Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 September 2014*

(Reference for a preliminary ruling — Freedom of establishment — Freedom to provide services — Undertakings for collective investment in transferable securities (UCITS) — Directive 85/611/EEC — Article 45 — Concept of 'payments to unit-holders' — Delivery to unit-holders of certificates for registered units)

In Case C-88/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Belgium), made by decision of 24 January 2013, received at the Court on 22 February 2013, in the proceedings

**Philippe Gruslin**

v

**Beobank SA**, formerly Citibank Belgium SA,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça (Rapporteur), G. Arestis, J.-C. Bonichot, and A. Arabadjiev, Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2013,

after considering the observations submitted on behalf of:

— Mr Gruslin, by L. Misson and J. Meyer, avocats,

— Beobank SA, formerly Citibank Belgium SA, by M. van der Haegen and A. Fontaine, avocats,

— the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the European Commission, by J. Hottiaux, J. Rius and A. Nijenhuis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2014,

* Language of the case: French.

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3), as amended by European Parliament and Council Directive 95/26/EC of 29 June 1995 (OJ 1995 L 168, p. 7) ('the UCITS Directive').

2 The request has been made in proceedings between Mr Gruslin and Beobank SA, formerly Citibank Belgium SA ('Beobank'), concerning the delivery of certificates for registered units in the Citiportfolios common investment fund ('the Citiportfolios fund').

## Legal context

### *EU law*

3 The UCITS Directive was amended on a number of occasions before being repealed by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions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 recast the UCITS Directive. None the less, it is the UCITS Directive which was applicable at the material time.

4 The second to fifth recitals in the preamble to the UCITS Directive, in the version in force at the material time, stated:

'Whereas national laws governing collective investment undertakings should be coordinated with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders; whereas such coordination will make it easier for a collective investment undertaking situated in one Member State to market its units in other Member States;

Whereas the attainment of these objectives will facilitate the removal of the restrictions on the free circulation of the units of collective investment undertakings in the Community, and such coordination will help to bring about a European capital market;

Whereas, having regard to these objectives, it is desirable that common basic rules be established for the authorisation, supervision, structure and activities of collective investment undertakings situated in the Member States and the information they must publish;

Whereas the application of these common rules is a sufficient guarantee to permit collective investment undertakings situated in Member States, subject to the applicable provisions relating to capital movements, to market their units in other Member States without those Member States' being able to subject those undertakings or their units to any provision whatsoever other than provisions which, in those states, do not fall within the field covered by this Directive; whereas, nevertheless, if a collective investment undertaking situated in one Member State markets its units in a different Member State it must take all necessary steps to ensure that unit-holders in that other Member State can exercise their financial rights there with ease and are provided with the necessary information.'

5 Article 1(6) of the UCITS Directive provided:

‘Subject to the provisions governing capital movements and to Articles 44, 45 and 52(2) no Member State may apply any other provisions whatsoever in the field covered by this Directive to [undertakings for collective investment in transferable securities (UCITS)] situated in another Member State or to the units issued by such UCITS, where they market their units within its territory.’

6 Under Article 4(1) of that directive:

‘No UCITS shall carry on activities as such unless it has been authorised by the competent authorities of the Member State in which it is situated ...

Such authorisation shall be valid for all Member States.’

7 Under Section VIII of the UCITS Directive, entitled ‘Special provisions applicable to UCITS which market their units in Member States other than those in which they are situated’, Article 44(1) thereof provided:

‘A UCITS which markets its units in another Member State must comply with the laws, regulations and administrative provisions in force in that State which do not fall within the field governed by this Directive.’

8 Article 45 of that directive was worded as follows:

‘In the case referred to in Article 44, the UCITS must, inter alia, in accordance with the laws, regulations and administrative provisions in force in the Member State of marketing, take the measures necessary to ensure that facilities are available in that State for making payments to unit-holders, re-purchasing or redeeming units and making available the information which UCITS are obliged to provide.’

