JUDGMENT OF THE COURT (First Chamber)

14 May 2020 (*)

(Failure of a Member State to fulfil obligations — Common system of value added tax (VAT) — Directive 2006/112/EC — Derogations — Simplification measures and measures to prevent tax evasion or avoidance — Article 395(2) — Obligation incumbent on Member States to notify the European Commission of special measures intended to simplify the procedure for charging VAT — Substantial amendment of the measure initially notified)

In Case C?276/19,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 1 April 2019,

European Commission, represented by X. Lewis and J. Jokubauskait?, acting as Agents,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by F. Shibli, acting as Agent, O. Thomas QC and R. Hill, Barrister,

defendant,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, M. Safjan, L. Bay Larsen, C. Toader and N. Jääskinen (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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 asks the Court to declare that by introducing new simplification measures that extend the zero-rating and the exception to the normal requirement to keep value added tax (VAT) records which were provided for in the Value Added Tax (Terminal Markets) Order 1973 (‘the 1973 Order’) without submitting an application to the Commission with a view to seeking the authorisation of the Council of the European Union, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 395(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

Legal context

EU law

Provisions relating to the withdrawal of the United Kingdom from the European Union

2 In Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the EAEC') (OJ 2020 L 29, p. 1), the Council approved that agreement — which was attached to that decision (OJ 2020 L 29, p. 7; 'the Withdrawal Agreement') — on behalf of the European Union and the EAEC.

3 Article 86 of the Withdrawal Agreement, headed 'Pending cases before the Court of Justice of the European Union', is worded as follows:

'1. The Court of Justice of the European Union shall continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period. Such jurisdiction shall apply to all stages of proceedings …

…

3. For the purposes of this Chapter, proceedings shall be considered as having been brought before the Court of Justice of the European Union … at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or the General Court, as the case may be.'

4 In accordance with Articles 126 to 132 of the Withdrawal Agreement, during the transition period, which begins on the date of entry into force of that agreement and will end on 31 December 2020 unless it is extended, EU law is to continue to apply in the United Kingdom and its territory under the conditions set out in that agreement.

VAT provisions

5 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: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth VAT Directive') has been amended on a number of occasions.

6 Article 27 of that directive, which appeared under Title XV, headed 'Simplification procedures', provided as follows:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

3. The Commission shall inform the other Member States of the proposed measures within one month.

4. The Council's decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.'

7 Council Directive 2004/7/EC of 20 January 2004 (OJ 2004 L 27, p. 44) amended the Sixth VAT Directive as regards conferment of implementing powers and the procedure for adopting derogations; specifically, it amended Article 27(1) to (4) thereof as follows:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption.

2. A Member State wishing to introduce the measure referred to in paragraph 1 shall send an application to the Commission and provide it with all the necessary information. If the Commission considers that it does not have all the necessary information, it shall contact the Member State concerned within two months of receipt of the application and specify what additional information is required. Once the Commission has all the information it considers necessary for appraisal of the request it shall within one month notify the requesting Member State accordingly and it shall transmit the request, in its original language, to the other Member States.

3. Within three months of giving the notification referred to in the last sentence of paragraph 2, the Commission shall present to the Council either an appropriate proposal or, should it object to the derogation requested, a communication setting out its objections.

4. In any event, the procedure set out in paragraphs 2 and 3 shall be completed within eight months of receipt of the application by the Commission.'

8 With effect from 1 January 2007, the Sixth VAT Directive was repealed and replaced by Directive 2006/112.

9 Title I of Directive 2006/112 defines the subject matter and scope of the directive. Article 2(1) thereof, which comes under that title, states as follows:

'The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…

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

…'

10 Title XIII of Directive 2006/112 relates to ‘Derogations’, and Chapter 2 of that title is headed ‘Derogations subject to authorisation’. Section 1 of that chapter concerns simplification measures and measures to prevent tax evasion or avoidance.

11 Article 394, which appears in that section, provides:

‘Member States which, at 1 January 1977, applied special measures to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance may retain them provided that they have notified the Commission accordingly before 1 January 1978 and that such simplification measures comply with the criterion laid down in the second subparagraph of Article 395(1).’

12 Article 395, which also appears in that section, provides:

‘1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

Measures intended to simplify the procedure for collecting VAT may not, except to a negligible extent, affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption.

