marine pollution, it is natural that it defined the concept of vessel very widely. In the light of that objective, it is essentially irrelevant whether that pollution came from a fixed platform supporting a drilling rig or from a conventional nautical vessel such as a ship or a boat. That is why, in essence, the MARPOL Convention includes in the definition of the term ‘ship’ fixed or floating platforms of this

kind.

42.

Yet the wording of the present Article 148(a) and (c) of the VAT Directive is of some importance. The exemption, after all, is not simply in respect of ‘vessels’simpliciter, but rather in respect of ‘vessels used for navigation on the high seas’. In this respect the directive employs the same venerable language of notable items of maritime legislation contained in the statute roll of some Member States. (7) The phrase ‘… used for navigation on the high seas …’ is nevertheless an important and, to my mind, a decisive qualification of the word ‘vessel’.

43.

In ordinary language the word ‘vessel’ connotes a craft of some sort which is capable of doing something on the water involving the carriage of persons or goods, irrespective of whether this is done for reward or otherwise or just simply for recreational purposes. (8) Therefore, I rather doubt if a rig of this kind can properly be described as a ‘vessel’ in this sense, since it neither carries persons or goods on the water: it is more in the nature of a large-scale man-made machine structure which, once moved, is affixed to the sea floor for drilling purposes. While it is true that, as the Court was informed at the hearing, there is a crew on board such a rig and that it has a log book, one might nonetheless observe that a jackup drilling rig seems to lack many of the standard features of a sailing vessel such as a bow or anchors or a rudder, although this is ultimately a matter for the national courts to verify in each case. Nor does it seem that they possess any conventional steering mechanism: it appears, for example, there is no wheel-house, albeit again that these details are matters for the national courts to verify. Moreover, as the Court was informed at the hearing, the rigs at issue in the present proceedings are furthermore in the nature of platforms which do not possess any means of self-propulsion.

44.

Yet even if I am wrong on this point and a ‘jackup’ drilling rig may nonetheless properly be regarded as a ‘vessel’, the fact that such a rig may (contrary to my own view) qualify as a ‘vessel’simpliciter does not mean that it is a vessel ‘used for navigation on the high seas’ as required by Article 148(a) of the VAT Directive.

45.

It is true that in some of its language versions, Article 148(a) does not expressly mention the ‘used for navigation’ requirement. For example, the German version simply states that the vessel is required to be used on the high sea. (9) Since, however, the objective of Article 148 is to exempt the supply of vessels taking place within the geographical scope of the VAT Directive, but which are intended to carry out economic activities outside of it, the application of that provision to a vessel requires, implicitly, but necessarily, that the former is at least navigated in order to leave the EU waters.

46.

It follows, therefore, that, even if a jackup drilling rig should be considered a ‘vessel’, in order to fall within the definition contained in Article 148(a) it must nonetheless be used for navigation on the high seas. Navigation is essentially the nautical art of seafaring. It implies that the location of the vessel can be determined and the future course of the vessel plotted by its navigator.

47.

So far as the term ‘the high seas’ is concerned, it is clear from Article 86 of the United Nations Convention on the Law of the Sea that international law regards the high seas as ‘all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State’.

48.

Accordingly, the context of Article 148(a) and (c) necessarily assumes that the vessel in question must at least be capable of being navigated far from the coast. This in turn implies that the direction of the vessel can be plotted by the navigator and that the vessel is accordingly capable of self-propulsion. And whatever the nautical qualities of the drilling rigs in question, it is perfectly clear that these rigs are not used for navigation on the high seas, precisely because they do not possess any capacity for self-propulsion.

49.

It is, of course, true that these rigs are designed to withstand adverse weather conditions and, as was further confirmed at the hearing, they are capable of being transported on the high seas and have regularly operated in that capacity on the high seas. This, however, is not the same thing as saying that these drilling rigs ‘are used for navigation on the high seas’. Any other conclusion would, to my mind, amount to a distortion of language and would justly be viewed with some scepticism by the seafaring community. One could not, I think, in any realistic sense describe this rig as a ‘sea-going vessel’.

50.

One might, moreover, equally observe that any exemption from the scope of the VAT Directive must be strictly construed, (10) and the case for bringing ‘jackup’ drilling rigs of this kind within the scope of the Article 148(c) exemption has not been clearly established.

51.

It follows, therefore, for these reasons that the Article 148(c) exemption does not apply to drilling rigs of this kind.

