Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 July 2015 [1]

Case C-264/14

Skatteverket
v
David Hedqvist

(Request for a preliminary ruling from the Högsta förvaltningsdomstol (Sweden))

(Tax legislation — Value-added tax — Exchange of the virtual currency 'bitcoin' for a conventional currency — Article 2(1)(c) of Directive 2006/112/EC — Taxation of supplies of services effected for consideration — Article 135(1)(d) of Directive 2006/112/EC — Exemption of transactions concerning negotiable instruments — Article 135(1)(e) of Directive 2006/112/EC — Exemption of transactions concerning currencies — Article 135(1)(f) of Directive 2006/112/EC — Exemption of transactions in securities))

I – **Introduction**

1. In these proceedings the Court of Justice will for the first time address the question of the treatment for VAT purposes of the exchange of the virtual currency 'bitcoin' for conventional currencies. To this end, further clarification is required of the scope of the exemptions for financial transactions in particular.

II – **Legislative framework**

2. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the 'VAT Directive') provides that the following are to be subject to VAT:

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

3. However, Article 135(1) of the VAT Directive provides that the Member States are to exempt the following transactions from VAT:

'…

(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

1 — Original language: German.

(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

(f) transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2);

…'

4. Provisions corresponding to these exemptions are found in Article 13B(d)(3) to (5) of 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,[2] which was in force until 31 December 2006. In so far as the Court of Justice has interpreted the latter provisions, those findings may also be used in the present case.

5. Swedish law contains provisions corresponding to the abovementioned provisions of EU law.

III – **The main proceedings**

6. Mr Hedqvist plans to engage, via the internet, in the purchase and sale of the virtual currency 'bitcoin' (bitcoins) for Swedish crowns. The price of the bitcoins will be based on the exchange rate on a particular exchange site plus or minus a certain percentage as consideration for the exchange.

7. According to the findings of the referring court, bitcoins are accepted as a means of payment by a number of private individuals and internet traders. Bitcoins are stored as data either on the user's computer or on the computer of a third party service provider and are only transferred electronically. They do not have a particular issuer but are created on the internet by an algorithm programmed by an as yet unknown individual. Bitcoins are not designated as legal tender in any country.

8. Before taking up the activity, Mr Hedqvist requested a preliminary decision from the Skatterättsnämnd (Swedish Revenue Law Commission) to establish whether he was required to pay VAT on the purchase and sale of bitcoins as described. The preliminary decision found the purchase and sale of bitcoins to be a supply of services for consideration which was however exempt from VAT because bitcoins are a means of payment which is used in a manner corresponding to a legal means of payment. However, the Swedish tax administration appealed against this preliminary decision.

IV – **Proceedings before the Court of Justice**

9. The Högsta förvaltningsdomstol (Supreme Administrative Court), before which the dispute has now been brought, considers that European Union VAT law will determine the dispute and on 2 June 2014 therefore referred the following questions to the court pursuant to Article 267 TFEU:

'(1) Is Article 2(1) of the VAT Directive to be interpreted as meaning that transactions in the form of what has been described as the exchange of virtual currency for traditional currency and vice versa, which is effected for consideration included by the supplier when the exchange rates are determined, constitute the supply of a service effected for consideration?

(2) If so, must Article 135(1) [of that directive] be interpreted as meaning that the abovementioned exchange transactions are tax exempt?'

2 — OJ 1977 L 145, p. 1.

10. In the proceedings before the Court of Justice, written observations regarding these questions were submitted by the Swedish tax authority (Skatteverket), Mr Hedqvist, the Federal Republic of Germany, the Republic of Estonia and the European Commission. At the oral hearing on 17 June 2015, arguments were submitted by Mr Hedqvist, the Kingdom of Sweden, the Federal Republic of Germany and the Commission.

V – **Legal assessment**

11. The present proceedings concern two different issues. First, they concern the taxability of the exchange transactions, that is to say, the question of whether this activity produces a chargeable event under the VAT Directive (section A). Secondly, in the event that the exchange transactions are taxable, it must be clarified whether they are tax exempt (section B).

