Case C-350/10

Nordea Pankki Suomi Oyj

(Reference for a preliminary ruling from the Korkein hallinto-oikeus)

(Reference for a preliminary ruling – Sixth VAT Directive – Article 13B(d)(3) and (5) – Exemptions – Transfers and payments – Transactions in securities – Electronic messaging services for financial institutions)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive – Banking transactions covered by Article 13B(d)(3) and (5)

(Council Directive 77/388, Article 13B(d)(3) and (5))

Article 13B(d)(3) and (5) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that the exemption from value added tax under that provision does not cover electronic messaging services for financial institutions, such as swift services.

If swift services are electronic messaging services which are simply intended to transmit information, they do not by themselves perform any of the functions of one of the financial transactions referred to in Article 13B(d)(3) and (5) of the Sixth Directive, that is to say, those that have the effect of transferring funds or securities, and do not therefore possess the character of such transactions.

(see paras 34, 40, operative part)

JUDGMENT OF THE COURT (Fourth Chamber)

28 July 2011 (*)

(Reference for a preliminary ruling – Sixth VAT Directive – Article 13B(d)(3) and (5) – Exemptions – Transfers and payments – Transactions in securities – Electronic messaging services for financial institutions)

In Case C?350/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Korkein hallinto-oikeus (Finland), made by decision of 8 July 2010, received at the Court on 12 July 2010, in the proceedings brought by

Nordea Pankki Suomi Oyj,

THE COURT (Fourth Chamber),

composed of J.?C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader (Rapporteur) and E. Jaraši?nas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2011,

after considering the observations submitted on behalf of:

– Nordea Pankki Suomi Oyj, by L. Äärilä, oikeustieteen kandidaatti,

– the Finnish Government, by H. Leppo, acting as Agent,

– the Belgian Government, by J.?C. Halleux and by M. Jacobs and C. Pochet, acting as Agents,

– the German Government, by T. Henze, acting as Agent,

– the Greek Government, by F. Dedousi, M. Germani and M. Tassopoulou, acting as Agents,

– the United Kingdom Government, by H. Walker, acting as Agent,

– the European Commission, by I. Koskinen and L. Lozano Palacios, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 13B(d)(3) and (5) 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’).

2 The reference has been made in proceedings between Nordea Pankki Oyj (‘Nordea’), and the Finnish tax authority concerning the rejection of a claim for reimbursement of value added tax (‘VAT’).

Legal context

European Union law

3 Article 2 of the Sixth Directive provides:

‘The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…’.

4 Article 13B of the Sixth Directive provides:

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

…

(d) the following transactions:

…

3. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;

…

5. transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding:

– documents establishing title to goods,

– the rights or securities referred to in Article 5(3);

…’.

National law

5 Under point 1 of Paragraph 1(1) of the Law on value added tax (Arvonlisäverolaki 1501/1993) of 30 December 1993, as amended by the Law of 29 December 1994 (1486/1994) (‘the AVL’), VAT is paid to the State on each sale of goods and services made in Finland in the course of business.

6 Under the first subparagraph of Paragraph 9 of the AVL, it is the purchaser who is liable to tax on goods and services sold in Finland by a foreigner who does not have a fixed establishment there and who has not applied for registration there as a person liable to tax under the second subparagraph of Paragraph 12 of the AVL.

7 Under Paragraph 41 of the AVL, the sale of financial services is not subject to VAT. Under Paragraph 42(1)(4) and (6) thereof, financial services include payment transactions and dealing in securities.

8 The third subparagraph of Paragraph 42 of the AVL provides that dealing in securities includes the sale and brokerage of shares and comparable interests, and claims and derivative agreements, even when they are not made out in documentary form.

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

9 Nordea is the Finnish subsidiary of Nordea Bank AB, whose registered office is in Sweden. It is a merchant bank which handles both retail and corporate banking. Its banking activities include purchase and brokerage of securities and currency and it also offers investment and fiduciary services. Nordea is the representative of a VAT group formed by the Nordea group.

10 Nordea purchased services from Society for Worldwide Interbank Financial Telecommunication – SWIFT SC ('SWIFT'), a cooperative society owned jointly by more than 2 000 financial institutions in more than 200 countries.

11 SWIFT manages a worldwide electronic messaging service for financial institutions ('swift services') which enables more than 9 000 banks and financial and securities management institutions and other corporate clients to exchange between themselves standardised financial messages with the help of software developed by the undertaking itself and its international secure data exchange network. By way of that data exchange network which it set up and maintains, SWIFT processes in particular messages concerning interbank payments and transactions in securities. The financial institutions affiliated to SWIFT are connected to the network by their own computer systems through a special gateway. In order to access its services SWIFT requires its clients to use computer hardware it has approved in advance.