9 Section 1.10 of column 1, entitled ‘Information concerning the unit trust’, of Schedule A in the Annex to the UCITS Directive, was worded as follows:

‘Details of the types and main characteristics of the units and in particular:

— the nature of the right (real, personal or other) represented by the unit,

— original securities or certificates providing evidence of title; entry in a register or in an account,

— characteristics of the units: registered or bearer. ...

...’

*Belgian law*

10 The second paragraph of Article 138 of the Law of 4 December 1990 on financial transactions and financial markets (*Moniteur belge*, 22 December 1990, p. 23800, ‘the Law of 4 December 1990’), in the version in force at the material time, provided:

‘The investment undertaking referred to in the first paragraph must designate an undertaking as referred to in Article 3(1) or (2) to ensure that units are distributed to unit-holders, sold or redeemed and that the information which the investment undertaking is required to provide is made available.’

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

11 It is apparent from the order for reference and from the file submitted to the Court that the Citiportfolios fund is a common investment fund governed by Luxembourg law which is managed by Citiportfolios, a company governed by Luxembourg law, and its depository bank is Citibank Luxembourg, a company governed by Luxembourg law.

12 The prospectus of the Citiportfolios fund was distributed in Belgium by Beobank in its capacity as the undertaking designated by Citiportfolios in accordance with the second paragraph of Article 138 of the Law of 4 December 1990.

13 Mr Gruslin, a Belgian national, resident in Belgium, invested in the Citiportfolios fund between 12 and 24 January 1996 by subscribing to units directly with Citibank Luxembourg. Beobank was not involved as a subscription domicile and received no commission in that capacity.

14 On 9 September 1996, Citibank Luxembourg terminated, with effect from 17 September 1996, all its accounts and business relationships with Mr Gruslin and asked him to withdraw by that date all funds and securities remaining in his accounts. He was notified that, in the absence of any instructions regarding the transactions to be carried out for the purpose of liquidating the units in the Citiportfolios fund, those units would be registered in his name in the issuer's register of unit-holders. On 14 October 1996, having received no instructions from Mr Gruslin, Citibank Luxembourg registered the units in that register.

15 In December 1996, Mr Gruslin wrote to Beobank seeking delivery of the certificates providing evidence of title to the units which were registered in his name in the register of unit-holders relating to the Citiportfolios fund. Beobank replied that, as the units had been bought directly from Citibank Luxembourg, there was no record of them in the file relating to Mr Gruslin held by Beobank. Beobank indicated to Mr Gruslin that it was forwarding the file to Citibank Luxembourg for further action.

16 On 14 January 2008, Mr Gruslin initiated proceedings before the tribunal de commerce de Bruxelles (Commercial Court, Brussels) seeking an order requiring Beobank to deliver those certificates in order to be able to prove ownership of the units to which he had subscribed. As he was unsuccessful in the proceeding before that court, he brought an appeal against its decision, relying in particular on the second paragraph of Article 138 of the Law of 4 December 1990.

17 By judgment of 11 January 2011, the cour d'appel de Bruxelles (Court of Appeal, Brussels) dismissed Mr Gruslin's action seeking delivery of the certificates at issue as unfounded. It noted, inter alia, that, as the second paragraph of Article 138 of the Law of 4 December 1990 transposed into Belgian law Article 45 of the UCITS Directive, the term 'distribution' used in that provision was to be understood as referring not to the delivery of unit certificates, as submitted by Mr Gruslin, but to 'payments' to unit-holders.

18 Mr Gruslin appealed on a point of law against that judgment. In support of that appeal, he asserted, inter alia, that, under the second paragraph of Article 138 of the Law of 4 December 1990, the delivery of unit certificates forms part of the tasks entrusted to Beobank in relation to the Citiportfolios fund.

19 In those circumstances, the Court of Cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 45 of the [UCITS] Directive to be interpreted as meaning that the concept of "payments to unit-holders" also refers to the delivery to unit-holders of certificates for registered units?'

**The request to have the oral part of the procedure reopened**

20 By document of 6 March 2014, received at the Court Registry on 10 March 2014, and following the Opinion of the Advocate General of 13 February 2014, Mr Gruslin requested, on the basis of Article 83 of the Rules of Procedure of the Court of Justice, the reopening of the oral part of the procedure, maintaining, in essence, that, in point 48 of his Opinion, the Advocate General had referred to a novel legal principle, which was not addressed by the parties in their submissions.