2. A Member State wishing to introduce the measure referred to in paragraph 1 shall send an application to the Commission and provide it with all the necessary information. If the Commission considers that it does not have all the necessary information, it shall contact the Member State concerned within two months of receipt of the application and specify what additional information is required.

Once the Commission has all the information it considers necessary for appraisal of the request it shall within one month notify the requesting Member State accordingly and it shall transmit the request, in its original language, to the other Member States.

3. Within three months of giving the notification referred to in the second subparagraph of paragraph 2, the Commission shall present to the Council either an appropriate proposal or, should it object to the derogation requested, a communication setting out its objections.

4. The procedure laid down in paragraphs 2 and 3 shall, in any event, be completed within eight months of receipt of the application by the Commission.’

United Kingdom law

13 The 1973 Order provides as follows:

‘The Treasury … make the following Order:

1. This Order … shall come into operation on 1st April 1973.

2. …

(2) This Order applies to the following terminal markets:

– the London Metal Exchange,

– the London Rubber Market,

– the London Cocoa Terminal Market,

– the London Coffee Terminal Market,

– the London Sugar Terminal Market,

– the London Vegetable Oil Terminal Market,

– the London Wool Terminal Market,

– the London Silver Market,

– The London Grain Futures Market, and

– the Liverpool Barley Futures Market.

(3) References in this Order to a member of a market include any person ordinarily engaged in dealings on the market.

3. (1) The following supplies of goods or services in the course of dealings on a terminal market to which this Order applies are hereby zero-rated, subject to the conditions specified in this Article–

(a) the sale by or to a member of the market of any goods ordinarily dealt with on the market,

(b) the grant by or to a member of the market of a right to acquire such goods,

(c) where a sale of goods or the grant of a right zero-rated under subparagraph (a) or (b) above is made in dealings between members of the market acting as agents, the supply by those members to their principals of their services in so acting.

(2) The zero-rating of a sale by virtue of paragraph (1)(a) above is subject to the condition that the sale is either–

(a) a sale which, as a result of other dealings on the market, does not lead to a delivery of the goods by the seller to the buyer, or

(b) a sale by and to a member of the market which–

(i) if the market is the London Metal Exchange, is a sale between members entitled to deal in the ring,

(ii) if the market is the London Cocoa Terminal Market, the London Coffee Terminal Market, the London Sugar Terminal Market, the London Vegetable Oil Terminal Market or the London Wool Terminal Market, is a sale registered with the London Produce Clearing House Limited,

(iii) if the market is the London Grain Futures Market, is a sale registered in the Clearing House of the Grain and Feed Trade Association Limited, and

(iv) if the market is the Liverpool Barley Futures Market, is a sale registered at the Clearing House of the Liverpool Corn Trade Association Limited.

(3) The zero-rating of the grant of a right by virtue of paragraph (1)(b) above is subject to the condition that either–

(a) the right is exercisable at a date later than that on which it is granted, or

(b) any sale resulting from the exercise of the right would be a sale with respect to which the condition specified in paragraph (2) above is satisfied.'

14 The Value Added Tax (Terminal Markets) (Amendment) Order 1975 ('the 1975 Order') provides:

'The Treasury … make the following Order:

…

3. Paragraph (2) of Article 2 of the [1973 Order] shall be amended by inserting the words "the London Soya Bean Meal Futures Market, and" after the words "the London Grain Futures Market", and accordingly the word "and" after the words "the London Grain Futures Market," shall be deleted.

4. Paragraph (2)(b)(ii) of Article 3 of the [1973 Order] shall be amended as follows–

(a) by inserting the words "the London Soya Ben Meal Futures Market", after the words "the London Coffee Terminal Market,"; and

(b) by deleting the words "the London Produce Clearing House Limited," and substituting therefor the words "the International Commodities Clearing House Limited,".'

15 The 1973 Order, as amended by the 1975 Order, was subsequently amended several times. Pursuant to various regulatory acts adopted between 1980 and 1999, the London Potato Futures Market, the International Petroleum Exchange of London, the London Meat Futures Market, the London Platinum and Palladium Market, the London Securities and Derivatives Exchange Ltd (OMLX) and the London Bullion Market were added to the list of markets in paragraph 2 of Article 2 of the 1973 Order, as amended by the 1975 Order. In addition, the London Gold Market and the London Gold Futures Market were added and then removed from that list. Furthermore, the London Silver Market was removed from the list.