A – *The exchange of bitcoins as the supply of a service effected for consideration*

12. By its first question, the referring court asks whether an activity such as that planned by Mr Hedqvist must be considered as the supply of a service effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive and is thus in principle subject to VAT.

13. Ruling on a similar question in *First National Bank of Chicago* the Court of Justice held that the exchange of currencies in relation to which a bank sets different rates for the sale and purchase of the currencies involved constitutes the supply of a service effected for consideration.[3] However, the taxable service effected by the bank comprised the exchange activity only, and not the transfer of the currencies themselves. The Court of Justice considered that this transfer constituted neither a supply of goods nor a supply of services, as the currencies were legal tender.[4] The court found that in principle the consideration for the taxable exchange service consisted in the difference between the purchase and sale prices for the currencies.

14. The judgment was based on the fact that the transfer of legal tender as such is accepted as not constituting a chargeable event for VAT purposes.[5] Rather, such a transfer can in principle[6] only constitute the consideration for a taxed supply, as VAT is a tax on the end consumption of goods.[7] Currencies currently used as legal tender — unlike gold or cigarettes, for instance, which also are or have been used directly or indirectly as means of payment — have no other practical use than as a means of payment. Their function in a transaction is simply to facilitate trade in goods in an economy; as such, however, they are not consumed or used as goods.

15. That which applies for *legal* tender should also apply for other means of payment with no other function than to serve as such. Even though such *pure* means of payment are not guaranteed and supervised by law, for VAT purposes they perform the same function as legal tender and as such must, in accordance with the principle of fiscal neutrality in the form of the principle of equal treatment,[8] be treated in the same way.

3 — Judgment in *First National Bank of Chicago* (C-172/96, EU:C:1998:354, paragraphs 25 to 35).

4 — See judgment in *First National Bank of Chicago* (C-172/96, EU:C:1998:354, paragraph 25).

5 — See also to that effect judgment in *Mirror Group* (C-409/98, EU:C:2001:524, paragraph 26).

6 — This may well be different in the case of transfer of legal tender constituting collectors' items within the meaning of Article 135(1)(e) of the VAT Directive.

7 — See, to that effect, judgments in *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21 and the case-law cited therein) and *Dresser Rand* (C-606/12 and C-607/12, EU:C:2014:125, paragraph 28 and the case-law cited therein).

8 — See inter alia judgments in *Commission* v *France* (C-481/98, EU:C:2001:237, paragraph 22); *NCC Construction Danmark* (C-174/08, EU:C:2009:669, paragraph 44); and *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 48).

16. This is consistent with the case-law. The case-law treats legal tender and other pure means of payment — such as vouchers with a face value [9] or the purchase of 'points rights' for later use in hotels or accommodation [10] — in largely [11] the same way, in that in the latter cases the transfer of the means of payment is not held to constitute a taxable transaction.

17. According to the findings of the referring court, bitcoins also constitute a pure means of payment. The only purpose of possessing them is to reuse them as a means of payment at some point. For the purposes of the chargeable event for VAT, therefore, they must be treated in the same way as legal tender.

18. Consequently, the approach in *First National Bank of Chicago* must also be applied to bitcoins. Their transfer as such does not constitute a chargeable event. However, as Mr Hedqvist plans to buy and sell bitcoins for Swedish crowns at a price which includes a mark-up on the exchange rate on a particular exchange site, his activity includes the supply of services for consideration in accordance with Article 2(1)(c) of the VAT Directive in the form of the exchange.

B – *Exemption of the exchange of bitcoins*

19. Secondly, it must be clarified whether the service of exchanging bitcoins and Swedish crowns is covered by one of the exemptions provided for in Article 135(1) of the VAT Directive. The order for reference correctly identifies subparagraphs (d), (e) and (f) of this provision as possible exemptions. I will examine them in reverse order.

