Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

4 May 2017 *

(Failure of a Member State to fulfil obligations — Taxation — Value added tax — Directive 2006/112/EC — Article 132(1)(f) — Exemption from VAT of supplies of services by independent groups of persons to their members — Article 168(a) and Article 178(a) — Right of deduction for the members of the group — Article 14(2)(c) and Article 28 — Actions of a member in his own name and on behalf of the group)

In Case C-274/15,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 8 June 2015,

European Commission, represented by F. Dintilhac and C. Soulay, acting as Agents,

applicant,

v

Grand Duchy of Luxembourg, represented by D. Holderer, acting as Agent, F. Kremer and P.-E. Partsch, avocats, and B. Gasparotti, acting as expert,

defendant,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, C. Vajda (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 30 June 2016,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2016,

gives the following

* Language of the case: French.

Judgment

1 By its application, the European Commission asks the Court to declare that, by providing for the value added tax (VAT) regime applicable to independent groups of persons, as defined in Article 44(1)(y) of the consolidated text of the loi du 12 février 1979 concernant la taxe sur la valeur ajoutée (Law of 12 February 1979 on value added tax) (*Mémorial* A 1979, No 23, 'the Law on VAT'), Articles 1 to 4 of the règlement grand-ducal du 21 janvier 2004 relatif à l'exonération de la TVA des prestations de services fournies à leurs membres par des groupements autonomes de personnes (Grand-Ducal Regulation of 21 January 2004 on the exemption from VAT of supplies of services by independent groups of persons to their members) (*Mémorial* A 2004, No 9, 'the Grand-Ducal Regulation'), circulaire administrative n°707, du 29 janvier 2004 (administrative circular No 707 of 29 January 2004), in so far as it comments on Articles 1 to 4 of the Grand-Ducal Regulation ('the administrative circular'), and the note of 18 December 2008 drafted by the working group within the comité d'observation des marchés (Market Observation Committee, COBMA) with agreement from the administration de l'Enregistrement et des Domaines (Registration and Land Authority) ('the COBMA note'), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) ('Directive 2006/112'), and, in particular, under Article 2(1)(c), Article 132(1)(f), the second subparagraph of Article 1(2), Article 168(a), Article 178(a), Article 14(2)(c) and Article 28 of that directive.

Legal context

European Union law

2 The second subparagraph of Article 1(2) of Directive 2006/112, which is set out in Title I thereof entitled 'Subject matter and scope', provides as follows:

'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.'

3 Article 2(1)(c) of that directive provides:

'The following transactions shall 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;

…'

4 The first subparagraph of Article 9(1) of Directive 2006/112, which is set out in Title III thereof entitled 'Taxable persons', is worded as follows:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.'

5 Article 14(2)(c) of that directive, which is set out in Title IV thereof entitled 'Taxable transactions', provides:

'In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

…

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.'

6 Article 28 of Directive 2006/112 provides:

'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.'

7 Article 132(1) of that directive, which is set out in Title IX thereof entitled 'Exemptions', provides:

'Member States shall exempt the following transactions:

…

(f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;

…'

8 Article 168 of Directive 2006/112, which is set out in Title X thereof entitled 'Deductions', is worded as follows:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…'

9 Article 178 of that directive provides:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI;

…'

10 Article 226 of Directive 2006/112, which is set out in Title XI thereof entitled 'Obligations of taxable persons and certain non-taxable persons', provides:

'Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(5) the full name and address of the taxable person and of the customer;

…'

Luxembourg law

11 Under Article 44(1) of the Law on VAT, as amended, in particular, by paragraph 2 of the fifth subparagraph of Article 5 of the loi du 22 décembre 1989 concernant le budget des recettes et des dépenses de l'État pour l'exercice 1990 (Law of 22 December 1989 on the budget of revenue and expenditure of the State for the 1990 financial year) (*Mémorial* A 1989, No 81):

'The following shall be exempted from value added tax within the limits and under the conditions to be laid down by Grand-Ducal Regulation:

…

(y) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition.'

12 The conditions for the application of Article 44(1) of the Law on VAT, as amended, were specified in the Grand-Ducal Regulation, Article 1 of which was worded as follows:

'For the purposes of applying the provisions of Article 44(1)(y) of the Law [on VAT, as amended], an "independent group of persons" shall mean:

(a) a group which has legal personality;

(b) a group which does not have legal personality but which acts in its own name, as a group, with regard to its members and third parties.'

13 The règlement grand-ducal du 7 août 2012 (Grand-Ducal Regulation of 7 August 2012) (*Mémorial* A 2012, No 168) amended the Grand-Ducal Regulation by adding the following subparagraph to Article 1:

'The present grand-ducal regulation shall not apply to independent groups of persons whose supplies of services are used, by one or more of their members, primarily for carrying out transactions which are subject to the tax and which are not covered by an exemption.'