Background to the dispute

16 Paragraphs 1 to 4 of Article 27 of the Sixth VAT Directive (now paragraphs 1 to 4 of Article 395 of Directive 2006/112) made it possible for Member States to seek authorisation to introduce into their national legal system special measures for derogation designed to simplify the procedure for charging VAT or to prevent certain types of tax evasion or avoidance. Special measures intended to simplify the procedure for charging the tax were required not to affect, except to a negligible extent, the amount of tax due at the final consumption stage.

17 Article 27(5) of the Sixth VAT Directive (now Article 394 of Directive 2006/112) allowed Member States to retain such measures which were already in force in their national legal system, provided that they were applicable on 1 January 1977 and that the Commission had been notified of them before 1 January 1978.

18 By letter of 28 December 1977, the United Kingdom notified the Commission, in accordance with Article 27(5) of the Sixth VAT Directive, of a number of special measures which were in force

on 1 January 1977 and which it intended to maintain after 1 January 1978, including the simplification measures relating to 'terminal markets' which are at issue in this case ('the notification of 28 December 1977').

19 According to that notification, those simplification measures applied to transactions carried out on 11 commodity futures markets by defined members of each market. The notification stated that those future transactions (including options) which did not result in the delivery of the underlying goods were, in certain circumstances, subject neither to VAT nor to the requirements relating to the keeping of VAT records. In addition, it stated that the futures markets concerned and the extent to which the transactions were zero-rated had been specified in the 1973 Order, as amended by the 1975 Order.

20 More specifically, in Annex V to the notification letter of 28 December 1977, the subject matter and the justification of the measures notified were set out as follows:

'1. There are in the United Kingdom a number of Commodity markets. These are centres of much international merchanting trade. Some are solely "physical" markets dealing in consignments of goods … The normal VAT rules are applied to transactions of these markets and are operated without distortion of competition. The application of normal VAT rules to all transactions on the "futures market", however, would have had damaging consequences. The eleven "futures" markets in the United Kingdom provide growers, merchants and manufactures with the facility of buying and selling "futures" contracts in certain commodities to protect themselves against loss on their real trading operations through changes in price. "Futures" trading on each of the markets is generally confined to small groups of "ringdealing" members. In most cases these members deal as principals on their own account; in other cases members may act as agents on behalf of outside clients. A "futures" contract is normally drawn up so as to require the eventual delivery of goods and a small percentage of [futures] contracts in fact run to maturity. This helps to maintain a close relationship between "futures" prices and "physical" prices. However, most dealings in "futures" are of the nature of financing or insurance and are not performed with the intention of acquiring goods.

2. If VAT had been applied without relief to all "futures" transactions, this would have distorted UK market prices … This could have led to the loss of much of the international "futures" trade to countries outside the [European Union]. Further, there is a very substantial volume of business on the "futures" markets which is often conducted in very short periods of the day and application of the full system of VAT would have imposed considerable administrative burdens on the markets which would not have been easy for them to sustain, and the pattern of trading could have been seriously disrupted. Additionally, it would have been difficult to institute effective verification of the complete chain of transactions of each "futures" market. It was decided, therefore, that the scheme of relief was necessary for these markets. The scheme provides a simplified system of control and reduces the administrative burdens on the markets without a substantial loss of revenue at the final consumption stage.

3. In broad terms, the scheme provides that transactions on the eleven "futures" markets involving defined market members are traded free of VAT and of the recording requirements of VAT. The markets involved and the extent of zero-rating of these transactions are defined in the [1973 Order and the 1975 Order]. … The exception to the normal requirement of keeping VAT records of these zero-rated transactions is made under the "care and management" provision vested in the Commissioners of Customs and Excise. The zero-rating extends only to "futures" transactions on a commodity which involves a member of the relevant market and agency charges by market members in connection with these transactions. … If a "futures" contract runs to maturity and delivery of the goods takes place where a non-market member is involved the supply

of both the goods and any agency service by a market member is not relieved by the Orders and normal VAT rules apply. The Orders do not allow users of these commodities to acquire them free of tax in the United Kingdom although it is important to bear in mind that many commodities may of course still be zero-rated … and agency services by market members to overseas customers may also be zero-rated as an export of services.'

Pre-litigation procedure

21 By letter of 8 March 2018, the Commission sent a letter of formal notice to the United Kingdom. It claimed that the amendments made to the 1973 Order since the notification of 28 December 1977 extended the scope of the derogation which had been requested in that notification, which meant that the Commission should have been notified of those amendments in accordance with Article 395(2) of Directive 2006/112.