12 Interbank payments may be divided into domestic and international payments. Swift services are used mostly for international payments, but the proportion of domestic payments is increasing.

13 According to the referring court, the procedure for the transmission of messages concerning interbank payments provides that when a message is sent via the SWIFT network the issuing bank receives a first acknowledgement that the message was received for processing by SWIFT. That formality marks the start of SWIFT's financial responsibility for the transmission of the message concerned and for the performance of the transaction in accordance with that message. After the arrival of the first acknowledgement, the transaction described in the relevant message becomes binding. From the moment the receiving bank informs the system that it has received the message, SWIFT's responsibility for the performance of the transaction ends. At the same time, SWIFT sends the bank which gave the order an acknowledgement that the message has been received.

14 In addition to those payment transactions swift services are also used to carry out cross-border securities transactions. According to the referring court, only the registration of shares in the client's securities account made via swift services provides protection against third parties, although the ownership of the securities has already been transferred at the time the transaction on the stock exchange is made. SWIFT's responsibility for the messages connected with transactions in securities is similar to that described for interbank payments.

15 In order to maintain banking secrecy, SWIFT may and must open only the message fields which are necessary in order to establish their conformity with message transmission standards.

16 Nordea's expenses for swift services, the connection and maintenance of that connection to those services were EUR 1 999 559.96 for the 2001 financial year. In accordance with the reverse charge procedure, EUR 439 903.19 in VAT have been paid on that amount.

17 By decision of 22 February 2006, the Konserniverokeskus (department responsible for the taxation of large undertakings) dismissed the claim for a VAT refund submitted by Nordea for the

2001 financial year. The claim related to the VAT paid on swift services in December 2001.

18 Nordea brought an action before the Helsingin hallinto-oikeus (Administrative Court, Helsinki) (Finland) seeking the annulment of the decision of the Konserniverokeskus and the refund of the VAT it had paid for swift services in accordance with the reverse charge procedure.

19 By decision of 29 February 2008, the Helsingin hallinto-oikeus dismissed Nordea's action, basing its decision on the applicable provisions of national law, Article 13B(d)(3) of the Sixth Directive, and Case C-2/95 *SDC* [1997] ECR I?3017.

20 Nordea appealed against that decision to the Korkein hallinto-oikeus (Supreme Administrative Court) (Finland), which decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must points 3 and 5 of Article 13B(d) of the [Sixth Directive] be interpreted as meaning that the swift services described in section 1 of this order, which are used in payment transactions and securities transaction settlements between financial institutions, are exempt from VAT?'

Consideration of the question referred

Preliminary observations

21 Before analysing the legal basis of any exemption of swift services such as those at issue in the main proceedings, it is appropriate to state that those services fall within the scope of the Sixth Directive, which is not disputed, inasmuch as they constitute a supply of services effected for consideration within the meaning of Article 2(1) of that directive, having regard to the fact that there is a legal relationship between the client financial institutions and SWIFT and that the price received by the latter from its clients represents the value actually given in return for the services supplied to them by that undertaking (see, to that effect, Case C?540/09 *Skandinaviska Enskilda Banken* [2011] ECR I-0000, paragraph 18, and the case-law cited).

22 It must be borne in mind that, in accordance with the case-law of the Court, the exemptions referred to in Article 13 of the Sixth Directive constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another (see *Skandinaviska Enskilda Banken*, paragraph 19, and the case-law cited).

23 It must also be recalled that the terms used to specify the exemptions in Article 13 of the Sixth Directive are to be interpreted strictly, since those exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, to that effect, *Skandinaviska Enskilda Banken*, paragraph 20, and the case-law cited).

The exemption from VAT of swift services

24 According to settled case-law, in order to be characterised as exempt transactions for the purposes of points 3 and 5 of Article 13B(d) of the Sixth Directive, the services provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those points. As regards transactions concerning transfers, within the meaning of Article 13B(d)(3) of that directive, the services provided must have the effect of transferring funds and entail changes of a legal and financial character. A service exempt under the directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank. To that end, the national court must examine in particular the extent of the

responsibility of the supplier of services vis-à-vis the banks, in particular the question whether that responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions (see, to that effect, *SDC*, paragraph 66, and Case C?235/00 *CSC Financial Services* [2001] ECR I-10237, paragraphs 25 and 26).

25 The Court has also held that a transfer is a transaction consisting of the execution of an order for the transfer of a sum of money from one bank account to another. It is characterised in particular by the fact that it involves a change in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective banks and, in some cases, between the banks. Moreover, the transaction which produces this change is solely the transfer of funds between accounts, irrespective of its cause (see, to that effect, *SDC*, paragraph 53).