14 Article 2 of the Grand-Ducal Regulation is worded as follows:

‘Services supplied by the independent groups of persons referred to in Article 1 to their members shall be exempt from the tax provided that:

(a) the activities of the group consist exclusively in supplying services directly necessary for the exercise of the activity of its members, and that the members all carry on an activity which is exempt under Article 44(1) of the [Law on VAT, as amended] or in relation to which they are not taxable persons. For the purposes of applying Article 44(1)(y) of the [Law on VAT, as amended], members who, in the framework of their economic activity which is exempt from VAT under Article 44(1), or in relation to which they are not taxable persons for VAT purposes, also carry out supplies of goods and services which are not exempt from the tax under Article 44(1), shall be regarded as carrying on an activity which is exempt under Article 44(1) or in relation to which they are not taxable persons for VAT purposes, provided that the annual turnover excluding tax relating to those taxed supplies of goods and services does not exceed 30% of the annual turnover excluding tax relating to all their transactions, the turnover to be taken into consideration being that referred to in Article 57(3) of the [Law on VAT, as amended], and subject to what is set out in Article 3;

…’

15 Article 3 of the Grand-Ducal Regulation provides:

‘As regards the percentage figure set out in Article 2(a), the exemption, for a calendar year, of the supplies of services by the group shall be conditional on that percentage figure not having been exceeded by the members of the group in the preceding calendar year. However, exceeding that percentage figure shall not result in loss of the exemption provided that the percentage figure is not exceeded by more than 50% of that percentage figure and provided that the period of time over which it has been exceeded has not exceeded the two consecutive calendar years preceding the calendar year in respect of which the applicability of the exemption is being ascertained.

The foregoing conditions must be satisfied by each member of the group, failing which all the services supplied by the group shall be excluded from the exemption.’

16 Under Article 4 of the Grand-Ducal Regulation:

‘The members of the group who, in the framework of their economic activity which is exempt from VAT under Article 44(1) of the [Law on VAT, as amended] or in relation to which they are not taxable persons for VAT purposes, also carry out, within the limits of the percentage figure referred to in Articles 2(a) and 3, supplies of goods or services which are not exempt under Article 44(1), shall be permitted to deduct from the tax which they are liable to pay in respect of the taxable transactions carried out by them, the [VAT] invoiced to the group or payable by the group in respect of the group’s input transactions, and included in the amount of the payment attributed individually to them in accordance with the provisions of Article 2(c). The deduction shall be made in accordance with the provisions of Chapter VII of the Law [on VAT, as amended].’

17 Article 4 of the Grand-Ducal Regulation forms the subject matter of the following comments in the administrative circular:

‘In order to ensure, in so far as possible, compliance with the principle of the neutrality of [VAT], Article 4 is intended to confer on taxable person members, who achieve within the limits of the percentage figure laid down in Articles 2(a) and 3 a turnover which falls within the scope of the tax and which is not exempt under Article 44, a right to deduct the input VAT paid or payable by the

independent group. It is to be understood that that right of deduction must, moreover, comply with the rules laid down in Chapter VII of the Law [on VAT] and, in particular, in Articles 50 (general pro rata) and 51 (actual use) thereof.

In practice, the taxable person member in question may proceed to deduct the VAT paid by the group or payable by the group only if he is in possession of a statement of account, supported by copies of the invoices, issued to him by the group, setting out the exact net price paid to suppliers, the amount of the tax charged by them or payable by the group and the member's share of the joint expenses and of the tax.'

18 The COBMA note is intended to clarify certain matters for the purposes of the practical application of the legal regime applicable to independent groups of persons. It contains, inter alia, the following questions and answers:

' – Which entity must appear on the invoices to be received from third parties relating to shared costs where the group does not have legal personality?

Two possible situations may arise:

— the group has a direct relationship with the third parties and receives from them the goods and services in its name;

— the members have a direct relationship with the third parties and receive from them the goods and services in their names. The members then share the expenses relating to those goods and services received from third parties and on that basis allocate those expenses to the group. That situation may arise, inter alia, where a direct relationship between the group and the third parties may not be entered into for commercial or legal reasons.

In the first situation, the invoices issued by third parties relating to shared costs must be clearly addressed to the independent group of persons. Since the group does not have legal personality, the invoices shall be addressed: "Group ABC / Care of member X - address of member X". That member X must allocate the cost (all taxes included) to the group, irrespective of the right of deduction to which that member may be entitled as regards VAT incurred in his own name. Since the group does not have legal personality, at least one of its members must nevertheless be designated as a party legally bound by the payment terms of, and other obligations arising from, the contract.

In the second situation, the invoices issued by third parties shall be addressed to one of the members. That member shall then share the expenses relating to those goods and services and allocate those expenses to the group. Those expenses (all taxes included) must be allocated to the group irrespective of the right of deduction to which that member may be entitled as regards VAT incurred in his own name.

…

Furthermore, it is hereby clarified that the allocation of shared expenses by the members to the group is a transaction that falls outside the scope of VAT.

…'

Pre-litigation procedure

19 By letter of formal notice of 7 April 2011, the Commission drew the attention of the Grand Duchy of Luxembourg to the fact that the VAT regime applicable to independent groups of persons ('IGPs' or 'IGP', as appropriate), as defined, in particular, in Article 44(1)(y) of the Law on VAT and in Articles 1 to 4 of the Grand-Ducal Regulation, did not appear to it to be compatible with several provisions of Directive 2006/112.