22 On 9 May 2018, the United Kingdom replied to that letter of formal notice, disputing the substance of the allegations set out therein.

23 On 20 July 2018, the Commission sent a reasoned opinion to the United Kingdom pursuant to Article 258(1) TFEU.

24 The Commission claimed, more specifically, that by introducing new simplification measures which extended the zero-rating and the exception to the normal requirement to keep VAT records provided for by the 1973 Order, as amended by the 1975 Order, without sending an application to the Commission with a view to seeking the Council's authorisation, the United Kingdom had failed to fulfil its obligations under Article 395(2) of Directive 2006/112.

25 The Commission stated that the amendments made to the 1973 Order, as amended by the 1975 Order, after the notification of 28 December 1977 constituted substantial changes when compared with the derogation described in that notification. It stated that it was not taking issue with mere changes of name and that its complaints concerned only the markets and exchanges added to the list of terminal markets covered by the 1973 Order, as amended, which were still trading. In that regard, it claimed that the scope of the notified measure had been extended, in particular, when, in 1981 and 1987 respectively, the International Petroleum Exchange of London and the London Platinum and Palladium Market were added to that list, with such additions remaining in force to this day. Further, it singled out the temporary concession extending the zero-rating and the exception to the normal requirement to keep VAT records provided for by the 1973 Order, to the 'ICE Futures' and 'APX Power' markets, the first of which covers natural gas, electricity and carbon emission allowances (from 1997, 2004 and 2005 respectively) and the second of which concerns electricity. Finally, it stated that the markets and exchanges that had been added were capable of having an effect that was more than merely negligible on the overall amount of United Kingdom tax revenue collected at the stage of final consumption.

26 On 18 September 2018, the United Kingdom replied to the reasoned opinion referred to in paragraph 23 above, submitting, in essence, that the amendments introduced since the notification of 28 December 1977 to the 1973 Order, as amended by the 1975 Order, did not extend the notified measure beyond its purpose but, on the contrary, made purely formal amendments. It criticised the Commission for failing to take account of the complex series of restructurings carried out in the London commodity markets since 1977. It also claimed that the 'APX Power' market was no longer active in its territory and that, therefore, that factor should not be taken into consideration in connection with the alleged infringement of EU law.

27 On 1 April 2019, the Commission decided to bring the present action.

The action

Jurisdiction of the Court

28 As a preliminary point, it follows from Article 86 of the Withdrawal Agreement, which came into force on 1 February 2020, that the Court of Justice is to continue to have jurisdiction in any proceedings brought against the United Kingdom before the end of the transition period, such as the present action for failure to fulfil obligations.

Substance

Arguments of the parties

– *Arguments of the Commission*

29 The Commission submits that the amendments made since the notification of 28 December 1977 to the 1973 Order, as amended by the 1975 Order, which are referred to in the reasoned opinion ('the contested amendments') constitute new 'special measures for derogation' within the meaning of Article 395(1) of Directive 2006/112, since they extend the scope of the derogation resulting from the notification made in 1977 under Article 27(5) of the Sixth VAT Directive (now Article 394 of Directive 2006/112).

30 In that regard, the Commission submits that the notification of 28 December 1977 covered 11 specific markets and exchanges and that any addition of other markets or exchanges constitutes a substantial amendment requiring a new notification to the Commission with a view to seeking the Council's authorisation, in accordance with the procedure laid down in Article 395(2) of Directive 2006/112.

31 The Commission makes reference to the judgment of 27 January 2011, *Vandoorne* (C?489/09, EU:C:2011:33, paragraph 27), and notes that the derogations referred to in Articles 394 and 395 of Directive 2006/112, which are permitted 'in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance', must be interpreted strictly and may derogate from the basis for charging VAT that is normally applicable only within the limits strictly necessary for achieving that aim. Furthermore, the Commission makes reference to the judgment of 13 February 1985, *Direct Cosmetics* (5/84, EU:C:1985:71, paragraph 24) and argues that new special measures derogating from that directive do not accord with EU law unless, first, they remain within the limits of the aims referred to in Article 395(1) of that directive and, second, the Commission has been notified of the measures for authorisation by the Council.

