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Provisional text

JUDGMENT OF THE COURT (First Chamber)

1 August 2022 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Sixth Council Directive 77/388/EEC – Article 2(1) – Scope – Taxable transactions – Article 9(2)(b) – Place where transport services are supplied – Tourist trips on the Moselle – River subject to condominium status)

In Case C?294/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, Luxembourg), made by decision of 6 May 2021, received at the Court on 10 May 2021, in the proceedings

État luxembourgeois,

Administration de l'enregistrement, des domaines et de la TVA

v

Navitours Sàrl,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the First Chamber, I. Ziemele, P.G. Xuereb and A. Kumin (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Navitours Sàrl, by C. Kaufhold, lawyer,

– the Luxembourg Government, by A. Germeaux and T. Uri, acting as Agents, and by F. Kremer, lawyer,

– the German Government, by J. Möller and P.-L. Krüger, acting as Agents,

– the European Commission, by A. Armenia and V. Uher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1) and Article 9(2)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) ('the Sixth Directive').

2 The request has been made in proceedings between the État luxembourgeois ('Luxembourg State') and the administration de l'enregistrement et des domaines et de la TVA (Registration Duties, Estates and VAT Authority, Luxembourg) ('the Luxembourg Tax Authority') and Navitours Sàrl concerning the treatment, as regards value added tax (VAT), of the tourist navigation services carried out by Navitours on the Moselle.

Legal context

International law

3 Under Article 1(1) of the Treaty between the Grand Duchy of Luxembourg and the Federal Republic of Germany on the demarcation of the joint border between those two States, signed in Luxembourg on 19 December 1984 ('the Treaty of 19 December 1984'):

'Wherever the Moselle, the Sûre and the Our form the border, according to the Treaty of 26 June 1816, they constitute a joint territory under the joint sovereignty of the two Contracting States.'

4 Article 5(1) of that Treaty provides:

'the Contracting States shall settle matters concerning the law applicable in the joint territory under joint sovereignty by means of an additional agreement.'

European Union law

5 The Sixth Directive was repealed and replaced, from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, given the date of the facts of the dispute in the main proceedings, those proceedings remain governed by the Sixth Directive.

6 Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' was subject to VAT.

7 Article 3(1) to (3) of the Sixth Directive provided:

'1. For the purposes of this Directive, the following definitions apply:

– "territory of a Member State": shall mean the territory of the country as defined in respect of each Member State in paragraphs 2 and 3,

…

2. For the purposes of this Directive, the "territory of the country" shall be the area of application of the Treaty establishing the European Economic Community as stipulated in respect of each Member State in Article 227.

3. The following territories of individual Member States shall be excluded from the “territory of the country”:

– Federal Republic of Germany:

– the Island of Heligoland,

– the territory of Büsingen,

…’

8 Article 9 of the Sixth Directive provided:

‘1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. However:

…

(b) the place where transport services are supplied shall be the place where transport takes place, having regard to the distances covered;

…’

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

9 The Luxembourg company Navitours provides tourist navigation services on the stretch of the Moselle over which the Federal Republic of Germany and the Grand Duchy of Luxembourg exercise their joint sovereignty under Article 1 of the Treaty of 19 December 1984 (‘the German-Luxembourg Condominium’). On account of that situation, Navitours had, for many years, been regarded by the Luxembourg Tax Authority as falling outside the scope of VAT, with the result that the Luxembourg Tax Authority had not sought the payment of VAT on the sale of passenger transport tickets by Navitours.

10 On 5 August 2015, that tax authority issued, of its own motion, tax notices relating to Navitours’ turnover for the years 2004 and 2005, by which the transport services carried out by Navitours were considered to be subject to VAT.

11 Those tax notices followed a judgment of the Cour d’appel (Court of Appeal, Luxembourg), of 10 July 2014, delivered in legal proceedings between Navitours and that tax authority relating to the VAT treatment of the acquisition of a vessel by Navitours. According to that judgment, the VAT on passenger transport services in the German-Luxembourg Condominium may be collected either by the Grand Duchy of Luxembourg or by the Federal Republic of Germany. In the absence of taxation by the German tax authorities, there is no risk of double taxation.

12 Since the objection lodged by Navitours against the tax notices of 5 August 2015 was rejected, that company brought an action for annulment before the Tribunal d’arrondissement de Luxembourg (District Court, Luxembourg).