20 In its first ground for complaint, the Commission stated that the national provisions under which services supplied by IGPs for the benefit of their members are exempted from VAT, including where those services are used for the purposes of the taxed transactions of those members where the annual turnover excluding tax in relation to those taxed transactions does not exceed 30%, or even 45% in certain cases, of their total annual turnover excluding tax, appeared to it to be incompatible with Article 2(1)(c) and Article 132(1)(f) of Directive 2006/112.

21 In its second ground for complaint, the Commission stated that the national legislation was incompatible with the second subparagraph of Article 1(2), Article 168(a) and Article 178(a) of Directive 2006/112, in so far as it provides that the members of an IGP who carry out taxable activities up to a maximum of 30% of their total annual turnover excluding tax may deduct the VAT invoiced to the IGP in respect of the goods and services supplied to it from the VAT for which they themselves are liable.

22 The third and last ground for complaint raised by the Commission was directed at the fact that, where a member of an IGP acquires goods and services from third parties in his own name, but on behalf of the IGP, the national legislation excluded from the scope of VAT the transaction consisting, for that member, in allocating to the IGP the expenses thus incurred, contrary to the provisions of Article 14(2)(c) and Article 28 of Directive 2006/112.

23 In its reply of 8 June 2011 to the letter of formal notice, the Grand Duchy of Luxembourg disputed the interpretation of the national legislation and EU law adopted by the Commission. As a preliminary point, it contended that the concept of 'independent groups of persons' referred to in Directive 2006/112 mainly concerned structures which do not have legal personality, the activities of which are attributable to their members which have legal personality.

24 As regards the first ground for complaint, the Grand Duchy of Luxembourg replied that Article 44(1)(y) of the Law on VAT limited the scope of the exemption to that defined in Article 132(1)(f) of Directive 2006/112, and that the Grand-Ducal Regulation merely laid down subsidiary rules in respect of the regime applicable to IGPs.

25 As regards the second ground for complaint, the Grand Duchy of Luxembourg replied that, where an IGP does not have legal personality, the right of deduction, depending on the nature of the output transactions, must benefit the group's members, not the group. Whilst accepting that, from a theoretical point of view, the regime provided for by national law departed from the 'principle of the prefinancing of the tax by the customer', the Grand Duchy of Luxembourg nevertheless submitted that that was of no consequence in practice.

26 As regards the third ground for complaint, the Grand Duchy of Luxembourg contended that the regime resulting from Article 14(2)(c) and Article 28 of Directive 2006/112 was not applicable in the case in point.

27 The Commission found that reply unconvincing, and, on 27 January 2012, issued a reasoned opinion in which it maintained its position as set out in the letter of formal notice and invited the Grand Duchy of Luxembourg to take the measures necessary to bring its legislation into conformity with Directive

2006/112, and, in particular, with Article 2(1)(c), Article 132(1)(f), the second subparagraph of Article 1(2), Article 168(a), Article 178(a), Article 14(2)(c) and Article 28 of that directive, within two months of receipt of that opinion.

28 The Grand Duchy of Luxembourg replied to the reasoned opinion by letter of 7 February 2012, again disputing the merits of the grounds for complaint addressed to it, and maintaining its position as set out in its letter of reply of 8 June 2011.

29 The Grand Duchy of Luxembourg indicated, however, by letter of 26 March 2012, that it undertook to adopt a regulation designed to bring the Luxembourg legislation into conformity with Directive 2006/112 in order to satisfy the requirements in the first ground for complaint in the reasoned opinion, although it maintained its arguments relating to the second and third grounds for complaint.

30 By letter of 11 June 2012, the Commission requested that the Grand Duchy of Luxembourg forward the draft regulation announced and the timetable for its adoption.

31 By letter of 4 September 2012, the Grand Duchy of Luxembourg sent the Commission the Grand-Ducal Regulation of 7 August 2012, which amended Article 1 of the Grand-Ducal Regulation.

32 The Commission found, however, that, having regard to the three grounds for complaint raised in the reasoned opinion, the Grand-Ducal Regulation of 7 August 2012 had not brought the Luxembourg legislation into conformity with Directive 2006/112. In view of the persistence of those grounds for complaint, the Commission announced, on 20 February 2014, its decision to bring an action.

The action

The first ground for complaint, alleging failure to comply with Article 2(1)(c) and Article 132(1)(f) of Directive 2006/112

Admissibility of the first ground for complaint

– Arguments of the parties

33 The Grand Duchy of Luxembourg contends, in the first place, that the first ground for complaint must be rejected as inadmissible on the ground that the Commission's application is based on a complaint different from that set out in the reasoned opinion. The ground for complaint put forward in the reasoned opinion alleges that the Grand-Ducal Regulation does not preclude the possibility that the services of a group intended principally, or even exclusively, for taxable transactions, may be exempted. By contrast, the ground for complaint put forward in the application alleges that the Grand-Ducal Regulation permits the exemption of services supplied by an IGP and intended, secondarily, for its members' taxable transactions.

34 The Grand Duchy of Luxembourg contends, in the second place, that the Commission was in breach of the principle of sincere cooperation by its failure to react to the amendment made to the Grand-Ducal Regulation in August 2012. According to the Grand Duchy of Luxembourg, the Commission ought to have informed it of any reservations the Commission may have had about whether that amendment brought the Luxembourg legislation into conformity with Directive 2006/112, and ought not to have remained silent for 18 months, before ultimately announcing, on 20 February 2014, that it had decided to bring an action before the Court.