32 With regard to whether the contested amendments comply with Article 395(1) of Directive 2006/112, the Commission claims that the United Kingdom has failed to show that those amendments affect only to a negligible extent the overall amount of the tax revenue collected by that Member State at the stage of the final consumption, as required by the second subparagraph of paragraph 1. The Commission argues that, on the contrary, the contested amendments are inconsistent with that provision, since commodity options are traded on the markets and exchanges at issue and such transactions are financial instruments that should not be zero-rated for VAT purposes, as the United Kingdom has claimed, but should instead be exempt as 'other securities' under Article 135(1)(f) of Directive 2006/112, without the right to deduct input VAT.

33 As regards the information provided by the United Kingdom in its response to the reasoned opinion referred to in paragraph 23 above concerning the complex restructuring that its commodity markets have allegedly undergone, the Commission claims that that information does not change

its overall conclusion that the United Kingdom failed to comply with the requirements of Article 395(2) of Directive 2006/112. The contested amendments are not purely formal and were not undertaken simply to take account of the restructuring process. They have allegedly allowed increasingly complex types of instruments, traded on increasingly complex markets, to fall within the derogation sought in the notification of 28 December 1977, with the consequence that the derogation is now no longer limited to the commodities trading initially intended and is therefore no longer being applied correctly.

– *Arguments of the United Kingdom*

34 The United Kingdom denies the alleged failure to fulfil obligations, claiming, principally, that the Commission's approach to Article 395(2) of Directive 2006/112 is too formalistic. It maintains that the contested amendments did not substantively extend the derogation authorised pursuant to the notification of 28 December 1977 beyond the scope or purpose of that notification.

35 As regards the scope of the notification of 28 December 1977, the United Kingdom emphasises that it covered a specific type of commodities market on which futures contracts were traded (as well as options and some spot transactions between members of those markets) and that the special measures notified applied exhaustively to all of the 11 commodity futures markets operated in the United Kingdom at the time. The purpose of the contested amendments was simply to ensure that the material scope of the derogation sought pursuant to that notification remained unchanged from that which existed initially, since, the United Kingdom claims, those amendments allowed transactions of the same type as those identified in 1977 to be treated in the same way as the latter transactions. The United Kingdom invokes the judgment of 13 February 1985, *Direct Cosmetics* (5/84, EU:C:1985:71, paragraph 25) and asserts that it was not required to make a fresh notification to the Commission, since those amendments are substantially the same as the provisions notified in 1977 and are purely formal in nature.

36 The United Kingdom argues that it is the purpose of the measures that were the subject of the notification of 28 December 1977 that is important and makes reference, in particular, to the judgment of 14 July 2005, *British American Tobacco and Newman Shipping* (C?435/03, EU:C:2005:464, paragraph 44 and the case-law cited). In that regard, the United Kingdom claims that the purpose of the contested amendments was the same as that of the above measures, namely to simplify the VAT treatment of all transactions on UK terminal markets, as long as they fulfilled the substantive conditions set out in the original notification, and to avoid market distortion. According to the United Kingdom, the need for simplification measures to be applied — given that zero-rating for VAT purposes reduces the administrative burden on the markets and simplifies controls — does not differ depending on what commodity is being traded.

37 Further, the strictly literal, rather than purposive reading of the notification adopted by the Commission allegedly fails to take account of the complex series of restructurings seen in the London commodity markets since 1977. The singular result of the Commission's approach is that contracts which are now traded on the same exchange or which are owned by the same group of exchanges would have different VAT liabilities simply by virtue of the historical development of trading in the commodity concerned.

38 In addition, the United Kingdom disputes the Commission's arguments concerning the VAT regime that should be applied to commodity options if the zero rate is not applicable to those transactions. First, it disputes in its entirety the analysis carried out by the Commission in that regard and refers, in particular, to the judgments of 12 June 2014, *Granton Advertising* (C?461/12, EU:C:2014:1745, paragraphs 27, 28, 30, 31 and 33), and of 22 October 2015, *Hedqvist* (C?264/14, EU:C:2015:718, paragraph 54). Second, the United Kingdom argues, moreover, that the matter of which regime should be applied to commodity options goes beyond the subject

matter of the present action, since the only matter which the Court should decide upon is whether or not the contested amendments were covered by the notification of 28 December 1977.