13 By judgment of 23 May 2018, the Tribunal d’arrondissement de Luxembourg (District Court) upheld that action, holding that, in so far as the transport services in question were supplied in the

German-Luxembourg Condominium, both the Federal Republic of Germany and the Grand Duchy of Luxembourg could potentially collect VAT, but that the particular location of Navitours' activities required the establishment of a mechanism to ensure the collection of VAT while avoiding double taxation. In the absence of such a mechanism, the question of determining that a particular State is the place of performance for VAT purposes of the activities carried out by Navitours was not settled, with the result that Luxembourg tax authority was not justified in taxing the relevant turnover of that company.

14 The Luxembourg State and the Luxembourg Tax Authority appealed against that judgment and the Cour d'appel (Court of Appeal, Luxembourg) upheld that judgment by judgment of 11 December 2019, against which those parties brought an appeal in cassation.

15 In their appeal in cassation, the Luxembourg State and the Luxembourg Tax Authority contend that the Sixth Directive, and in particular Article 2 thereof, apply to the transport services at issue.

16 Having doubts as to the interpretation of that directive, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do[es] Article 2(1) of [the Sixth Directive]… and/or Article 9(2)(b) of [that] directive … apply and entail the levying of VAT in Luxembourg on passenger transport services carried out by a service provider established in Luxembourg, where those services are performed within a condominium, as that condominium is defined in [the Treaty of 19 December 1984], as being a joint territory under the joint sovereignty of the Grand Duchy of Luxembourg and the Federal Republic of Germany and in relation to which there is no agreement relating to the collection of VAT on supplies of transport services between those two States, such as provided for in Article 5(1) [of that] treaty?'

Consideration of the question referred

17 By its question, the national court asks, in essence, whether Article 2(1) and Article 9(2)(b) of the Sixth Directive must be interpreted as meaning that a Member State may tax passenger transport services carried out, by a service provider established in that Member State, within a territory which, pursuant to an international treaty concluded between that Member State and another Member State, constitutes a joint territory under the joint sovereignty of those Member States.

18 In that regard, it should be noted that, under Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to VAT.

19 Article 9(1) of the Sixth Directive provides that the place where a service is supplied is deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

20 However, in accordance with Article 9(2)(b), the place where transport services are supplied is the place where the transport takes place, having regard to the distances covered.

21 In the present case, it is common ground that the supply of services at issue in the main proceedings is a ‘supply of services’ within the meaning of Article 2(1) of the Sixth Directive and it is effected for consideration by a taxable person acting as such.

22 However, the referring court, based on the premiss that the services at issue in the main proceedings constitute ‘transport services’, within the meaning of Article 9(2)(b) of the Sixth Directive, which are supplied in the German-Luxembourg Condominium, expresses doubts as to whether the transport services performed in that condominium may be taxed by the Grand Duchy of Luxembourg since it is uncertain whether they may be regarded as being performed ‘within the territory of the country’, within the meaning of Article 2(1) of that directive.

23 It is apparent from the documents before the Court that the services at issue in the main proceedings consist of, inter alia, the organisation of boat tours that end in the same place in which they began. In those circumstances, it is necessary to examine, first of all, whether such services do in fact come within the scope of Article 9(2)(b) of the Sixth Directive, as transport services.

24 In that regard, it should be noted that the term ‘transport services’ in that provision is not defined by the Sixth Directive.

25 According to settled case-law, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules of which they form part (judgment of 1 October 2020, *Entoma*, C?526/19, EU:C:2020:769, paragraph 29 and the case-law cited).

26 As regards the usual meaning of the expression ‘transport services’ in everyday language, it must be noted that it covers services which consist of bringing persons or goods from one place to another. That term is sufficiently broad to include services of which the essential element consists of moving persons over non-negligible distances, even though that service begins and ends in the same place and its purpose is of a tourist nature.

27 That interpretation is supported by the objective pursued by Article 9(2)(b) of the Sixth Directive.

28 According to the Court’s case-law, the objective of the provisions of Article 9(1) and (2) of the Sixth Directive is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, second, non-taxation (judgment of 8 May 2019, *Geelen*, C?568/17, EU:C:2019:388, paragraph 23 and the case-law cited).