2. An Alternative Approach

52.

In any event, even if the commonly accepted meaning of the terms ‘vessel’ and ‘navigation’ is put aside, I nonetheless take the view that, in circumstances such as those of the case in the main proceedings, precisely the same conclusion, namely that the exemption laid down in Article 148(c) of the VAT directive is not applicable, can be arrived at by another way.

53.

It is true that if regard is had only to the objective pursued by Article 148(a) and (c) — which is to exempt certain transactions because they are ‘equated with exports’ or, more precisely, because they are related to supplies of goods or services intended for use outside the EU territory —, it must be admitted that such an objective implies that the word ‘vessel’ must be understood as referring to a craft capable of being moved outside EU waters, albeit necessarily on its own. (11)

Viewed further from this perspective, the word ‘navigation’ could be taken to refer to the movement that a vessel needs to perform in order to leave EU waters so as to carry out its activities outside of the scope of application of the VAT legislation.

54.

It must also be recalled, however, that Article 148(c) of the VAT directive requires in order for a supply of ships to be exempt that two other conditions, apart from being a vessel used for navigation, be met. First, the vessel must be intended to be assigned to one of the activities mentioned in Article 148 (a) of that directive. Second, as the Court has already ruled in the context of both the Sixth Directive (12) and the VAT Directive (13) in the case of both vessels carrying passengers for reward and vessels used for commercial or industrial activities that this exemption does not apply unless these activities take place on the high seas.

55.

Regarding the activities that a vessel must carry out in order that its supply be exempted, the referring Court underlined in its first question that Article 148 of the VAT directive is mentioned in Chapter 7 of that directive which is headed ‘Exemptions related to international transport’.

56.

However, as the heading of a chapter is chosen in view of the components of the principal provisions laid down in it, all provisions contained in a chapter do not necessarily have a scope of application limited to the subject mentioned in the heading of that chapter. (14) In the case of Article 148(a), it flows from the wording of that provision itself that the activities covered are not limited simply to transportation, but include any commercial, fishing or industrial activities. (15)

57.

There is, of course, no doubt that the carrying-out of offshore drilling by means of a drilling rig is one of the activities referred to in Article 148(a), as industrial activities includes drilling.

58.

Concerning the condition related to the high seas, the Romanian Government and the Commission claim that such condition implies that the vessel must be used on them whereas the Belgian and Italian Governments argue that a vessel only needs to be suitable to navigate on such waters, regardless of the time spent on the high seas. In their opinion, a vessel which carries out its activities in the territorial waters of one of the Member States could benefit from the exemption enshrined in Article 148(c) without being used on the high seas, as long as it could be moved there.

59.

As, however, I have already pointed out, transactions covered by Article 148(a) and (c) are exempted because they are related to goods or services purchased within EU territories but which are expected to be used outside those territories. This means, in other words, that the vessel in question must move from a place situated within EU waters to a place outside them, where the activities in question will be carried out. It is precisely for these reasons that I consider, contrary to the arguments put forward by the Belgian and Italian Governments, that it is not sufficient for a vessel to be suitable for being used on the high seas. In my view, the vessel needs to be mainly and effectively engaged in an activity conducted on the high seas.

3. The concept of the high seas in Article 148(a) of the VAT directive

60.

It is finally necessary to examine what is meant by the concept of ‘high seas’ in Article 148(a) of the VAT directive.

61.

Since the objective pursued by that article is to exempt transactions equated with exports, I consider that the concept of high seas must be understood as designating the water outside the territorial scope of the the VAT Directive.

62.

The territorial scope of that directive is determined in Article 5. According to that provision, the VAT Directive applies to transactions occurring within a part of the territory of one of the Members States ‘to which the Treaty establishing the European Community, which has been replaced since then by the Treaty on the Functioning of the European Union, in accordance with [Article 52 TEU and Articles 349 and 355 TFEU], is applicable with the exception of any territory referred to in Article 6 of this Directive’.

63.

In the absence, in the Treaty, of a definition of the notion of territory, the latter must be determined in accordance with the principles of public international law.

64.

In this respect, the Romanian Government and the Commission argued during the hearing that, when the Sixth VAT Directive was adopted, which already contained the exemption now provided for in Article 148(a), only the Convention on the Territorial Sea and the Contiguous Zone, signed at Geneva on 29 April 1958 (United Nations Treaty Series, Vol. 516, p. 205) was in force and that, therefore, the notions of ‘territories’ and ‘high seas’ should be interpreted in the light of this convention.

