Provisional text

JUDGMENT OF THE COURT (First Chamber)

25 March 2021 (*)

(Reference for a preliminary ruling – Directive 2006/112/EC – Value added tax (VAT) – Exemptions – Article 135(1)(a) – Insurance transactions and related services performed by insurance brokers and insurance agents – Service supplied for an insurer, comprising different services – Categorisation as a single supply)

In Case C?907/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 5 September 2019, received at the Court on 11 December 2019, in the proceedings

Q-GmbH

v

Finanzamt Z,

THE COURT (First Chamber),

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

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Q-GmbH, by T. Küffner and M. Rust, Rechtsanwälte,

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,

– the European Commission, by A. Armenia and L. Mantl, acting as Agents,

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

gives the following

Judgment

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

2 The request has been made in proceedings between Q-GmbH and Finanzamt Z (Tax Office Z, Germany) concerning the value added tax (VAT) payable in respect of the services supplied by Q to an insurer, including the grant of a licence to use an insurance product, the placement of that product on behalf of the insurer and the performance of the insurance contracts concluded.

Legal context

EU law

3 Under the first subparagraph of Article 1(2) of Directive 2006/112:

‘On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.’

4 In Chapter 3 of Title IX of that directive, entitled ‘Exemptions for other activities’, Article 135 provides, in paragraph 1 thereof:

‘Member States shall exempt the following transactions:

(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;

…’

German law

5 Pursuant to Paragraph 4(11) of the Umsatzsteuergesetz (Law on turnover tax; ‘the UStG’), of 21 February 2005 (BGBl. 2005 I, p. 386), the transactions arising from the activities of building society representatives, insurance agents and insurance brokers are exempt from tax.

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

6 Q develops, markets and places insurance products. In the course of its activities, that company entered into a contract with an insurer, namely F-Versicherungs-AG (‘F’).

7 In accordance with that contract, Q was to supply three types of services. In the first place, it made available to F an insurance product designed to cover special risks, with a non-exclusive user licence. In the second place, Q placed insurance contracts for that insurer, adapting policies if necessary and assessing the risks. Those contracts were concluded between the insurer and the policyholders. In the third and last place, Q managed those insurance contracts and the settlement of claims, in particular.

8 Those services were subject to remuneration paid by F to Q in the form of brokerage fees.

9 On 27 August 2012, Q submitted its turnover tax return for 2011 to the German tax authorities. In that tax return, it applied to be exempt from VAT in respect of all of its services, pursuant to Paragraph 4(11) of the UStG.

10 In its tax notice of 4 November 2014, Tax Office Z rejected the application made by Q. It found that there were several individual services, of which the insurance mediation activity alone was exempt under Paragraph 4(11) of the UstG.

11 Q brought an action against that tax notice before the court of first instance with jurisdiction

in tax matters, then challenged the judgment given by the latter before the Bundesfinanzhof (Federal Finance Court, Germany). The latter court considers that, in accordance with the criteria identified in the case-law of the Court of Justice, in particular in the judgment of 18 January 2018, *Stadion Amsterdam* (C?463/16, EU:C:2018:22), the services concerned should, in principle, be classified as a single supply.

12 According to the referring court, the tax scheme for a single supply is determined by reference to its main component, namely, in the present case, the grant of licences for the use of insurance products. The other elements, namely insurance mediation and services for the performance of insurance contracts, including the settlement of claims, are ancillary services only. The insurance mediation activities carried out by Q are linked to the supply of its insurance product to the insurer. It was on behalf of the latter that that company placed that product with policyholders. Moreover, remuneration was also payable to Q when other agents placed its insurance product on behalf of the insurer.

13 Furthermore, as is apparent from the case-law of the Court, the exemption provided for in Article 135(1)(a) of Directive 2006/112 does not apply to an activity consisting of the grant of licences for the use of an insurance product.

14 In the case of an insurer outsourcing insurance services in order to entrust them to a third party, those services do not fall within the exemption, as is clear from the judgment of 3 March 2005, *Arthur Andersen* (C?472/03, EU:C:2005:135). Moreover, in the light of the judgment of 17 March 2016, *Aspiro* (C?40/15, EU:C:2016:172), the settlement of claims by an undertaking on behalf of an insurer cannot be classified as a service performed by an insurance agent, since there is no link with the essential aspects of the activity of insurance agent, namely the search for clients and bringing them into contact with the insurer.

15 According to the Bundesfinanzhof (Federal Finance Court), it cannot be ruled out that the judgment of 17 March 2016, *Aspiro* (C?40/15, EU:C:2016:172), may be interpreted differently, so that a single supply should also be exempt where only one ancillary service satisfies the requirements laid down in Article 135(1)(a) of Directive 2006/112. In the case in the main proceedings, it is common ground that Q engaged, accessorily, in an insurance mediation activity which, as such, should be exempt under that provision.