35 The Commission submits that the Court's case-law does not require the statement of the grounds for complaint in the reasoned opinion and the form of order sought in the application to be exactly the same. It submits that, contrary to what the Grand Duchy of Luxembourg contends, the first ground for complaint has the same subject matter and the same scope in the reasoned opinion and in the application.

36 As regards the principle of sincere cooperation, the Commission claims that it alone is competent to decide whether it is appropriate, at the end of the pre-litigation procedure, to bring an action before the Court for a declaration that the Member State concerned has failed to fulfil its obligations as alleged. It is for the Commission to choose when it will bring an action for failure to fulfil obligations and it is not required to act within a specific period, subject to situations in which the excessive duration of the pre-litigation procedure would be liable to affect adversely the rights of the defence, a point which it is for the Member State concerned to prove.

– *Findings of the Court*

37 It should be recalled, in the first place, that, according to the settled case-law of the Court, the subject matter of proceedings under Article 258 TFEU is delimited by the pre-litigation procedure provided for in that provision. Accordingly, the application must be based on the same grounds and pleas as the reasoned opinion. However, that requirement cannot go so far as to mean that in every case the formal statement of complaints in the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject matter of the proceedings, as defined in the reasoned opinion, has not been extended or altered (judgment of 9 April 2013, *Commission* v *Ireland*, C-85/11, EU:C:2013:217, paragraph 17 and the case-law cited).

38 It must be held that, in the present case, the Commission has neither extended nor altered the subject matter of the proceedings as defined in the reasoned opinion. The Commission stated clearly, in both the reasoned opinion and in the application, that it considered the Luxembourg legislation to be contrary to Article 2(1)(c) and Article 132(1)(f) of Directive 2006/112, since it permits the exemption of the services of an IGP which are not directly necessary for the non-taxable or exempt activities of its members.

39 In the second place, it should be recalled that, according to the settled case-law of the Court, it is for the Commission to choose the point in time which it considers to be appropriate for bringing an action for failure to fulfil obligations. The considerations which determine that choice cannot affect the admissibility of the action. The rules laid down in Article 258 TFEU must be applied without any obligation on the Commission to act within a specific period, subject to situations in which the excessive duration of the pre-litigation procedure is liable to make it more difficult for the Member State concerned to refute the Commission's arguments and thus to infringe the rights of the defence. It is for the Member State concerned to adduce evidence that it has been affected by such an excessive duration (see, to that effect, judgment of 16 April 2015, *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 14).

40 It must be stated that, in the present case, the Grand Duchy of Luxembourg has not adduced evidence that it has been so affected.

41 Furthermore, the mere fact that the Grand Duchy of Luxembourg amended its regulation after the expiry of the period prescribed in the reasoned opinion, namely 27 March 2012, does not have the effect of preventing the Commission, under the principle of sincere cooperation, from bringing an action for failure to fulfil obligations after that date.

42 The first ground for complaint is therefore admissible.

Substance

– Arguments of the parties

43 The Commission observes that Article 1 of the Grand-Ducal Regulation defines the conditions for the application of Article 44(1)(y) of the Law on VAT. Under Article 2(a) and Article 3 of the Grand-Ducal Regulation, the services supplied by an IGP to its members are exempt from VAT provided that the members of that group who also carry out taxable activities generate a turnover excluding tax from those activities of no more than 30%, and even 45% in certain cases, of their total turnover excluding tax. Thus, the Grand-Ducal Regulation does not restrict the exemption from VAT to, solely, the services supplied by the IGP and directly necessary for the activities which are not liable to VAT or which are exempt undertaken by its members, contrary to Article 132(1)(f) of Directive 2006/112. Accordingly, in so far as those supplies of services do not satisfy the conditions set out in Article 132(1)(f) of Directive 2006/112, they ought to be taxed in accordance with Article 2(1) of that directive.

44 The Grand Duchy of Luxembourg contends that the Commission, in maintaining that the exemption at issue is reserved to members of IGPs carrying out exclusively activities which are exempt or not subject to VAT, added to Article 132(1)(f) of Directive 2006/112 a condition that is not set out therein. According to the Grand Duchy of Luxembourg, the fact, for the members of an IGP, of carrying out an activity which is exempt or in relation to which they are not taxable persons is a sufficient condition for the purposes of the application of the exemption set out in that provision. On the other hand, the exemption set out in Article 132(1)(f) of Directive 2006/112 is not reserved to members of IGPs carrying out exclusively such an activity.

45 The Grand Duchy of Luxembourg contends that the Luxembourg regime providing that the members of an IGP may carry out taxed activities up to 30% of turnover is designed to render workable in practice a regime which, if it was subject to other conditions of application, would become economically impracticable. In this connection, that Member State submits that the costs shared by the members of an IGP, through the latter, constitute general costs, and that requiring a difference in the treatment of the VAT applicable to the services rendered by the IGP depending on whether they relate to the part attributable to the members' taxable activities or that attributable to the members' exempt activities is unrealistic, in the light of the practical and administrative difficulties and burdens engendered by such a requirement.