Findings of the Court

39 As a preliminary point, it should be noted that the Commission bases its action on Directive 2006/112, which had not yet entered into force when the United Kingdom adopted the contested amendments — namely those described in paragraph 25 above — but which had entered into force by the time of the expiry of the period allowed by the Commission for the Member State concerned to comply with its reasoned opinion. According to the Court's case-law, a complaint seeking a declaration of a failure to fulfil obligations which were created in the original version of an EU measure, subsequently amended or repealed, and which were maintained in force under the provisions of a new EU measure, is admissible. Conversely, the subject matter of the dispute cannot be extended to obligations arising under new provisions which do not correspond to those arising under the original version of the measure concerned, for otherwise it would constitute a breach of the essential procedural requirements of infringement proceedings. Consequently, the present action must be examined in the light of Directive 2006/112, since it is not in dispute that the obligations incumbent on Member States under Article 395(2) of that directive correspond to those which were already applicable before it entered into force, under Article 27(2) of the Sixth VAT Directive (see, by analogy, judgments of 17 June 2010, *Commission* v *France*, C?492/08, EU:C:2010:348, paragraphs 31 and 32, and of 22 February 2018, *Commission* v *Poland*, C?336/16, EU:C:2018:94, paragraph 44 and the case-law cited).

40 Furthermore, it is necessary to reject at the outset one of the arguments put forward by the Commission and contested by the United Kingdom, namely the argument, set out in paragraph 32 above, according to which the contested amendments do not affect 'only to a negligible extent the overall amount of the tax revenue collected by that Member State at the stage of the final consumption', having regard to the alleged incorrect VAT treatment of commodity options in the United Kingdom.

41 That argument clearly relates to the substantive requirement laid down in the second subparagraph of Article 395(1) of Directive 2006/112, which limits the Member States' right to apply derogations, even if notification of them was given before 1 January 1978 — as indicated at the end of Article 394 of that directive — whereas the form of order sought in the Commission's application concerns the procedural obligations arising from Article 395(2). Thus, by the present action, the Court is asked to determine only whether or not the United Kingdom failed to fulfil the latter obligations in so far as it did not notify the Commission of the contested amendments derogating from the common system of VAT, which were introduced after the notification of 28 December 1977, so that they could be authorised by the Council. It follows, as the United Kingdom has rightly pointed out, that, as the proceedings were brought under Article 395(2) of Directive 2006/112, the Court cannot rule in the present case on whether those measures do in fact satisfy the criterion relating to the effect on tax revenue laid down in the second subparagraph of paragraph 1 of that article. The argument based on that criterion is therefore irrelevant in the present case.

42 With regard to the other arguments put forward by the Commission, it should be noted, first, that it follows from the Court's settled case-law that the national derogations referred to in Article 27(1) to (5) of the Sixth VAT Directive (now Articles 394 and 395 of Directive 2006/112), which were allowed 'in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance', must be interpreted strictly and may not derogate from the basis for charging VAT usually applicable except within the limits strictly necessary for achieving that aim (see, inter alia, judgments of 29 April 2004, *Sudholz*, C?17/01, EU:C:2004:242, paragraphs 45 and

46; of 14 July 2005, *British American Tobacco and Newman Shipping*, C?435/03, EU:C:2005:464, paragraph 44; of 27 January 2011, *Vandoorne*, C?489/09, EU:C:2011:33, paragraph 27; and of 14 December 2017, *Avon Cosmetics*, C?305/16, EU:C:2017:970, paragraph 36).

43 Second, the Court has held that, with regard to the special measures for derogation referred to in Article 27(1) and (5) of the Sixth VAT Directive (now Article 395(1) and Article 394 of Directive 2006/112) intended to simplify the procedure for charging VAT without affecting, except to a negligible extent, the amount of tax due at the final consumption stage which were in force on 1 January 1977, the Member States were allowed to retain them provided that they notified the Commission of them before 1 January 1978 (see, to that effect, judgment of 13 February 1985, *Direct Cosmetics*, 5/84, EU:C:1985:71, paragraph 22).

44 Third, new derogations that a Member State wishes to introduce accord with EU law only if, in the first place, they are consistent with the aims referred to in Article 27(1) of the Sixth VAT Directive (now Article 395(1) of Directive 2006/112) and, in the second place, the Commission has been notified of them and they have then been authorised by the Council (see, to that effect, judgments of 13 February 1985, *Direct Cosmetics*, 5/84, EU:C:1985:71, paragraph 24, and of 9 June 2011, *Campsa Estaciones de Servicio*, C?285/10, EU:C:2011:381, paragraph 32).