16 Therefore, according to the referring court, in order to resolve the dispute before it, it is necessary to determine the exact scope of the judgment of 17 March 2016, *Aspiro* (C?40/15, EU:C:2016:172), in order to ascertain whether the single supply of services provided by Q must be exempt from VAT.

17 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and refer the following question to the Court of Justice:

‘Does a service related to insurance and reinsurance transactions that is performed with exemption from tax by insurance brokers and insurance agents within the meaning of Article 135(1)(a) of Directive [2006/112] exist if a taxable person who carries out intermediary work for an insurance company also provides that insurance company with the mediated insurance product?’

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether Article 135(1)(a) of Directive 2006/112 must be interpreted as meaning that the VAT exemption which it lays down applies to services provided by a taxable person, which include the supply of an insurance product to an insurance company and, accessorily, the placement of that product on behalf of that company, as

well as the management of the insurance contracts concluded, inasmuch as those services must be categorised as a single supply for the purposes of VAT.

19 It is clear from the case-law of the Court that where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether that transaction gives rise, for the purposes of VAT, to two or more distinct supplies or to one single supply (judgment of 18 January 2018, *Stadion Amsterdam*, C?463/16, EU:C:2018:22, paragraph 21 and the case-law cited).

20 Although, for VAT purposes, each transaction must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of Directive 2006/112, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. That is why there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgment of 2 July 2020, *Blackrock Investment Management (UK)*, C?231/19, EU:C:2020:513, paragraph 23 and the case-law cited).

21 That is the case particularly where one or more elements are to be regarded as constituting the principal service, while other elements are to be regarded, by contrast, as one or more ancillary services which share the tax treatment of the principal service. In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service provided (judgment of 2 December 2010, *Everything Everywhere*, C?276/09, EU:C:2010:730, paragraphs 24 and 25 and the case-law cited).

22 In the present case, it is apparent from the order for reference that it is the licence to use the insurance product in question that allows an insurer to offer that product to potential customers. The insurer may, to that end, use the mediation services provided by Q, but there is no obligation to do so. It therefore appears that the mediation services provided by that company are not essential to the distribution of that insurance product to future insured persons, but instead constitute a distinct and independent activity, which is a matter for the referring court to determine.

23 Furthermore, the information in the order for reference does not make it possible to determine whether the mediation services provided by Q can be distinguished from the same services provided by other agents. In particular, subject to the checks to be carried out by the referring court, it does not appear that the mediation for which Q is responsible allows an insurer to better use the licence granted by that company or that it alone can guarantee, through its mediation services, that that insurer enjoys that licence under the best possible conditions.

24 In those circumstances, the grant of a licence to use the insurance product in question to an insurer, on the one hand, and the mediation services provided by Q, on the other, do not appear to have to be classified as a single supply for VAT purposes.

25 Furthermore, it is in the light of those same considerations, set out in paragraphs 22 and 23 of the present judgment, that it is for the referring court to ascertain whether the insurance contract management services also provided by Q and the grant of a licence to use the insurance product in question constitute a single supply.

26 It is not however for the Court, giving a ruling under Article 267 TFEU, to classify the facts at issue in the main proceedings, as such classification falls within the jurisdiction of the national court alone. The Court’s role is confined to providing the national court with an interpretation of EU law which will be useful for the decision which it has to take in the dispute before it (judgment of 2

July 2020, *Blackrock Investment Management (UK)*, C?231/19, EU:C:2020:513, paragraph 25 and the case-law cited).

27 Consequently, since it cannot be entirely ruled out that, after carrying out the checks referred to in paragraphs 22 to 25 of the present judgment, the referring court concludes that the various services provided by Q form a single supply, it is necessary to examine whether such a supply may fall within the exemption from VAT provided for in Article 135(1)(a) of Directive 2006/112.

28 In that connection, it should be borne in mind that, since ancillary supplies share the VAT treatment of the principal supply, if that principal supply fell within the scope of Article 135(1)(a) of Directive 2006/112, the entire transaction would be exempt from VAT pursuant to that provision (see, to that effect, judgment of 8 December 2016, *Stock ‘94*, C?208/15, EU:C:2016:936, paragraph 25).

29 In the present case, the referring court considers that the grant of licences for the use of an insurance product constitutes the principal supply provided by Q. Accordingly, it is necessary to examine whether that supply fulfils the criteria laid down in Article 135(1)(a) of Directive 2006/112 in order to be exempt from VAT.

30 In that connection, it must be borne in mind that the terms used to specify the exemptions covered by Article 135(1) of that directive are to be interpreted strictly, given that they constitute exceptions to the general principle that VAT is levied on all services supplied for consideration by a taxable person acting as such (judgment of 8 October 2020, *United Biscuits (Pensions Trustees) and United Biscuits Pensions Investments*, C?235/19, EU:C:2020:801, paragraph 29).