46 The Grand Duchy of Luxembourg relies, in addition, on the fact that, following the Commission's letter of 11 June 2012, the Grand-Ducal Regulation of 7 August 2012 amended the Grand-Ducal Regulation by supplementing Article 1 thereof with a new subparagraph.

– Findings of the Court

47 As a preliminary point, it should be recalled that, according to the settled case-law of the Court, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (judgment of 28 January 2016, *Commission* v *Portugal*, C-398/14, EU:C:2016:61, paragraph 49).

48 In the present case, the period granted to the Grand Duchy of Luxembourg within which to bring its legislation into conformity with Directive 2006/112 expired on 27 March 2012. However, the amendment to Article 1 of the Grand-Ducal Regulation by the Grand-Ducal Regulation of 7 August 2012 took effect only at a later date. Consequently, that amendment is irrelevant to the analysis of the first ground for complaint.

49 It is therefore necessary to examine whether the Grand-Ducal Regulation is consistent with Article 2(1)(c) and Article 132(1)(f) of Directive 2006/112, in so far as it provides that the services supplied by an IGP to its members are exempt from VAT provided that the members of that group who also carry out taxable activities generate a turnover excluding tax from those activities of no more than 30%, or, in certain cases, even 45%, of their total turnover excluding tax.

50 In this connection, it is clear from the settled case-law of the Court that the terms used to specify the exemptions from VAT set out in Article 132 of Directive 2006/112 must be interpreted strictly since those exemptions constitute exceptions to the general principle that all services supplied for consideration by a taxable person are subject to that tax. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive the exemptions of their intended effects. It is not the purpose of the case-law of the Court to impose an interpretation which would make the exemptions concerned almost inapplicable in practice (see, to that effect, judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 30 and the case-law cited).

51 According to the wording of Article 132(1)(f) of Directive 2006/112, under certain conditions, the supply of services by independent groups 'of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons' for the purpose of rendering their members the services 'directly necessary for the exercise of that activity' is to be exempt. Consequently, it follows from the wording of that provision that it does not provide for an exemption for the supply of services which are not directly necessary for the exercise of an IGP's members' exempt activities or those in relation to which they are not taxable persons.

52 Since such a supply of services does not fall within the scope of the exemption set out in Article 132(1)(f) of Directive 2006/112, Article 2(1)(c) of that directive requires that that supply of services for consideration within the territory of a Member State by a taxable person acting as such be subject to VAT.

53 Contrary to what the Grand Duchy of Luxembourg contends, that interpretation of Article 132(1)(f) of Directive 2006/112 does not result in the exemption provided for in that provision being deprived of its intended effect. In particular, the application of that exemption is not restricted to groups whose members exercise exclusively an activity which is exempt from VAT or in relation to which they are not taxable persons. Accordingly, the services rendered by an IGP whose members also carry out taxable activities may qualify for that exemption, but only in so far as those services are directly necessary for those members' exempt activities or activities in relation to which they are not taxable persons.

54 The Grand Duchy of Luxembourg has not shown that that requirement would render the exemption set out in Article 132(1)(f) of Directive 2006/112 almost inapplicable in practice. First, as the Advocate General has observed in point 42 of her Opinion, the services supplied by an IGP to its members do not necessarily relate to their general costs and thus to the totality of their activities. Second, the Grand Duchy of Luxembourg has not shown why, if at all, it might be excessively difficult for the IGP to invoice its services excluding VAT, according to the share of its members' activities in their totality represented by the activities which are exempt from that tax or in relation to which they are not taxable persons.

55 It follows that Article 44(1)(y) of the Law on VAT, read in conjunction with Article 2(a) and Article 3 of the Grand-Ducal Regulation, is contrary to Article 2(1)(c) and Article 132(1)(f) of Directive 2006/112, and that, therefore, the first ground for complaint is well founded.

The second ground for complaint, alleging failure to comply with the second subparagraph of Article 1(2), Article 168(a) and Article 178(a) of Directive 2006/112

Arguments of the parties

56 The Commission notes, in the first place, that, according to Article 4 of the Grand-Ducal Regulation, the members of an IGP who carry out transactions subject to VAT are entitled to deduct, from the VAT which they are liable to pay in respect of those taxed transactions, the tax invoiced to the IGP or payable by the latter in respect of the goods and services which the IGP received for the purposes of its own activities. However, according to the Commission, it is clear from Article 168(a) of Directive 2006/112 that the VAT may be deducted only by the taxable person who is the recipient of the goods or services subject to VAT and solely from the VAT which that taxable person is himself liable to pay.

57 In the second place, the Commission claims that it follows from Article 4 of the Grand-Ducal Regulation, read in conjunction with the administrative circular, that the right to deduct VAT may be exercised by the members of the IGP in respect of transactions in the absence of an invoice drawn up in their name, in breach of Article 178(a) of Directive 2006/112.

