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JUDGMENT OF THE COURT (Tenth Chamber)

14 March 2013 (*)

(Failure of a Member State to fulfil obligations – VAT – Reduced rate – Supply of greyhounds and horses not intended for the preparation or production of foodstuffs for human or animal consumption, hire of horses and insemination services – Directive 2006/112/EC – Infringement of Articles 96, 98, read in conjunction with Annex III, and 110)

In Case C?108/11,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 2 March 2011,

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

applicant,

v

Ireland, represented by E. Creedon, D. O'Hagan, M. Collins and N. Travers, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

French Republic, represented by G. de Bergues and J.?S. Pilczer, acting as Agents,

intervener,

THE COURT (Tenth Chamber),

composed of A. Rosas, President of the Chamber, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 November 2012,

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

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by applying a reduced rate of value added tax ('VAT') of 4.8% to supplies of greyhounds and horses not intended for the preparation of foodstuffs, to the hire of horses and certain insemination services, Ireland has failed to fulfil its obligations under Articles 96, 98, read in conjunction with Annex III, and 110 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 Directive’).

Legal context

Union law

2 Article 96 of Directive 2006/112/EC provides:

‘Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.’

3 Article 97 of that directive provides:

‘1. From 1 January 2006 until 31 December 2010, the standard rate may not be lower than 15%.

2. The Council shall decide, in accordance with Article 93 [EC], on the level of the standard rate to be applied after 31 December 2010.’

4 Article 98 of the Directive states:

‘1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

...

3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned.’

5 Annex III to Directive 2006/112 contains inter alia the following categories of services:

‘(1) Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs;

...

(11) supply of goods and services of a kind normally intended for use in agricultural production but excluding capital goods such as machinery or buildings;

...’

6 Article 99(1) of the Directive provides that the reduced rates are to be fixed as a percentage of the taxable amount, and may not be less than 5%.

7 Article 110 of the Directive provides:

‘Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.

The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer.'

8 Article 113 of Directive 2006/112 allows Member States which, at 1 January 1991, in accordance with EU law, were applying reduced rates lower than the minimum laid down in Article 99, in respect of goods and services other than those specified in Annex III of the Directive, to apply the reduced rate or one of the two reduced rates provided for in Article 98 of the Directive to the supply of such goods or services.

Irish law

9 The provisions applicable to the present dispute are set out in Section 46 of the Value?Added Tax Consolidation Act 2010, which governs VAT rates.

10 Section 46(1)(a) of that legislation sets the standard rate at 21%.

11 Section 46(1)(c) of that legislation applies a reduced rate of 13.5% to supplies of goods and services of a kind specified in Schedule 3 of the legislation, inter alia, artificial insemination services and the sale of livestock semen.

12 Section 46(1)(d) of the Value?Added Tax Consolidation Act 2010 applies a rate of 4.8% to the supply of livestock and live greyhounds as well as to the hire of horses.

13 Section 2(1) of that legislation defines 'livestock' as 'live cattle, horses, sheep, goats, pigs and deer'.

14 Substantially identical provisions were previously set out in Section 11(1) of the Value Added Tax Act 1972, in conjunction with Schedule 6 thereto, last amended by the Finance Act 2005.

Pre-litigation procedure

15 By letter of formal notice of 23 October 2007, the Commission drew Ireland's attention to the fact that the application of a reduced rate of VAT to supplies of greyhounds and horses which are not normally intended for the preparation of foodstuffs, to the hire of horses and to mounting services in stud farms, could constitute a failure to fulfil obligations which flow from Directive 2006/112 and, in particular, Articles 96, 98, read in conjunction with Annex III, 110 and 113 of the Directive.

16 Ireland replied by letter of 4 March 2008.

17 The Commission sent Ireland a reasoned opinion, by letter dated 24 June 2010, requesting that Member State to take the measures necessary to comply with the reasoned opinion within two months of its receipt.

18 By letter dated 20 August 2010, Ireland disputed the Commission's analysis.

19 The line of argument put forward by Ireland having failed to sway the Commission, the latter brought this action.

The action

20 According to the Commission, Ireland, in applying a VAT rate of 4.8% to supplies of

greyhounds and horses not intended for the preparation of foodstuffs, to the hire of horses and certain insemination services, has failed to fulfil its obligations under Articles 96, 98, read in conjunction with Annex III, and 110 of Directive 2006/112.

21 The Commission notes that the first paragraph of Article 110 of Directive 2006/112 could, in principle, apply to the disputed rate, but the conditions required under the second paragraph of Article 110 of that directive are not fulfilled.

22 The Commission contends that, though reduced rates have been applied to the supplies at issue without interruption since 1 January 1991 and that they have been progressively raised since that date, they do not satisfy the two cumulative conditions required under the second paragraph of Article 110 of that directive, which are that those reduced rates must be adopted for clearly defined social reasons and for the benefit of the final consumer.