26 Furthermore, according to the case-law of the Court, that analysis relating to transactions concerning transfers or payments within the meaning of Article 13B(d)(3) of the Sixth Directive applies, in principle, *mutatis mutandis* with regard to transactions in securities within the meaning of Article 13B(d)(5) thereof (see, to that effect, *CSC Financial Services*, paragraph 27, and *Skandinaviska Enskilda Banken*, paragraph 33).

27 Thus, nothing prevents services entrusted to operators external to financial institutions, which therefore do not have a direct link with the clients of those institutions, from being exempt from VAT (see, to that effect, *SDC*, paragraph 59) provided that those services, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of the financial transactions described in Article 13B(d)(3) and (5) of the Sixth Directive.

28 In order to determine whether swift services satisfy that criterion it is necessary to examine, first, whether the provision of those services is capable of giving rise to changes of a legal and financial character similar to those resulting from interbank payments or transactions in securities themselves and, second, whether SWIFT's responsibility towards its clients is limited to technical aspects or whether it extends to specific, essential aspects of those financial transactions.

29 As regards the first aspect, Nordea maintains, first, that, without swift services, international payments or cross-border transactions in securities would be impossible in practice and, second, that only the registration of securities in the client's securities account affords protection against third parties, although the ownership of the securities has already been transferred at the time the transaction is made on the stock exchange, before the transmission of messages sent in the SWIFT network, with the result that those services implicitly affect the legal and financial situation of financial institutions and that of their clients.

30 However, as indicated by the referring court, all the Member States who have submitted observations and the European Commission, without being challenged by Nordea, swift services are electronic messaging services by means of which payment orders and orders concerning transactions in securities are transmitted from one financial institution to another in a secure and reliable manner, and SWIFT does not have access to the actual content of the messages thereby transmitted.

31 Even if it were accepted that, as Nordea submits, swift services are, on a number of markets, essential and the only services available, the mere fact that a constituent element is essential for completing an exempt transaction still does not warrant the conclusion that the service which that element represents is exempt (*SDC*, paragraph 65).

32 It is also not disputed that, although orders for transfers of funds or those which are intended to effect certain transactions in securities must be transmitted via computer systems approved by

SWIFT in order to guarantee their security, ownership rights as regards those funds or, as the case may be, those securities is transferred only by the financial institutions themselves in the context of legal relations with their own clients.

33 It is also clear from the case-law cited in paragraphs 24 to 26 of this judgment that the legal and financial changes which are such as to characterise a transaction exempt from VAT result only from the transfer of ownership, actual or potential, in funds or securities, without it being necessary for the transaction thereby performed to be effective against third parties.

34 Accordingly, if swift services are electronic messaging services which are simply intended to transmit information, they do not by themselves perform any of the functions of one of the financial transactions referred to in Article 13B(d)(3) and (5) of the Sixth Directive, that is to say those which have the effect of transferring funds or securities, and do not therefore possess the character of such transactions.

35 As regards the second aspect, Nordea submits that SWIFT's very extensive financial responsibility for the correct and secure transmission of financial messages, which has an annual ceiling of EUR 75 million per incident and EUR 150 million per year, and SWIFT's role as the guarantor of the regularity of the financial transfers mean that swift services are not purely technical services.

36 However, the importance of the financial consequences of SWIFT's responsibility cannot be relevant in order to determine whether that responsibility extends to specific, essential elements of the financial transactions at issue in the main proceedings.

37 Furthermore, as the Belgian Government submitted, according to point 4 of the Swift General Terms and Conditions of 1 January 2010, available on the SWIFT website, the contractual obligations of that undertaking are limited to the technical aspects of the messaging service, in particular, implementation, activation, connection, maintenance and software licences, and SWIFT is thus only responsible for the proper transmission of financial messages via the approved computer system.

38 Therefore, as is clear from the conclusions drawn in paragraph 34 of this judgment and as argued by all the Member States which have lodged observations and the Commission, SWIFT's contractual responsibility to Nordea concerns only the obligation to ensure the security and legibility of the data transmitted and the obligation to make good any damage caused by a defective or delayed transmission of data.

39 Consequently, it must be held that, in the case in the main proceedings, SWIFT's responsibility is limited to technical aspects and does not extend to specific, essential elements of the financial transactions at issue in the main proceedings.

40 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 13B(d)(3) and (5) of the Sixth Directive must be interpreted as meaning that the exemption from VAT under that provision does not cover swift services such as those at issue in the main proceedings.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 13B(d)(3) and (5) 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 must be interpreted as meaning that the exemption from value added tax under that provision does not cover electronic messaging services for financial institutions, such as those at issue in the main proceedings .

[Signatures]

* Language of the case: Finnish.