65.

One must, however, recall that the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must be interpreted, as from the date of the entry into force of these agreements, in a manner that is consistent with them. (16) Consequently, in so far as Decision 98/392 entered into force on 13 July 1998, before the rigs at issue in the main proceedings were purchased, the territory of Member States had to be assessed in the light of the United Nations Convention on the Law of the Sea. (17)

66.

According to Article 2 of the United Nations Convention on the Law of the Sea, the sovereignty of the coastal State extends to the territorial sea as well as to its bed and subsoil.

67.

In accordance with Article 3 of that convention, each State has the right to establish the breadth of

its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this convention.

68.

Beyond this limit, the United Nations Convention on the Law of the Sea provides that each coastal State has sovereign rights on the exclusive economic zone and the continental shelf. These rights are, however, limited to activities laid down respectively in Articles 56 and 77 of the United Nations Convention on the Law of the Sea.

69.

Accordingly, in its judgment of 29 March 2007, Aktiebolaget NN (C?111/05, EU:C:2007:195, paragraphs 59 and 60), the Court held that the ‘sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the United Nations Convention on the Law of the Sea’.

70.

As the activity at issue in Aktiebolaget NN was the supplying and laying of an undersea cable, which was not included in the activities listed in Articles 56 and 77 of the United Nations Convention on the Law of the Sea, the Court ruled that this activity is not within the sovereignty of the coastal Member State and, thus, cannot be regarded as falling within the territorial scope of application of the common system of VAT. (18)

71.

In the present case, although rigs enjoy the freedom of navigation referred to in Articles 58(1), 78 and 87 of the United Nations Convention on the Law of the Sea, it remains the case that the activity which they carry out is the exploration and exploitation of the natural resources of the subsoil of the ocean floor. This, however, is one of the activities to which Articles 56 and 77 of the United Nations Convention on the Law of the Sea refers as being subject to the sovereign rights of the coastal State.

72.

In contrast, therefore, with the activity at issue in Aktiebolaget NN, when a craft is performing drilling activities in the exclusive economic zone or in the continental shelf of a Member State, such activities are carried out within the territorial scope of application of the VAT Directive. Consequently, in order for its supply to be exempted under Article 148(c), read in conjunction with Article 148(a) of that directive, a rig may not carry out its activities either in the territorial sea, or in the exclusive economic zone, nor in the continental shelf of an EU Member State.

73.

In its request for a preliminary ruling, the referring court has indicated that the rigs at issue in the main proceedings were, when, purchased, performing drilling activity in Romanian territorial waters in the Black Sea and that they continued to perform those activities after the point when they were purchased.

74.

As all the parties agreed during the hearing, the Black Sea falls entirely under one or the other

exclusive economic zone of its various coastal States. Accordingly, no part of the Black Sea can be considered as part of the high seas within the meaning of Article 148(c) of the VAT Directive. (19) It follows, therefore, that even if (contrary to my own view) these rigs could be regarded as ‘vessels’ which were ‘used for navigation on the high seas’, their supply nonetheless cannot fall under Article 148(c), precisely because of the location where they carried out their activities immediately after they have been supplied.

75.

Contrary to the argument put forward by Grup servicii Petroliere, this conclusion is neither contradicted by the fact that these rigs could be moved in the future to the Mediterranean Sea or to the North Sea, nor by the principle of fiscal neutrality, understood here in the sense of equal treatment. (20)

76.

Indeed, as a matter of principle, the use which needs to be taken into consideration to determine the applicable VAT rules, is that which will be directly carried out after the purchase of the goods or the supply of the services in question and not those that could hypothetically be carried out at some point in the future. (21)

77.

Moreover, concerning the principle of tax neutrality, which precludes similar goods or services which are in competition with each other from being treated differently for VAT purposes, (22) it must be recalled that the latter can only be invoked against national provisions. (23)

78.

It is true that according to a particular line of case-law the principle of neutrality is the translation in the field of VAT of the principle of equal treatment, (24) which implies that comparable situations must not be treated differently unless such treatment is objectively justified. (25) The Court has, however, consistently held that the question whether or not situations are comparable must be determined in the light of the subject matter of the provisions in question and of the aim pursued by them, whilst account must be taken for that purpose of the principles and objectives of the field in question. (26)

79.