31 Under Article 135(1)(a) of Directive 2006/112, Member States are to exempt, first, ‘insurance and reinsurance transactions’ and, second ‘related services performed by insurance brokers and insurance agents’.

32 As regards, in the first place, insurance transactions, these are characterised, as generally understood, by the fact that the insurer undertakes, in return for prior payment of a premium, to provide the insured party, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded. Such transactions necessarily imply the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance, that is to say, the insured party (judgment of 17 March 2016, *Aspiro*, C?40/15, EU:C:2016:172, paragraphs 22 and 23).

33 Thus, it is clear that the service provided by Q, consisting of the grant of a licence for the use of an insurance product, cannot be classified as an insurance transaction, as the grantor is contractually linked only to the insurer who uses the product in question in accordance with the licence agreement. According to the referring court, Q is also not responsible for covering the risks insured on the basis of that product.

34 In so far as concerns, in the second place, ‘services related to [insurance] transactions performed by insurance brokers and insurance agents’, as is clear from the very wording of Article 135(1)(a) of Directive 2006/112, their exemption is subject to two cumulative conditions: those services must be ‘related’ to insurance transactions and ‘performed by insurance brokers and insurance agents’.

35 As regards the first of those conditions, the Court has held that the term ‘related’ is sufficiently broad to cover different services connected with the performance of insurance transactions and, in particular, the settlement of claims, which constitute one of the essential parts

of those transactions (judgment of 17 March 2016, *Aspiro*, C?40/15, EU:C:2016:172, paragraph 33). It cannot therefore be ruled out that the grant of a licence allowing an insurer to use an insurance product designed by a third party and, on that basis, to conclude insurance contracts may constitute a service related to an insurance transaction.

36 As to the second of those conditions, in order to determine whether the services in respect of which the exemption under Article 135(1)(a) of Directive 2006/112 is sought are supplied by an insurance broker or agent, it is not necessary to take as a basis the formal status of the supplier, but rather the actual content of those services (see, to that effect, judgment of 17 March 2016, *Aspiro*, C?40/15, EU:C:2016:172, paragraphs 35 and 36).

37 In the context of that examination, it is necessary to ascertain whether two criteria are fulfilled. In the first place, the supplier of services must be related to the insurer and the insured party, since that relationship may be indirect only if the supplier of services is a subcontractor of the broker or agent. In the second place, its activities must cover the essential aspects of the work of an insurance agent, such as the finding of prospective clients and their introduction to the insurer, with a view to concluding insurance contracts (see, to that effect, judgment of 17 March 2016, *Aspiro*, C?40/15, EU:C:2016:172, paragraphs 37 and 39).

38 As regards the grant of licences for the use of an insurance product by Q, it must be held, subject to the checks to be carried out by the referring court, that neither of those criteria is fulfilled.

39 Since it is necessary to examine the content of that specific service in order to determine whether it falls within the scope of Article 135(1)(a) of Directive 2006/112, the fact that Q also provides mediation services is irrelevant.

40 As has been observed in paragraph 22 of the present judgment, it is apparent from the order for reference that the licence to use the insurance product in question allows an insurer to offer that product to potential customers with a view to concluding insurance contracts. However, it does not appear that, at the stage at which such a licence is granted, the assistance of potential future clients is required. It is only if the insurer decides to use mediation services and chooses, in that context, the services offered by Q that the latter can contact the insured persons.

41 For the same reasons, the grant of licences for the use of an insurance product is not an activity which covers essential aspects of the role of insurance agents. Assuming that the product in question was specifically designed for a limited class of persons according to their specific needs, it is nevertheless for the insurer to take the necessary steps to deal with them for the purposes of placing that product, in particular by having recourse to an insurance agent.

42 It follows that the activity carried out by Q, which comprises the grant of licenses for the use of an insurance product, cannot be classified as a service performed by insurance brokers and insurance agents within the meaning of Article 135(1)(a) of Directive 2006/112.

43 Accordingly, if the services provided by Q formed a single supply, that supply could not be exempt from VAT under that provision, since the principal supply does not fall within the scope thereof.

44 In the light of all the foregoing considerations, the answer to the question referred is that Article 135(1)(a) of Directive 2006/112 must be interpreted as meaning that the VAT exemption which it lays down does not apply to services provided by a taxable person, which include the supply of an insurance product to an insurance company and, accessorily, the placement of that product on behalf of that company and the management of insurance contracts concluded, in the

event that the referring court categorises those services as a single supply for VAT purposes.

Costs

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

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

Article 135(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the value added tax (VAT) exemption which it lays down does not apply to services provided by a taxable person, which include the supply of an insurance product to an insurance company and, accessorily, the placement of that product on behalf of that company and the management of insurance contracts concluded, in the event that the referring court categorises those services as a single supply for VAT purposes.

[Signatures]

* Language of the case: German.