58 The Grand Duchy of Luxembourg contends that it is clear from the judgment of 18 July 2013, *PPG Holdings* (C-26/12, EU:C:2013:526) that a taxable person may deduct the VAT on amounts invoiced to him for goods or services which benefit a separate entity, in so far as it is shown that those amounts are linked to the taxable activity of the taxable person. The Grand Duchy of Luxembourg infers from this that, for the purposes of determining whether there is a right of deduction, it is necessary to identify the entity which in fact bears those amounts and to determine whether there is a link between those amounts and the taxable activity of the taxable person. In this connection, the Grand Duchy of Luxembourg contends that, although technically invoiced to the IGP, the amounts and the VAT relating to them are borne by the members of the IGP in proportion to the interest held by them in the group.

59 Furthermore, to uphold the second ground for complaint relied on by the Commission would, according to the Grand Duchy of Luxembourg, effectively undermine the principle of fiscal neutrality. Should the members of the IGP be refused the right to deduct VAT and the IGP be unable to recover that tax, those members would bear an additional VAT cost.

60 As regards the requirements relating to holding an invoice, the Grand Duchy of Luxembourg states that the Court recognised, in its judgment of 21 April 2005, *HE* (C-25/03, EU:C:2005:241), the right of a taxable person who does not hold an invoice in his own name to deduct VAT. According to the Grand Duchy of Luxembourg, the requirement to hold an invoice, to be satisfied by the taxable person claiming an exemption, is justified essentially by the low level of risk it is thereby possible to achieve as regards possible double deduction of VAT, fraud or abuse. In this connection, the Grand Duchy of Luxembourg contends that, since IGPs are not entitled to deduct VAT, there is therefore no risk of double deduction of VAT.

Findings of the Court

61 As a preliminary point, it should be noted that it follows from the exemption provided for in Article 132(1)(f) of Directive 2006/112 that the IGP is a taxable person in its own right, separate from its members. It is clear from the very wording of that provision that the IGP is independent, and that it therefore carries out its supplies of services independently, within the meaning of Article 9 of Directive 2006/112. Furthermore, if the services supplied by the IGP were not services supplied by a taxable person acting as such, those services would not be subject to VAT, under Article 2(1)(c) of Directive

2006/112. Those services would therefore not be capable of forming the subject matter of an exemption, such as that set out in Article 132(1)(f) of that directive, as the Advocate General has observed in point 50 of her Opinion.

62 It is in the light of those preliminary considerations that it must be determined whether the Grand-Ducal Regulation is contrary to the second subparagraph of Article 1(2), Article 168(a) and Article 178(a) of Directive 2006/112, in so far as it permits the members of an IGP who carry out transactions subject to VAT to deduct, from the VAT which they are liable to pay in respect of those taxed transactions, the tax invoiced to the IGP or payable by the latter in respect of the goods and services which the IGP received for the purposes of its own activities.

63 In the first place, it should be recalled that, first, under Article 168(a) of Directive 2006/112, a taxable person is entitled to deduct from the VAT which he is liable to pay the VAT due or paid in respect of supplies to him of goods or services carried out by another taxable person. It follows that it is contrary to that provision to permit the members of an IGP to deduct from the VAT which they are liable to pay the VAT due or paid in respect of goods and services supplied to the IGP.

64 That finding is not called in question by the judgment of 18 July 2013, *PPG Holdings* (C-26/12, EU:C:2013:526), relied on by the Grand Duchy of Luxembourg, in which the Court held, in essence, in paragraphs 24 to 26 and 29 of that judgment, that a taxable person who had set up a pension fund in the form of a legally and fiscally separate entity, in accordance with an obligation imposed on that taxable person as an employer by national legislation, was entitled to deduct the VAT he had paid on services relating to the management and operation of that fund. As is apparent from paragraph 25 of that judgment, the taxable person itself in that case had acquired the services in question subject to VAT, for the purpose of the administration of its employees' pensions and the management of the assets of the pension fund set up to safeguard those pensions. It cannot therefore be inferred from that judgment that the members of an IGP are entitled to deduct the VAT on the goods and services acquired by the group, since only the latter may possibly claim a right of deduction of that VAT.

65 Second, the line of argument of the Grand Duchy of Luxembourg alleging a breach of the principle of fiscal neutrality must be rejected. In accordance with that principle, the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities (judgment of 15 September 2016, *Landkreis Potsdam-Mittelmark*, C-400/15, EU:C:2016:687, paragraph 35). The common system of VAT therefore ensures that all economic activities, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way (see, to that effect, judgment of 22 October 2015, *PPUH Stehcemp*, C-277/14, EU:C:2015:719, paragraph 27).

66 Consequently, it is not contrary to the principle of fiscal neutrality to refuse, under Article 168(a) of Directive 2006/112, a right of deduction to the members of an IGP as regards the VAT borne by that group in respect of services provided by latter, which are exempt under Article 132(1)(f) of Directive 2006/112 and which, on that basis, do not give rise to any right of deduction. By contrast, in so far as such an IGP provides services which are not exempt, it must be held that, in accordance with that principle, the group in question, and not its members, is entitled in its own right to deduct the VAT charged on its input transactions.

67 In the second place, it is clear from Article 178(a) of Directive 2006/112, read in conjunction with Article 226(5) and Article 168(a) thereof, that, in order to exercise the right of deduction, the taxable person must hold an invoice on which his name appears as customer. Consequently, by permitting the members of an IGP to deduct from the VAT which they themselves are liable to pay, on the basis of an invoice drawn up in the name of that group, the VAT invoiced to the latter, the Luxembourg legislation is contrary to Article 178(a) of Directive 2006/112.