As Article 148(c) of the VAT Directive exempts certain transactions because they are ‘equated with exports’, only vessels delivered within the territory of the Union with the intent of carrying out their activities outside of it before returning to their starting position can be considered to be in a comparable situation in the light of that objective. Therefore, the legislature may treat platforms differently without infringing the principle of equal treatment depending on whether or not they carry out their activities on the high seas. (27)

80.

Similarly, I consider that the solution I have reached does not infringe the principle of equal treatment with regard to the provisions of Article 156 (d) of the VAT Directive. Indeed, I believe that this provision is not relevant in the present case, including in the view of the principle of fiscal neutrality. While Article 156 (d) states that the supply of goods which are intended to be admitted into territorial waters in order to be incorporated into drilling or production platforms, for purposes of the construction, repair, maintenance, alteration or fitting-out of such platforms, or to link such

drilling or production platforms to the mainland may be VAT exempted, the wording of that article does not mention among the transactions covered the resale of drilling platforms.

V. Conclusions

81.

In the light of the foregoing consideration, I propose that the Court answers the questions asked by the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania) that Article 148(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 148(a) of that directive, must be interpreted as meaning that the exemption laid down in this first provision is not applicable to offshore jackup drilling rigs such as the ones at issue in the main proceedings.

(1) Original language: English.

(2) See, by analogy, judgment of 16 June 2016, Kreissparkasse Wiedenbrück, C?186/15, EU:C:2016:452, paragraph 40.

(3) Judgment of 3 September 2015, Fast Bunkering Klaip?da, C?526/13, EU:C:2015:536, paragraph 25.

(4) Judgments of 26 June 1990, Velker International Oil Company, C?185/89, EU:C:1990:262, paragraph 21, and of 14 September 2006, Elmeka, C?181/04 to C?183/04, EU:C:2006:563, paragraph 21.

(5) This provision serves as a measure to foster competitiveness. Indeed, as the activities carried out by the vessel referred to took place outside the territorial scope of application of the common system of VAT, namely, outside EU waters, the goods and services necessary to perform those activities, including the vessels, could easily be supplied by non-EU operators. Moreover, regarding the situation of the goods used for the fuelling and provisioning of vessels, in the absence of Article 148(a) EU suppliers could be tempted to wait for the vessels to leave EU waters in order to supply them to obtain the benefit of the VAT exemption.

(6) Emphasis supplied.

(7) Notably, for example, the United Kingdom’s Merchant Shipping Act, 1894, s.742 of which defined a ‘vessel’ as including ‘any ship or boat or any other description of vessel used in navigation’.

(8) Or, to quote the words of the Supreme Court of Ireland in The Von Rocks [1998] 3 Irish Reports 41, the pleasure which many derive from just ‘messing about in boats’. The quotation is in turn taken from K. Grahame’s The Wind in the Willows.

(9) The terms used in German are that the vessel ‘auf hoher See … eingesetzt sind’.

(10) See, e.g., judgment of 18 October 2007, Navicon, C?97/06, EU:C:2007:609, paragraphs 21 and 22 and the case-law cited.

(11) This conclusion is not contradicted by the Article 38 of Implementing Regulation No 282/2011. Indeed, Although the latter includes the vessels in the notion ‘means of transport’ which are defined as any devices designed to transport persons or objects from one place to another, it flows from the wording of this provision that the scope of application of this definition is limited to the notion of ‘means of transport’ referred to in Article 56 and in Article 59, first paragraph, point

(g), of the VAT Directive.

(12) See, judgment of 14 September 2006, Elmeka, C?181/04 to C?183/04, EU:C:2006:563, paragraph 14. In addition to the reason laid down in this judgment, I would like to underline that, interpreting Article 148(a) of the VAT Directive as being only applicable to vessels carrying passengers for reward, would result in this condition being rendered pointless since passenger transport is also a commercial activity which is expressly exempted by this Article.

(13) Judgment of 21 March 2013, Commission v France, C?197/12, not published, EU:C:2013:202, paragraph 22.

(14) See, by analogy, regarding a provision the scope of application of which goes further than the subject of the regulation in which that provision is mentioned, judgment of 13 June 2018, Deutscher Naturschutzring, C?683/16, EU:C:2018:433, paragraph 43 et seq.