21 Firstly, under Article 83 of its Rules of Procedure, the Court may order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

22 Secondly, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General's involvement. In carrying out that task, the Advocate General may, where appropriate, analyse a request for a preliminary ruling by placing it within a context which is broader than that strictly defined by the referring court or by the parties to the main proceedings. Since the Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based, it is not absolutely necessary to reopen the oral part of the procedure each time the Advocate General raises a point of law which was not the subject of debate between the parties (the judgment in *Pohotovosť*, C-470/12, EU:C:2014:101, paragraph 22 and the case-law cited).

23 In the present case, having heard the Advocate General, the Court considers that it has all the information necessary to answer the question referred and that the observations submitted before it, inter alia by Mr Gruslin, related to that information.

24 The request that the oral part of the procedure be reopened must therefore be rejected.

**Consideration of the question referred**

25 By its question, the referring court essentially asks whether the obligation laid down in Article 45 of the UCITS Directive, under which a UCITS which markets its units within the territory of a Member State other than that in which it is situated is required to make payments to unit-holders in the Member State of marketing, must be interpreted as including the delivery to unit-holders of certificates providing evidence of title to units which are registered in their name in the register of unit-holders kept by the issuer.

*Admissibility*

26 The European Commission has expressed doubts as to the admissibility of the question referred, on the ground, essentially, that Mr Gruslin went to Luxembourg in person to subscribe to the units in question directly with Citibank Luxembourg, whereas the objective pursued by the UCITS Directive is to protect unit-holders who make investments by resorting to an intermediary established in a Member State other than that where the UCITS is located. That directive is, therefore, not necessarily applicable to the dispute in the main proceedings.

27 According to the Court's settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court and national courts by means of which the former provides the latter with the criteria for the interpretation of EU law which they need in order to decide the disputes before them (see, inter alia, the judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 29 and the case-law cited).

28 Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, the judgment in *Fish Legal and Shirley*, EU:C:2013:853, paragraph 30 and the case-law cited).

29 It is not disputed, first, that the Citiportfolios fund is located in Luxembourg and that its units were marketed in Belgium. Secondly, the second paragraph of Article 138 of the Law of 4 December 1990 sought to transpose into Belgian law Article 45 of the UCITS Directive and Mr Gruslin relied on those provisions to obtain delivery of the certificates at issue in the main proceedings. Consequently, as noted by the Advocate General in point 22 of his Opinion, it is not apparent that the question referred for a preliminary ruling, which relates only to the interpretation of that article, bears no relation to the actual facts of the main action or its purpose.

30 It follows from the foregoing that the question referred for a preliminary ruling is admissible.

*Substance*

31 The UCITS Directive does not define the term 'payments to unit-holders' included in Article 45 thereof.

32 The Court has consistently held that it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of the provision and the objective pursued by the legislation in question (the judgment in *Fish Legal and Shirley*, EU:C:2013:853, paragraph 42 and the case-law cited).

33 It follows from the second to fourth recitals in the preamble to the UCITS Directive that, in order to ensure that UCITS units are marketed freely within the European Union, the UCITS Directive seeks to coordinate national laws governing UCITS, in order, first, to approximate, within the European Union, the conditions of competition between those undertakings, and, secondly, to ensure more effective and more uniform protection for unit-holders. To that end, the UCITS Directive establishes common basic rules governing the authorisation, supervision, structure, and activities of UCITS and the information which they must publish.

34 It is apparent from Article 1(6) of the UCITS Directive, read in conjunction with the fifth recital in the preamble thereto, that the free marketing of units in UCITS within the European Union entails, for UCITS located in one Member State, the possibility of marketing their units in another Member State without that other Member State being able to subject them to any other provision whatsoever in the fields covered by the UCITS Directive.

35 Thus, in accordance with Article 4(1) of that directive, no UCITS may carry on activities as such unless it has been authorised by the competent authorities of the Member State in which it is situated and that authorisation is valid in all other Member States.