1. Transactions in securities (subparagraph (f))

20. Article 135(1)(f) of the VAT Directive exempts transactions in 'shares, interests in companies …, debentures and other securities'.

21. The exchange of bitcoins for Swedish crowns could only be covered by this exemption if at least one of them constituted 'other securities' within the meaning of the provision.

22. However, as recently held by the Court of Justice, Article 135(1)(f) of the VAT Directive covers only property rights over legal persons, pecuniary claims against a specific debtor and related rights. [12] Neither Swedish crowns nor bitcoins fall into any of these three categories.

23. The exemption provided for in Article 135(1)(f) of the VAT Directive is therefore not applicable in the present case.

2. Transactions concerning means of payment (subparagraph (e))

24. The next question is whether the tax exemption provided for in Article 135(1)(e) of VAT Directive applies. Under this subparagraph, transactions concerning 'currency, bank notes and coins used as legal tender' are tax exempt.

9 — See, to that effect, judgment in *Argos Distributors* (C-288/94, EU:C:1996:398).

10 — See judgment in *Macdonald Resorts* (C-270/09, EU:C:2010:780, particularly paragraphs 21 and 32).

11 — The judgment in *Astra Zeneca UK* (C-40/09, EU:C:2010:450) can be understood differently.

12 — See judgment in *Granton Advertising* (C-461/12, EU:C:2014:1745, paragraphs 27 and 31).

25. The first condition for exemption is a connection to means of payment, whether in cash or non-cash form. As is moreover shown by the English version of Article 135(1)(e) of the VAT Directive, which refers to 'currency, bank notes and coins', the scope of this provision covers any currency in general and not — as suggested by use of the term 'Devisen' in the German version — only foreign currencies.

26. However, if the exemption is to cover all transactions 'concerning' means of payment, the question of which transactions those should be is not easy to answer. The wording is extremely broad, as ultimately any transaction paid for with money concerns a means of payment. This also applies if one were to require, in line with the case-law regarding the exemption for transactions in securities provided for in Article 135(1)(f) of the VAT Directive,[13] that the transaction be liable to create, alter or extinguish parties' rights and obligations in respect of means of payment.

27. First of all, it is clear that the exemption cannot apply if only one party to a transaction transfers a means of payment while the other party supplies goods or effects services. In that case, transfer of the means of payment would constitute consideration for a supply of goods or services. If the exemption were applied to such unilateral transfers of means of payment, all transactions, except barter transactions, would be VAT exempt.

28. The exemption may, however, be applicable if, as in the case at hand, one means of payment is exchanged for another for consideration. In that case — as shown[14] — the taxed transaction is then the exchange service. This service 'concerns' means of payment within the meaning of Article 135(1)(e) of the VAT Directive, specifically the exchange thereof, and this exchange also establishes rights and obligations in relation to the means of payment.

29. However, in the present case, where Swedish crowns, which are legal tender in the Kingdom of Sweden, are exchanged for bitcoins, which are not legal tender in any country, the following question arises: Must both of the means of payment involved in the exchange be *legal* tender?

30. The wording of Article 135(1)(e) does not give a clear answer to this question.

31. The German version in particular can be understood as requiring both means of payment involved in the exchange to be legal tender ('Devisen …, die gesetzliches Zahlungsmittel sind' — 'currencies ... which are legal tender').

32. However, the English version merely refers to 'currency' in the singular. The English wording would therefore be satisfied by an exchange involving legal tender, in this case the Swedish crown, on one side only.

33. More open is the Finnish version which does not even require that currencies be legal tender, but only that bank notes and coins be so.[15] All currencies in non-cash form — even virtual currencies like bitcoins — could be covered by the exemption under that wording.

13 — See inter alia judgments in *CSC Financial Services* (C-235/00, EU:C:2001:696, paragraph 33) and *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 37).

14 — See paragraph 18 above.

15 — The Finnish version refers to 'valuuttaa sekä laillisina maksuvälineinä käytettäviä seteleitä ja kolikoita' which essentially means 'bank notes and coins used as legal tender and currencies'.