68 It should be observed that the reference made by the Grand Duchy of Luxembourg to the judgment of 21 April 2005, *HE* (C-25/03, EU:C:2005:241), is irrelevant in this connection, since the factual circumstances of the case which gave rise to that judgment were very different from those at issue in the present case. It is clear, in particular, from paragraph 81 of that judgment, that, unlike an IGP, which has the status of a taxable person for the purposes of VAT and all the members of which carry out an economic activity, the community at issue in the case which gave rise to the judgment of 21 April 2005, *HE* (C-25/03, EU:C:2005:241), constituted by the co-ownership in fact formed by the spouses, did not itself have the status of a taxable person for the purposes of VAT and only one of the spouses carried out an economic activity.

69 As to the remainder, however, it should be stated that the Commission has not shown that the Luxembourg legislation in question is contrary to the second subparagraph of Article 1(2) of Directive 2006/112, which sets out the principle that VAT is chargeable on each transaction, without, however, dealing specifically with the right of deduction guaranteed in Article 167 and Article 168(a) of that directive, under the conditions laid down, inter alia, in Article 178 thereof.

70 It follows from the foregoing considerations that Article 4 of the Grand-Ducal Regulation, read in conjunction with the administrative circular in so far as it comments on Article 4 of the Grand-Ducal Regulation, is contrary to Article 168(a) and Article 178(a) of Directive 2006/112 and that, to that extent, the second ground for complaint is well founded. As to the remainder, the second ground for complaint must be rejected.

The third ground for complaint, alleging failure to comply with Article 14(2)(c) and Article 28 of Directive 2006/112

Admissibility of the third ground for complaint

– Arguments of the parties

71 The Grand Duchy of Luxembourg contends that the third ground for complaint must be rejected as inadmissible since it relates exclusively to the COBMA note. It states that an action for failure to fulfil obligations must concern a failure to fulfil obligations attributable to the Member State concerned. It submits that the Commission has not shown that the COBMA is an organ of the State that exercises the prerogatives of a public authority.

72 The Commission submits that the wording of the COBMA note indicates that the Registration and Land Authority, which is an organ of the State, is the co-author of the document. In addition, it claims that the content of that note confirms that it does not concern mere recommendations or advice for operators, but rather the manner in which the legislation relating to IGPs is to be interpreted and applied in a harmonised way. In any event, the Commission submits that the COBMA note sets out the general practice of the Luxembourg tax authorities.

– Findings of the Court

73 It should be recalled that an administrative practice of a Member State can be made the object of an action for failure to fulfil obligations when it is, to some degree, of a consistent and general nature (judgment of 22 September 2016, *Commission* v *Czech Republic*, C-525/14, EU:C:2016:714, paragraph 14). The Grand Duchy of Luxembourg has, however, not disputed the Commission's argument that the COBMA note sets out the general practice of the Luxembourg tax authorities.

74 It follows that the third ground for complaint relates to a failure to fulfil obligations attributable to the Grand Duchy of Luxembourg and that, therefore, the plea of inadmissibility regarding it must be rejected.

Substance

– Arguments of the parties

75 The Commission observes that, under the COBMA note, the allocation to the IGP, by one of its members, of expenses incurred by that member in his name but on behalf of the IGP is a transaction which is excluded from the scope of VAT.

76 However, according to the Commission, such a transaction does fall within the scope of VAT under Article 14(2)(c) and Article 28 of Directive 2006/112. According to the Commission, each acquisition of goods or services carried out on behalf of the IGP by one of its members in his own name must, for VAT purposes, be regarded as two identical supplies of goods or services, provided consecutively and which fall within the scope of VAT. In this connection, it relies on the judgment of 14 July 2011, *Henfling and Others* (C-464/10, EU:C:2011:489).

77 As a preliminary point, the Grand Duchy of Luxembourg states that the passage in the COBMA note complained about does not concern IGPs which have legal personality, but only those which do not have such personality.

78 The Grand Duchy of Luxembourg contends that the analogy drawn by the Commission between the case which gave rise to the judgment of 14 July 2011, *Henfling and Others* (C-464/10, EU:C:2011:489), and the present case is irrelevant, since the two situations are substantially different. In this connection, it states that an IGP which does not have legal personality cannot act independently, but only through a member acting on its behalf, and that the transactions between an IGP and that member are not necessarily transactions between two separate taxable persons. In that context, the Grand Duchy of Luxembourg draws a parallel with common funds, within the meaning of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), which also may act only through their management company and are therefore excluded from the scope of VAT.

79 The Grand Duchy of Luxembourg submits that the relationship between the members of an IGP and the latter may, depending on the contractual stipulations of the IGP created, be analogous to that of the members of a consortium, such as found by the Court in the judgment of 29 April 2004, *EDM* (C-77/01, EU:C:2004:243). In that case, the Court held that the operations performed in connection with a consortium 'for its account' by each of its members did not constitute taxable transactions.