45 Fourth, in the judgment of 13 February 1985, *Direct Cosmetics* (5/84, EU:C:1985:71, paragraphs 25 to 29), the Court held that a measure notified by a Member State before 1 January 1978 is deemed to have become ineffective from the moment at which the measure in question was replaced by a new national provision, ‘unless it is shown that the new provision may be regarded as being substantially the same as the previous provision’. After finding that the amendment at issue in that case was a ‘substantial change compared with the measure notified in 1977 because it omits the very element which linked that measure to the Sixth [VAT] Directive’, the Court noted that ‘only a notification effected in conformity with paragraph (2) of Article 27 [of that directive (now Article 395(2) of Directive 2006/112)] would have enabled the Commission and, where appropriate, the Council to verify whether the new measure was still consistent with the aim laid down in paragraph (1) of that Article’ despite the removal of the element concerned. Therefore, the Court held that where national provisions that have been notified in accordance with Article 27(5) of the Sixth VAT Directive (now Article 394 of Directive 2006/112) are the subject of such a substantial amendment, that amendment constitutes a new ‘special measure’ and the Commission must be notified of it.

46 In the present case, it is not in dispute that, on 28 December 1977, the United Kingdom notified the Commission of a measure intended to simplify the procedure for charging VAT under the derogation provided for in Article 27(5) of the Sixth VAT Directive (now Article 394 of Directive 2006/112) for measures of that type in force on 1 January 1977. According to the grounds set out in Annex V to the letter of notification, the notified measure, which had been established by the 1973 Order, as amended by the 1975 Order, specifically authorised ‘transactions on the eleven “futures” markets [for trade in the commodities referred to in those orders,] involving defined market members [to be] traded free of VAT [through zero-rating] and of the recording requirements of VAT.’ After that notification, the United Kingdom adopted several provisions amending the content of the measure concerned, more particularly those mentioned in the Commission’s reasoned opinion and referred to in paragraph 25 above, without sending an application to the Commission for authorisation by the Council under Article 27(2) of the Sixth VAT Directive (now Article 395(2) of Directive 2006/112).

47 The United Kingdom disputes the alleged failure to fulfil obligations, arguing, in essence, that it was not required to notify the Commission of the contested amendments under Article 395(2) of Directive 2006/112 as they were purely formal amendments which did not go beyond the

purpose of the derogation that gave rise to the notification of 28 December 1977 and which, on the contrary, made it possible to ensure that the scope of that derogation remained the same, notwithstanding the development of the commodity markets and exchanges covered by that derogation.

48 By contrast, the Commission claims, in essence, that the notification of 28 December 1977 covers only the 11 markets and exchanges that benefited from zero-rating for VAT purposes and from an exception to the requirement to keep VAT records which were specifically referred to in the notification, namely the markets and exchanges listed in paragraph 2 of Article 2 of the 1973 Order, as amended by the 1975 Order, and that any addition to that list must be considered to be a substantial amendment giving rise to an obligation to give notification on the part of the United Kingdom.

49 In that regard, it should be noted that the approach advocated, correctly, by the Commission is consistent with the principles, referred to in paragraph 42 above, according to which national derogations referred to in Article 27(1) to (5) of the Sixth VAT Directive (now Articles 394 and 395 of Directive 2006/112) must be interpreted strictly and must be strictly proportionate to the aim of simplifying the charging of VAT.

50 In accordance with those principles, a particular regime which, in order to achieve that aim, derogates from the general rule laid down in Article 2(1) of Directive 2006/112 that VAT is to be levied on all goods or services supplied for consideration by a taxable person, cannot be extended to transactions which were excluded from that particular regime by the national legislator on the date on which that derogation was permitted under EU law and, more specifically, were not provided for when the Sixth VAT Directive came into force (see, by analogy, judgments of 19 September 2000, *Ampafrance and Sanofi*, C?177/99 and C?181/99, EU:C:2000:470, paragraphs 37 and 38, and of 6 July 2006, *Talacre Beach Caravan Sales*, C?251/05, EU:C:2006:451, paragraphs 22 and 23). It follows that, where a Member State adopts derogations in respect of transactions which do not fall within the scope of a particular regime that was the subject of a notification under Article 27(5) of the Sixth VAT Directive (now Article 394 of Directive 2006/112), that State is required to give notification of such new measures under Article 27(1) to (4) of the Sixth VAT Directive (now Article 395(1) to (4) of Directive 2006/112). That conclusion is all the more relevant in the case of markets covering types of transactions which did not exist at the time of such notification.