34. Furthermore, the Italian version even calls into question whether the means of payment involved need to have legal status at all. It states that transactions concerning means of payment 'con valore liberatorio' are exempt from VAT. As such, in this version it is the debt-discharging effect of the means of payment that is key. On the other hand, the term 'corso legale', which refers to legal tender in Italian, as is apparent inter alia from Article 10(2) of Regulation No 974/98, [16] and which is also used in Article 344(1) No 2 of the VAT Directive, is not used. However, bitcoins can also have the effect of discharging a debt if the relevant parties so agree.

35. Due to the different language versions, the question of which means of payment are covered by the exemption provided for in Article 135(1)(e) of the VAT Directive can be answered only by reference to the purpose of the exemption. [17] In the present case, it is necessary only to examine whether the exchange of legal tender for a pure means of payment which is not legal tender is covered by the purpose of the exemption.

36. As the Court of Justice has repeatedly held, the exemptions now contained in subparagraphs (b) to (g) of Article 135(1) of the VAT Directive cover 'financial transactions'. [18] In any event, exchanges of pure means of payment which, as here, involve only one legal tender also have the characteristics of a financial transaction. This follows for the simple reason that, as seen, [19] for VAT purposes the transfer of pure means of payment fulfils a payment function only.

37. However, the Court of Justice has not previously ruled on the specific purpose of the exemption provided for in subparagraph (e) of Article 135(1) of the VAT Directive to be interpreted here.

38. A VAT exemption always results in a reduction in the costs of supply. In the case at hand, this concerns exchange services involving pure means of payment. In my opinion, the objective of the exemption for transactions concerning means of payment is to not impede the convertibility of pure means of payment by levying VAT. This is also of significance in relation to the single market. In so far as cross-border services require the customer to exchange currencies, the levying of VAT on the exchange service would increase the price of a cross-border service as compared to a domestic service still further.

39. The exemption is not limited to currencies used within the European Union, however. All of the world's currencies are covered by the exemption. It follows that the objective of Article 135(1)(e) of the VAT Directive is to ensure that, in the interests of the smooth flow of payments, the conversion of currencies is as unencumbered as possible.

40. Exempting from VAT the exchange of legal tender for a means of payment which does not have legal status but which nevertheless is a pure means of payment, such as the bitcoins in this case, is in line with this objective. In so far as means of payment exist which are involved in payment transactions because they fulfil the same payment function in the course of trade as legal tender, the levying of VAT on exchanges of such means of payment would constitute an additional burden on payments.

16 — Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1), most recently amended by Council Regulation (EU) No 827/2014 of 23 July 2014.

17 — See, for example, judgment in *T.* (C-373/13, EU:C:2015:413, paragraph 62 and the case-law cited).

18 — See judgment in *Granton Advertising* (C-461/12, EU:C:2014:1745, paragraph 29 and the case-law cited therein).

19 — See paragraphs 14 to 16 above.

41. Moreover, Article 135(1)(e) of the VAT Directive must be interpreted in line with primary law [20] and in particular the general principle of equal treatment provided for in Article 20 of the Charter of Fundamental Rights. In this regard, the Court of Justice makes frequent reference to the principle of neutrality and, for the purpose of realising neutrality in competition in the VAT system, requires similar transactions to be taxed similarly. [21]

42. In light of this, to justify different treatment in the present case, there would need to be a material difference between the exchange of legal tender for legal tender and the exchange of legal tender for other, pure means of payment which are not legal tender, such as the bitcoins in this case. This is because both forms of means of payment, provided they are accepted in the course of trade, perform the same payment function.

43. With regard to VAT, I discern no such substantial difference.

44. The lack of stable value and vulnerability to fraud of bitcoins, raised by the Federal Republic of Germany in particular, cannot justify different treatment. Regardless of whether, depending on the currency, legal tender is also subject to such risks to the same extent, the only place for considerations of this kind is the governmental supervision of the financial markets. VAT is independent of this, however. It is clear from the case-law that even if a practice is prohibited under supervisory law, its assessment for VAT purposes is unaffected. [22] Thus, whether bitcoins constitute a 'good' or a 'bad' currency is irrelevant for the purpose of the present proceedings.