29 As regards, more specifically, Article 9(2)(b) of the Sixth Directive, the Court has held that the rule laid down by that provision is necessary because the very nature of the performance of that specific service constituted by transport, which is liable to be carried out on the territory of more than one Member State, requires a different criterion, which essentially must make it possible to delimit the jurisdiction of each of the States involved for tax purposes. That specific attachment rule for transport services is thus intended to ensure that each Member State taxes transport services in respect of the parts of the journey completed in its territory (judgment of 6 November 1997, *Reisebüro Binder*, C?116/96, EU:C:1997:520, paragraphs 13 and 14).

30 Those considerations also apply where a service, the essential element of which consists of moving persons, begins and ends in the same place and the purpose of that service is of a tourist nature.

31 The interpretation set out in paragraph 26 of the present judgment is not called into question by the fact that, in its judgment of 1 October 2015, *Trijber and Harmsen* (C?340/14 and C?341/14, EU:C:2015:641), the Court held that an activity which consists in providing, for consideration, a service of carrying passengers on a boat for a waterway tour of a city for event-related purposes does not constitute a service in the 'field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), which is excluded from the scope of that directive.

32 It is sufficient to note, in that regard, that, as the Advocate General observed, in essence, in points 21 to 23 of his Opinion, in view of the different purposes of Article 9(2)(b) of the Sixth Directive and Article 2(2)(d) of Directive 2006/123, the concept of 'transport services', within the meaning of the first provision, and the concept of 'services in the field of transport', within the meaning of the second provision, are not the same. Accordingly, it cannot be considered that services which are not covered by the second of those concepts are necessarily excluded from the scope of the first.

33 Therefore, services such as those at issue in the main proceedings, consisting of, inter alia, the organisation of boat tours that end in the same place in which they began, are covered by Article 9(2)(b) of the Sixth Directive as transport services.

34 Consequently, since, as pointed out in paragraph 20 of this judgment, the place where transport services are supplied is, under Article 9(2)(b) of the Sixth Directive, the place where transport takes place having regard to the distances covered, it must be held that the place of supply at issue in the main proceedings is the German-Luxembourg Condominium.

35 It must next be determined whether transport services performed in that condominium, for consideration and by a taxable person acting as such, are subject to VAT because they are performed 'within the territory of the country' within the meaning of Article 2(1) of the Sixth Directive.

36 The expression 'territory of the country' is defined in Article 3(2) of the Sixth Directive and is 'the area of application of the [EEC] Treaty as stipulated in respect of each Member State in Article 227'. In addition, Article 3(3) lists the territories of individual Member States which are excluded from the territory of the country.

37 In that regard, it should be noted, first, that Article 299 of the EC Treaty, which replaced Article 227 of the EEC Treaty, provides, in its first paragraph, that the Treaty applies, inter alia, to the Federal Republic of Germany and the Grand Duchy of Luxembourg. Article 299(2) to (6) of the EC Treaty lay down certain specific features and derogations, which do not, however, concern those two Member States. Second, Article 3(3) of the Sixth Directive does not mention, among the territories of individual Member States excluded from the territory of the country, the German-Luxembourg Condominium.

38 Furthermore, since the Court has held, in that context, that the rules laid down in the Sixth Directive have binding and mandatory force throughout the national territory of the Member States and that it is for each of the Member States to determine the extension and limits of that territory, in accordance with the rules of public international law (judgment of 29 March 2007, *Aktiebolaget NN*

, C?111/05, EU:C:2007:195, paragraphs 54 and 55 and the case-law cited), it must also be noted that, in their observations, both the German and Luxembourg Governments claimed that, for both the Federal Republic of Germany and the Grand Duchy of Luxembourg, the territory of the German-Luxembourg Condominium is indeed 'within the territory of the country', within the meaning of Article 2(1) and Article 3(2) of the Sixth Directive.

39 In those circumstances, the supply of services performed in the German-Luxembourg Condominium, for consideration and by a taxable person acting as such, are performed 'within the territory of the country', within the meaning of Article 2(1) of the Sixth Directive, and are therefore subject to VAT.

40 Moreover, in view of the status of a condominium, such as the condominium at issue in the main proceedings, as a joint territory under the joint sovereignty of two Member States, and in the absence of any specific indication in the Sixth Directive on the detailed rules for the taxation of services supplied in such a condominium, those services may, in principle, be taxed by each of those two Member States.