– Findings of the Court

80 As a preliminary point, as regards the scope of the disputed passage in the COBMA note, it must be stated that it is not unequivocally clear from the wording of that passage that it relates solely to the situation of IGPs which do not have legal personality, as the Grand Duchy of Luxembourg maintains. However, as the Commission maintains, the passage in that note, namely 'where a direct relationship between the group and the third parties may not be entered into for commercial or legal reasons', seems to indicate that that is not the case. Nevertheless, and in any event, whether that passage applies to IGPs which have legal personality has no bearing on the analysis of the third ground for complaint.

81 The third ground for complaint concerns the situation in which the member of an IGP acquires goods or services in his name but on behalf of the IGP.

82 As is clear from paragraph 61 of this judgment, the IGP is a taxable person in its own right, separate from its members, who are also taxable persons. Consequently, the transactions between the IGP, which acts independently, and one of its members are to be regarded as transactions between two taxable persons which fall within the scope of VAT. The argument of the Grand Duchy of Luxembourg that the transactions between an IGP and one of its members are not necessarily transactions between two separate taxable persons, since the former may act only through one of its members, and the parallel drawn in that context with common funds, are therefore irrelevant to the present case.

83 It follows that the allocation to the IGP, by one of its members, of expenses incurred by that member in his name but on behalf of the IGP is a transaction which falls within the scope of VAT.

84 That finding is confirmed by Article 14(2)(c) and Article 28 of Directive 2006/112, provisions which the Commission claims have been infringed under the third ground for complaint.

85 Article 28 of Directive 2006/112 provides that where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he is to be deemed to have received and supplied those services himself.

86 Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself (judgment of 14 July 2011, *Henfling and Others*, C-464/10, EU:C:2011:489, paragraph 35).

87 Since Article 28 of Directive 2006/112 comes under Title IV of that directive, entitled 'Taxable transactions', the two supplies of services concerned fall within the scope of VAT. It follows that, if the supply of services in which an operator takes part is subject to VAT, the legal relationship between that operator and the operator on behalf of whom it acts is also subject to VAT (see, by analogy, judgment of 14 July 2011, *Henfling and Others*, C-464/10, EU:C:2011:489, paragraph 36).

88 The same reasoning applies as regards the acquisition of goods pursuant to a contract under which commission is payable on purchase, under Article 14(2)(c) of Directive 2006/112, which also comes under Title IV of that directive. That provision thus creates the legal fiction of two identical supplies of goods made consecutively, which fall within the scope of VAT.

89 Consequently, where the member of an IGP acquires, in his name but on behalf of the IGP, goods under Article 14(2)(c) of Directive 2006/112, or services under Article 28 thereof, the reimbursement by the group of the expenses relating thereto is a transaction which falls within the scope of VAT.

90 The analogy with the case which gave rise to the judgment of 29 April 2004, *EDM* (C-77/01, EU:C:2004:243), relied on by the Grand Duchy of Luxembourg, must also be rejected. Unlike the consortium at issue in that case, the IGP is, as is clear from paragraphs 61 and 82 of this judgment, a taxable person separate from its members.

91 Consequently, by providing that the allocation to the IGP, by one of its members, of expenses incurred by that member in his name but on behalf of the IGP is a transaction which is excluded from the scope of VAT, the COBMA note is contrary to Article 14(2)(c) and Article 28 of Directive 2006/112, and, therefore, the third ground for complaint is well founded.

92 It follows from all the foregoing considerations that, by providing for the VAT regime applicable to IGPs, as defined, first, in Article 44(1)(y) of the Law on VAT, read in conjunction with Article 2(a) and Article 3 of the Grand-Ducal Regulation, second, in Article 4 of that regulation, read in conjunction with the administrative circular in so far as it comments on Article 4 of that regulation, and, third, in the COBMA note, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 2(1)(c), Article 132(1)(f), Article 168(a), Article 178(a), Article 14(2)(c) and Article 28 of Directive 2006/112.

Costs

93 Under Article 138(1) of the Rules of Procedure of the Court, 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 Grand Duchy of Luxembourg has been unsuccessful in the majority of its pleas, the latter must be ordered to pay the costs.

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

1. **Declares that by providing for the value added tax (VAT) regime applicable to independent groups of persons, as defined, first, in Article 44(1)(y) of the consolidated text of the loi du 12 février 1979 concernant la taxe sur la valeur ajoutée (Law of 12 February 1979 on value added tax), read in conjunction with Article 2(a) and Article 3 of the règlement grand-ducal du 21 janvier 2004 relatif à l'exonération de la TVA des prestations de services fournies à leurs membres par des groupements autonomes de personnes (Grand-Ducal Regulation of 21 January 2004 on the exemption from VAT of supplies of services by independent groups of persons to their members), second, in Article 4 of that regulation, read in conjunction with circulaire administrative nº707, du 29 janvier 2004 (administrative circular No 707 of 29 January 2004), in so far as it comments on Article 4 of that regulation, and, third, in the note of 18 December 2008 drafted by the working group within the comité d'observation des marchés (Market Observation Committee, COBMA) with agreement from the administration de l'Enregistrement et des Domaines (Registration and Land Authority), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 2(1)(c), Article 132(1)(f), Article 168(a), Article 178(a), Article 14(2)(c) and Article 28 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Grand Duchy of Luxembourg to pay the costs.**

[Signatures]