45. Consequently, the exemption provided for in Article 135(1)(e) of the VAT Directive also applies if, as in the present case, a currency used as legal tender is exchanged for another currency which, although not used as legal tender, is involved in payment transactions as a pure means of payment.

3. Transactions concerning negotiable instructions (subparagraph (d))

46. The Court of Justice may, contrary to my view, hold that the exemption for means of payment in accordance with Article 135(1)(e) of the VAT Directive is inapplicable in this case because bitcoins are not legal tender. In that case, it would also be necessary to examine whether the exemption in Article 135(1)(d) of the VAT Directive may apply in the present case.

47. To the extent that this provision concerns 'payments and transfers', the exchange services in the present case would not be exempt, because they do not comprise the execution of cash and non-cash payments to a particular third-party recipient.

48. However, Article 135(1)(d) of the VAT Directive also exempts transactions 'concerning debts, cheques and other negotiable instruments'. This would raise the question of whether bitcoins constitute 'other negotiable instruments' within the meaning of this exemption.

49. In *Granton Advertising*, the Court of Justice indicated that the exemption covers various forms of money transfer. [23] In my Opinion in that case I too considered that the objective of the exemption is to treat rights which are regarded in the course of trade as being similar to money in the same way as payments of money for VAT purposes and thus to exempt them from VAT. [24]

20 — See, to that effect, judgments in *Sturgeon and Others* (C-402/07, EU:C:2009:716, paragraph 48); *Chatzi* (C-149/10, EU:C:2010:534, paragraph 43); and *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 40).

21 — See inter alia judgments in *Commission* v *Germany* (C-109/02, EU:C:2003:586, paragraph 20); *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 46); and *Commission* v *Sweden* (C-480/10, EU:C:2013:263, paragraph 17).

22 — See judgment in *GfBk* (C-275/11, EU:C:2013:141, paragraph 32).

23 — See, to that effect, judgment in *Granton Advertising* (C-461/12, EU:C:2014:1745, paragraph 37).

24 — See my Opinion in *Granton Advertising* (C-461/12, EU:C:2013:700, paragraph 41).

50. Nevertheless, application of this exemption in the present case must be denied, for two reasons.

51. Firstly, Article 135(1)(d) of the VAT Directive concerns only derivatives of currency, such as debts, cheques and other 'instruments', and not the currencies themselves. In the present case, however, it is not rights to bitcoins which are exchanged, but the bitcoins themselves. In light of this, there is no need to clarify whether this exemption covers only rights concerning *legal* tender, as argued by the Republic of Estonia.

52. Secondly, there is a special provision exempting transactions concerning a currency itself, namely Article 135(1)(e) of the VAT Directive, the applicability of which was examined in the previous section. If the Court of Justice were to find that transactions directly concerning a virtual currency such as bitcoins are not covered by this special provision because only the exchange of *legal* tender is to be exempted, then to interpret another exemption widely instead would be to disregard such legislative decision. Transactions directly concerning currencies are either exempt under the special rule provided for this purpose in Article 135(1)(e) of the VAT Directive, if its conditions are met, or they are not exempt. Otherwise, the conditions laid down in this exemption would ultimately be meaningless.

53. Under no circumstances, therefore, is the exemption provided for in Article 135(1)(d) of the VAT Directive applicable in the present case.

VI – **Conclusion**

54. In the light of the foregoing, I propose to the Court that the answer to the questions referred by the Högsta förvaltningsdomstol should be as follows:

(1) The exchange of a pure means of payment for legal tender and vice versa, which is effected for consideration included by the supplier when the exchange rates are determined, constitutes the supply of a service effected for consideration within the meaning of Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

(2) Such transactions are exempt from VAT under Article 135(1)(e) of Directive 2006/112.