51 In addition, it should be noted that, as pointed out in paragraph 45 above, the Court has previously held that where national provisions in respect of which a Member State has given notification in accordance with Article 27(5) of the Sixth VAT Directive (now Article 394 of Directive 2006/112) have been substantially amended, the amendment constitutes a new ‘special measure’ notification of which must be given to the Commission by that Member State in accordance with Article 27(2) of the Sixth VAT Directive (now Article 395(2) of Directive 2006/112) (judgment of 13 February 1985, *Direct Cosmetics*, 5/84, EU:C:1985:71, paragraphs 28 and 29).

52 That obligation to give notification is also consistent with the requirements stemming from the principles of legal certainty and transparency, as it allows both the Commission and Member States other than the Member State that submitted the notification to verify, through an express decision adopted by the Council, how a Member State intends to make use of the power to derogate under Article 27(1) to (4) of the Sixth VAT Directive (now Article 395(1) to (4) of Directive 2006/112).

53 Furthermore, it cannot be sufficient, as the United Kingdom claims, that the national provisions which thus amended the measure notified under Article 27(5) of the Sixth VAT Directive (now Article 394 of Directive 2006/112) might pursue the same purpose as that measure, since

only a notification given in accordance with Article 27(2) of the Sixth VAT Directive (now Article 395(2) of Directive 2006/112) is capable of enabling the Commission and the Council to verify whether the special measure as amended still achieves the aim laid down in Article 27(1) of the Sixth VAT Directive (now Article 395(1) of Directive 2006/112) and meets the other criteria necessary for the derogation provided for in that provision to apply (see, to that effect, judgment of 13 February 1985, *Direct Cosmetics*, 5/84, EU:C:1985:71, paragraph 28).

54 In the present case, it is apparent from the evidence before the Court that the contested amendments directly affected the scope of the derogation measures adopted by the United Kingdom in order to simplify the procedure for charging VAT, which was the subject of the notification of 28 December 1977, which referred to 11 explicitly identified markets and exchanges when it defined the scope of the measure notified. Those measures specifically covered transactions carried out on the 11 commodity futures markets listed in the 1973 Order, as amended by the 1975 Order, whereas the contested measures not only removed certain transactions covered by those measures — which had been specifically justified by the United Kingdom in Annex V to the letter of notification — but also added a series of transactions. That is the case, inter alia, where markets covering new types of transaction were added, such as, in particular, transactions involving trade in carbon emission allowances on the 'ICE Futures' market, referred to in paragraph 25 above. Such additions extend the scope of those derogation measures beyond the items separately identified by the United Kingdom and the specific justifications given in that regard in the notification.

55 It follows that the contested amendments consist of substantial amendments and, therefore, constitute new 'special measures for derogation' within the meaning of Article 27(1) to (4) of the Sixth Tax Directive (now Article 395(1) to (4) of Directive 2006/112), which means that the Commission should have been given notification of those amendments for authorisation by the Council in accordance with Article 27(2) of the Sixth Directive (now Article 395(2) of Directive 2006/112).

56 Lastly, it should be stated that the obligation to give notification at issue does not in any way prejudge whether or not the Council will adopt a positive position in any future decision it may issue, which means that the United Kingdom's line of argument in which it alleges that the markets and exchanges affected by the contested amendments will be prejudiced if they are not subject to zero-rating are ineffective.

57 In the light of all the above, it must be held that, by introducing new simplification measures that extended the application of the zero-rating and the exception to the normal requirement to keep VAT records which were provided for in the 1973 Order, as amended by the 1975 Order, without submitting an application to the Commission with a view to seeking the authorisation of the Council, the United Kingdom has failed to fulfil its obligations under Article 395(2) of Directive 2006/112.

Costs

58 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the United Kingdom must be ordered to pay the costs.

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

1. **Declares that by introducing new simplification measures that extend the zero-rating and the exception to the normal requirement to keep value added tax records which were provided for in the Value Added Tax (Terminal Markets) Order 1973, as amended by the Value Added Tax (Terminal Markets) (Amendment) Order 1975, without submitting an application to the European Commission with a view to seeking the authorisation of the Council of the European Union, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 395(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;**

2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

Bonichot

Safjan

Bay Larsen

Toader

Jääskinen

Delivered in open court in Luxembourg on 14 May 2020.

A. Calot Escobar

J.-C. Bonichot

Registrar

President of the First Chamber

* Language of the case: English.