23 Ireland disputes the Commission's allegation that it has failed to fulfil its obligations.

24 Ireland alleges that the Commission failed to clarify the concept of 'horses not normally intended for the preparation of foodstuffs', which has prevented that Member State from preparing its defence at the different administrative and procedural stages of the action.

25 In that regard, even though Ireland did raise a question in relation to the definition of that concept at paragraph 4 of its letter of 20 August 2010, it appears from that letter and from the previous letter, of 4 March 2008, that Ireland fully understood the failures to fulfil obligations which were alleged by the Commission in its letter of formal notice of 23 October 2007 and submitted a defence based on the interpretation and application of Article 110 of Directive 2006/112.

26 In any event, that concept was made clear by the Court in its judgments of 3 March 2011 in Case C?41/09 *Commission* v *Netherlands* [2011] ECR I?831, paragraphs 56 to 59 and of 12 May 2011 in Case C?453/09 *Commission* v *Germany*, [2011] ECR I?0000, paragraphs 44 to 47, that is to say before Ireland submitted its defence in the present case.

27 Consequently, Ireland may not allege that it was prevented from arguing its defence on that basis.

28 Ireland complains that the Commission gave no explanation of the reasons why it selected Articles 96 and 98 of, and Annex III, to Directive 2006/112 in finding the reduced rate of 4.8% illegal.

29 In that regard, it should be noted that those articles refer to the standard rate and reduced rates of VAT. Article 110 of Directive 2006/112 seeks only, by derogation from those articles, to allow Member States to maintain reduced rates, lower than the minimum rate laid down at Article 99 of the Directive, after 1 January 1991.

30 Therefore, maintaining a VAT rate of 4.8%, such as that in issue, does not relate only to a potential infringement solely of Article 110 of Directive 2006/112, but, logically, also relates to the infringement of Articles 96 and 98 of that directive.

31 Thus, the Commission correctly based its action for failure to fulfil obligations not only on Article 110 of Directive 2006/112, but also on Articles 96 and 98 of that directive.

32 In its application, the Commission makes clear that it is asking for a finding of a failure to fulfil obligations only by virtue of the fact that Ireland has not fulfilled the conditions laid down in the second paragraph of Article 110 of Directive 2006/112, inter alia those according to which the rate in question was adopted for 'clearly defined social reasons' and 'for the benefit of the final

consumer’.

33 In that regard, it should be noted that there are two cumulative conditions. In order for Ireland to be eligible for the derogation set out at the first paragraph of Article 110 of Directive 2006/112, both conditions must be fulfilled.

34 The Commission submits that ‘clearly defined social reasons’ means measures taken principally for general social reasons and that the application of reduced rates must reduce the tax burden on the consumption of goods or services covering basic social needs.

35 The Commission submits that the supply of horses and greyhounds (other than for use in the preparation of foodstuffs), the hire of horses and insemination services cannot be deemed to be necessary in order to cover basic social needs. The cost of the supply of horses and greyhounds is very high and only a small proportion of the population is able to acquire such animals. The promotion of horse races, show-jumping and other equestrian sports does not constitute a social reason. The fact that certain activities are part of a culture or stem from a long tradition in a Member State is not sufficient to make their promotion a social reason.

36 Ireland disputes the Commission’s interpretation which it considers too restrictive. In addition, that interpretation is contrary to the Court’s case-law which flows from, inter alia, the judgments of 21 June 1988 in Case 415/85 *Commission* v *Ireland* ([1988] ECR 3097), and Case 416/85 *Commission* v *United Kingdom* ([1988] ECR 3127).

37 It should be noted that, in the above cases *Commission* v *Ireland*, paragraph 15, and *Commission* v *United Kingdom*, paragraph 14, the Court expressed its views on the determination of Member State and EU competences by declaring that the establishment of social reasons stems from the political choices of Member States and may not be subject to scrutiny by the European Union except where, by a distortion of that concept, it results in measures which fall, by virtue of their effect and true objectives, outside that context.

38 It follows from the wording of Article 110 of Directive 2006/112 and that case-law that Member States may invoke social reasons so long as they are ‘well defined’ and as the concept of social interest is not distorted, that is to say used for purposes other than social reasons.

39 Moreover, it is to be borne in mind that Article 110 of Directive 2006/112 is an exception to the principle set out at Article 99 of the Directive and must therefore be strictly interpreted.

40 It is not disputed that the social reasons capable of justifying the adoption of the reduced rate in question are not defined in the Irish legislation.

41 The Commission, in its application, quotes the declarations made by the Minister of Finance before the Irish Parliament, at the time of the adoption of legislative measures granting exemption from VAT on the sale of horses and greyhounds in 1973, and the reduced rate at issue on those sales in 1990. It appears that those measures were not of a social nature; rather their aim was not to compromise the sectors concerned.

42 In those circumstances, and given that Article 110 of Directive 2006/112 constitutes a derogation from the VAT system, which must be strictly interpreted, Ireland ought to have provided evidence that the reduced rate in question was adopted for reasons of exclusively social interest or, at least, for reasons of principally social interest.