36 Similarly, Article 44(1) of the UCITS Directive provides that, where a UCITS markets its units in a Member State other than that in which it is situated, it must comply with the laws, regulations and administrative provisions in force in that State which do not fall within the area covered by the UCITS Directive.

37 However, in that same situation, Article 45 of that directive provides that the UCITS must, inter alia, take the measures necessary to ensure that facilities are available in that State for making payments to unit-holders, re-purchasing or redeeming units and making available the information which UCITS are obliged to provide. That provision states that those measures must be taken in accordance with the laws, regulations and administrative provisions in force in the Member State of marketing.

38 It is apparent from the fifth recital in the preamble to the UCITS Directive that Article 45 of that directive seeks to ensure that mechanisms are in place to enable unit-holders to exercise their financial rights with ease in the Member State in which they are marketed and that the information which UCITS must provide to unit-holders is made available in that Member State.

39 It should be noted in that context that, even if a host of services, referred to by Beobank in its submissions, may be linked to the subscription to and holding of units in a UCITS, it none the less follows from the wording of Article 45 of the UCITS Directive that that undertaking is required only to ensure that facilities are available in the Member State in which they are marketed for making payments to unit-holders, re-purchasing or redeeming units and making available information.

40 Consequently, it is clear that the EU legislature considered that it is both necessary and sufficient, for the purpose of ensuring more effective and uniform protection for unit-holders, to require UCITS to ensure that the services referred to in the previous paragraph are provided to the unit-holders in the Member State in which the units are marketed.

41 In particular, the provisions of the UCITS Directive which govern the financial rights of unit-holders and the obligations UCITS are under to make information available to unit-holders do not contain any provision as to the rules governing evidence of title, the holding or movement of units in a UCITS, or as to the proof of ownership of units for the purpose of enabling the holder to exercise the rights attached to them.

42 As noted both by the Advocate General in point 32 of his Opinion and by the Commission, the form in which a unit is issued is intrinsically linked to the way in which ownership of units may be proved and the related rights exercised.

43 In that regard, it should also be noted that Section 1.10 of column 1, entitled ‘Information concerning the unit trust’, of Schedule A in the Annex to the UCITS Directive lists the information to be provided to unit-holders in relation to the type and main characteristics of the units to be issued by UCITS, including the form in which evidence of title is provided, that is, whether it is provided by a physical security, by a certificate providing evidence of title, or by registration in a register or account, as well as an indication as to whether the units are to be issued in a nominative form or to the bearer.

44 Consequently, as noted by the Advocate General in point 29 of his Opinion, it must be concluded that the UCITS Directive does not govern the fields referred to above; it merely lays down an obligation to make information available to unit-holders in that regard.

45 A unit-holder may not, therefore, rely on Article 45 of that directive, in particular on the obligation a UCITS is under to ensure facilities are available for making payments to unit-holders in the Member State of marketing, in order to ensure that the finance department of that undertaking delivers a certificate providing evidence of title to the units to which the unit-holder subscribed.

46 That interpretation is supported by Article 19(3)(m) of Directive 2009/65, read in conjunction with recital 22 of the preamble thereto. It is made expressly clear in those provisions that the content of the register of unit-holders, the manner in which the register is maintained and its location are governed either by the rules of the Member State of origin of the UCITS, or the organisational arrangements of that undertaking's management company.

47 In the light of all the foregoing, the answer to the question referred is that the obligation laid down in Article 45 of the UCITS Directive, under which a UCITS which markets its units within the territory of a Member State other than that in which it is situated is required to make payments to unit-holders in the Member State of marketing, must be interpreted as not including the delivery to unit-holders of certificates providing evidence of title to units which are registered in their name in the register of unit-holders kept by the issuer.

## 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 (Second Chamber) hereby rules:

**The obligation laid down in Article 45 of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended by European Parliament and Council Directive 95/26/EC of 29 June 1995, under which an undertaking for collective investment in transferable securities which markets its units within the territory of a Member State other than that in which it is situated is required to make payments to unit-holders in the Member State of marketing, must be interpreted as not including the delivery to unit-holders of certificates providing evidence of title to units which are registered in their name in the register of unit-holders kept by the issuer.**

[Signatures]