41 That said, as the Advocate General observed, in essence, in points 68 and 69 of his Opinion, and as the Court has already held, the double taxation of the same transactions is contrary to the principle of fiscal neutrality inherent in the common system of VAT (see, to that effect, judgments of 11 September 2003, *Cookies World*, C?155/01, EU:C:2003:449, paragraph 60, and of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International*, C?427/16 and C?428/16, EU:C:2017:890, paragraph 66, and the case-law cited). Therefore, the taxation of services performed in such a condominium by one of the Member States which shares sovereignty over that territory has the effect of preventing the other Member State from taxing, in turn, those same services. That is without prejudice to the possibility for those Member States to regulate in another way the taxation of services performed in that condominium by means of an agreement, as provided for in the present case by Article 5(1) of the Treaty of 19 December 1984, provided that non-taxation and double taxation are avoided.

42 The German Government submits, however, that the general principles of international law, which, in its view, limit the unilateral exercise of sovereignty within a condominium such as the German-Luxembourg Condominium and make it subject to the agreement of the other State involved, must be observed in the application and interpretation of the Sixth Directive. Therefore, it would be impossible for the Grand Duchy of Luxembourg and the Federal Republic of Germany to exercise their powers in relation to VAT in the territory under their joint sovereignty without an arrangement concluded on the basis of Article 5 of the Treaty of 19 December 1984. Furthermore, according to the German Government, the Sixth Directive does not preclude the Member States concerned from temporarily waiving VAT, in accordance with those principles.

43 In that regard, it should be noted that, in principle, VAT is to be levied on all services effected for consideration by a taxable person and exceptions to that general principle are to be interpreted strictly (see, to that effect, judgment of 21 October 2021, *Dubrovin & Tröger – Aquatics*, C?373/19, EU:C:2021:873, paragraph 22 and the case-law cited). Every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory (judgment of 21 November 2018, *Fontana*, C?648/16, EU:C:2018:932, paragraph 33 and the case-law cited).

44 To accept the arguments of the German Government set out in paragraph 42 of this judgment would mean allowing the Member States to establish a territory in which the services supplied there would escape any levying of VAT even though the Member States concerned consider that territory to be ‘within the territory of the country’, within the meaning of EU VAT law, and that territory is not subject to any exception.

45 To accept that line of argument would also infringe the principle of fiscal neutrality, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT (judgment of 16 March 2017, *Identi*, C?493/15, EU:C:2017:219, paragraph 18 and the case-law cited), since VAT would not be levied on services such as those at issue in the main proceedings, whereas the same services provided elsewhere by other traders are indeed subject to VAT.

46 Accordingly, the absence, in the present case, of an agreement on the collection of VAT between the Federal Republic of Germany and the Grand Duchy of Luxembourg in respect of German-Luxembourg Condominium cannot preclude the taxation of services performed within that condominium.

47 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 2(1) and Article 9(2)(b) of the Sixth Directive must be interpreted as meaning that a Member State must tax passenger transport services performed, by a transport service provider established in that Member State, within a territory which, pursuant to an international treaty concluded between that Member State and another Member State, constitutes a joint territory under joint sovereignty of those two Member states and which is not subject to any exception provided for by EU law, provided that those services have not already been taxed by that other Member State. The taxation, by one of the Member States, of those services prevents the other Member State from taxing them in turn, without prejudice to the possibility for those two Member States to regulate in another way the taxation of services performed within that territory, inter alia by means of an agreement, provided that non-taxation and double taxation is avoided.

Costs

48 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 (First Chamber) hereby rules:

Articles 2(1) and 9(2)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 91/680/EEC of 16 December 1991,

must be interpreted as meaning:

a Member State must tax passenger transport performed, by a service transport provider established in that Member State, within a territory which, pursuant to an international treaty concluded between that Member State and another Member State, constitutes a joint territory under joint sovereignty of those two Member states and which is not subject to any exception provided for by EU law, provided that those services have not already been taxed by that other Member State. The taxation, by one of the Member States, of those services prevents the other Member State from taxing them in turn, without prejudice to the possibility for those two Member States to regulate in another way the taxation of services performed within that territory, inter alia by means of an agreement, provided that non-

taxation and double taxation is avoided.

[Signatures]

* Language of the case: French.