(15) It should again be recalled that, according to case-law, transactions covered by Article 148 are exempted because they are ‘equated with exports’. As, in the case of a vessel, the latter must navigate outside the scope to be covered by this provision, I believe that this movement could explain why this provision has been put in Chapter 7, under the title ‘Exemptions related to international transport’.

(16) See, for example, judgment of 11 April 2013, HK Danmark, C?335/11 and C?337/11, EU:C:2013:222, paragraphs 28 to 30

(17) In this respect, it can be noted that Decision 98/392/EC approving the Convention on the Law of the Sea does not mention a date of entry into force. However, in accordance with Article 297 TFEU, a legislative act, which does not mention any date in that respect, enters into force on the twentieth day following its publication. Since Decision 98/392/EC was published on 23 June 1998, the latter must be considered to have entered into force on 13 July 1998.

(18) The Court underlined that this finding was confirmed by Articles 58(1) and 79(1) of the Convention, which allow, subject to certain conditions, any State to lay undersea cables in those zones.

(19) As a matter of fact, the problem in the main proceedings seems to have its origin in the fact that Romania had not correctly transposed Article 148(c) at the time that the purchase occurred. Indeed, Article 143(1)(h) of Law No 571/2003 establishing the Tax Code did not require, as a condition to benefit from the exemption, that the vessels’ activities consist in carrying passengers for reward or are used for the purpose of commercial, industrial or fishing activities, on the high seas. It was apparently only upon the adoption of Decision No 3/2015 that this condition was introduced into national legislation.

(20) The notion of tax neutrality is used in two different ways in the field of VAT. On the one hand, this principle is used to characterise the objective pursued by the deduction mechanism provided for in the Sixth Directive, namely to relieve the entrepreneur entirely of the burden of VAT due or paid in respect of all his economic activities which are themselves subject to VAT. On the other hand, this notion is used in a sense similar to that of equal treatment. See, on this subject, judgment of 15 November 2012, Zimmermann, C?174/11, EU:C:2012:716, paragraph 48.

(21) See, to that effect, judgment of 25 July 2018, Gmina Ryjewo, C?140/17, EU:C:2018:595, paragraph 34. As rigs are capital goods, any change in their use are subject to Article 187 of the VAT Directive.

(22) See, to that effect, judgment of 8 May 2003, Commission v France, C?384/01, EU:C:2003:264, paragraph 25. In so far as the EU legislature enjoys broad discretion to adopt tax measures, the former may treat differently goods or services in competition as soon as they present a characteristic which distinguishes them in the light of the aim pursued by them.

(23) Judgment of 29 October 2009, NCC Construction Danmark, C?174/08, EU:C:2009:669, paragraphs 41 to 43.

(24) According to some judgments, the principle of neutrality is the ‘translation’ of the principle of equal treatment in the field of VAT (judgments of 19 December 2012, Grattan, C?310/11, EU:C:2012:822, paragraph 28, and of 28 November 2013, MDDP, C?319/12, EU:C:2013:778, paragraph 38), while some others consider it as a particular expression of the principle of equal treatment (judgments of 19 December 2012, Orfey Balgaria, C?549/11, EU:C:2012:832, paragraph 33, and of 7 March 2013, Efir, C?19/12, not published, EU:C:2013:148, paragraph 28) which does not coincide with the latter (judgment of 25 April 2013, Commission v Sweden, C?480/10, EU:C:2013:263, paragraphs 17 and 18). In its recent judgment of 7 March 2017, RPO (C?390/15, EU:C:2017:174, paragraph 38), the Grand Chamber adopt a more rigorous approach, consisting in considering that, in its second acceptance, the notion of tax neutrality is equal to the principle of equal treatment, but that, for adopting tax measure, a broad discretion must be given to the EU legislature.

(25) See, judgments of 12 November 2014, Guardian Industries and Guardian Europe v Commission, C?580/12 P, EU:C:2014:2363, paragraph 51, and of 4 May 2016, Pillbox 38, C?477/14, EU:C:2016:324, paragraph 35.

(26) See, to that effect, judgment of 16 December 2008, Arcelor Atlantique et Lorraine and Others, C?127/07, EU:C:2008:728, paragraph 26 and the case-law cited.

(27) Here, the breach of equal treatment alleged is the consequence of the existence of two separate provisions of the VAT Directive. As these two provisions pursued separate objectives and since the question whether the two situations are comparable must be determined in the light of the objectives pursued by them, in principle, no breach of the principle of equal treatment can be invoked.