43 It must be noted that Ireland, despite having made lengthy submissions on the situation in question, has not provided any such evidence.

44 It appears from Ireland's defence and from its response to the Commission's formal letter of notice, to which that Member State refers in its defence, that the measures in question were adopted for mainly economic reasons.

45 In its written submissions, Ireland invokes the concepts of 'rural industry', 'horse industry' and 'equine-related industries'. Those terms are normally used to designate an economic activity, even if that activity also has a social impact.

46 The Programme for National Recovery of 1987, of which the policy in question formed part, contains a strategy which serves to 'regenerate the economy and improve social equity'. The Programme for Economic and Social Progress of 1991, which followed the previous programme, sought to maintain as many full-time commercially viable family farms as possible.

47 According to Ireland, the policy in question has contributed to a significant increase in the number of horses, from 90 000 in the beginning of the 1990s to 170 000 nowadays.

48 Even if it can be true that that policy is capable of having social effects and that those effects have actually been felt, its principally economic, rather than social, nature is shown by the circumstances described at paragraphs 45 to 47 of the present case.

49 Consequently, the condition relating to the fact that the reduced rate less than the minimum laid down at Article 99 of Directive 2006/112 must have been adopted for clearly defined social reasons is not satisfied.

50 The second condition laid down in the second paragraph of Article 110 of Directive 2006/112 requires the reduced rate which is less than the minimum laid down at Article 99 of that directive to have been adopted 'for the benefit of the final consumer'.

51 As the Court has held, under the general scheme of value-added tax, the final consumer is the person who acquires goods or services for personal use, as opposed to an economic activity, and thus bears the tax. The result is that, in the light of the social purpose of Article 17 [which is taken up in substance by the second paragraph of Article 110 of Directive 2006/112], the term 'final consumer' can be applied only to a person who does not use exempted goods or services in the course of an economic activity. The provision of goods or services at a stage higher in the production or distribution chain which is nevertheless sufficiently close to the consumer to be of advantage to him must also be considered to be for the benefit of the final consumer as so defined (see above cases *Commission* v *Ireland*, paragraph 18, and *Commission* v *United Kingdom*, paragraph 17).

52 The term 'final consumer' thus excludes buyers of horses or greyhounds and the users of insemination services who exercise an economic activity and are in a position to pass on the VAT to other persons.

53 According to the Commission, the reduced rate in question applies to, amongst other things, purchases made by farmers who are subject to the flat-rate system and by other persons carrying out an economic activity within the meaning of Article 9(1) of Directive 2006/112.

54 Ireland admits that those economic agents benefit from the reduced rate at issue, but argues, without providing any data, that, firstly, most of the persons who practise an equestrian sport or one relating to greyhounds do so in their private capacity as final consumers and

furthermore that, according to the Court's case?law, it is possible to satisfy the second condition laid down under the second paragraph of Article 110 of Directive 2006/112 also in the event that the buyers are not final consumers, but where the upstream transaction which is subject to a reduced rate is sufficiently close to the consumer to be of advantage to him (see aforementioned cases *Commission* v *Ireland*, paragraph 18, and *Commission* v *United Kingdom*, paragraph 17).

55 In that regard, it should be noted that a great many buyers of horses or greyhounds or users of insemination services are economic agents who are in a position to pass on the VAT to other persons.

56 In addition, there is nothing in Ireland's explanations to indicate that, in the circumstances under consideration, consumers are closer to the upstream transactions subject to VAT than in other economic activities.

57 By way of example, it is not possible to see those factors which, in that regard, set the transactions in question apart from transactions in the motor vehicle sector, that is to say the sale of motor cars, spare parts or after-sales service.

58 It follows that the second condition laid down under the second paragraph of Article 110 of Directive 2006/112 is not fulfilled either.

59 Concerning insemination services, considered by Ireland as sales transactions, it is sufficient to note that Ireland's objection is, in any event, ineffective if Article 110 of Directive 2006/112 is not applicable, given that the categorisation of those acts is irrelevant.

60 It follows from all of the above that the Commission's action is well founded.

Costs

61 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has requested that Ireland be ordered to pay the costs and Ireland has been unsuccessful, it must be ordered to pay the costs.

62 Pursuant to Article 140(1) of those rules, the French Republic, which intervened in support of the submission made by Ireland, must bear its own costs.

On those grounds, the Court (Tenth Chamber) hereby

1. **Declares that, in applying a reduced rate of value added tax of 4.8% to supplies of greyhounds and horses not intended for the preparation of foodstuffs, to the hire of horses and certain insemination services, Ireland has failed to fulfil its obligations under Articles 96, 98, read in conjunction with Annex III, and 110 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;**

2. **Orders Ireland to pay the costs;**

3. **Orders the French Republic to bear its own costs.**

[Signatures]

* Language of the case: English.