

Case C-786/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 October 2019

Referring court:

Finanzgericht Köln (Germany)

Date of the decision to refer:

22 February 2019

Applicant:

The North of England P & I Association Ltd., at the same time acting as legal successor for Marine Shipping Mutual Insurance Company

Defendant:

Bundeszentralamt für Steuern (Federal Central Tax Office)

Subject matter of the main proceedings

Insurance tax in respect of seagoing vessels — Ships registered in Germany in the register of seagoing vessels, but flying the flag of another State — Linking the tax liability under national law solely to the entry in the register — Compatibility with Directive 88/357

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred

Is the second indent of Article 2(d) in conjunction with the first clause of Article 25(1) of Directive 88/357/EEC and/or Article 46(2) of Directive 92/49/EEC with regard to the determination of the Member State where the risk is

situated to be interpreted as meaning that, in the case of safeguarding against risks in connection with the operation of a seagoing vessel, the State concerned is the State in whose territory a seagoing vessel is entered in an official register for the purposes of proof of ownership, or the State whose flag is flown by the seagoing vessel?

Provisions of international law cited

United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982, specifically Articles 91 and 94

Provisions of EU law cited

Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, specifically the second indent of Article 2(d) in conjunction with Article 25(1)

Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357 (third non-life insurance Directive), specifically Article 46(2)

Provisions of national law cited

Versicherungsteuergesetz (Insurance tax law) in the version of the new publication of 10 January 1996 (VersStG 1996), specifically Paragraph 1(2) (sentence 2 point 2)

Brief summary of the facts and procedure

- 1 The applicant is an insurer established in the United Kingdom and providing global marine insurance. It is also the legal successor of Marine Shipping Mutual Insurance Company Limited (MSMI). The applicant and MSMI have underwritten risks in relation to a number of seagoing vessels owned by limited liability companies under German law. The respective seagoing vessels have been assigned what is known as an IMO (International Maritime Organisation) number and are entered in the register of seagoing vessels of the Amtsgericht Hamburg (District Court of Hamburg, Germany).
- 2 The applicant collected insurance premiums on the basis of these insurance contracts. German insurance taxes were not paid in this regard.

- 3 The German Bundesamt für Seeschifffahrt und Hydrographie (Federal Maritime and Hydrographic Agency) agreed that the ships concerned could fly a different national flag, specifically the flag of Liberia or Malta, instead of the (German) federal flag (known as out-flagging (or flagging out)). The seagoing vessels remained entered in the German register of seagoing vessels for the out-flagging period.
- 4 The defendant issued the applicant with an assessment notice regarding insurance tax in respect of the premiums collected. Following an unsuccessful objection, the applicant brought an action against that notice before the referring court (Finanzgericht Köln (Finance Court, Cologne, Germany)).

Principal arguments of the parties in the main proceedings

- 5 The applicant claims that, under the provisions of EU law in the second indent of Article 2(d) of Directive 88/357, the attribution of the right of taxation depended solely on the registration of a vehicle. In the case of ships, the State whose flag a ship was entitled to fly was the State of registration, since the flag States established the quality standards for ships flying their flag and were therefore responsible for the risk associated with the ship.
- 6 The defendant counters this by stating that the German legislature linked the taxation of insurance contracts in connection with vehicles of any kind in Paragraph 1(2) (sentence 2, point 2) of the VersStG 1996 precisely not with the flag sovereignty, but with the entry in a (domestic) register (in this case the register of seagoing vessels) and the existence of a distinguishing mark (in this case the IMO number). Any further registration of the ship, for example in a foreign flag register, was irrelevant.

Brief summary of the basis for the reference

The position under national law

- 7 Under national law, the action would have to be dismissed, as all the conditions for taxation of the insurance premiums collected by the applicant have been met. Under Paragraph 1(2) (sentence 2, point 2) of the VersStG 1996, the tax liability depends *inter alia* on ‘the vehicle being entered in an official or officially recognised register in the territory of application [of the VersStG] and having a distinguishing mark’. Both criteria are met here. In contrast, it is irrelevant in which State the ships have ‘registration’ for trading purposes.
- 8 The out-flagging does nothing to change the insurance obligation, as the entry in the German register of seagoing vessels still continues to exist. The condition of a domestic register entry (‘in the territory of application of this law’) is also not met by an entry in a foreign flag register.

- 9 This interpretation is consistent with the intention of the German legislature and the history of the VersStG 1996. Whilst the original draft law provided that account is taken of the registration, following consultation with the European Commission and agreement with the experts of the other Member States, a link to a register entry and distinguishing mark was ultimately established. The reasoning for that change was that the German version of Directive 88/357 differed significantly from the versions in other official languages of the Union. The *travaux préparatoires* state the following in this regard: ‘For the purpose of clear demarcation, reference should in future be made — in accordance with the regulations provided in other EC countries — not to the registration, but to the entry in an official register (e.g. vehicle register, register of seagoing vessels).’

The position under EU law

- 10 However, the referring court has doubts as to whether the national position is in line with EU law, in particular as taxation is then possible both in the Member State of the register entry and in the Member State of the registration and/or in the flag State.
- 11 EU law (Article 25(1) of Directive 88/357 and/or Article 46(2) of Directive 92/49) attributes the right of taxation to the Member State where the risk is situated. For insurance in relation to registered vehicles pursuant to the second indent of Article 2(d) of Directive 88/357, this is understood as the ‘Member State of registration’. However, those provisions do not contain a definition of the term ‘Member State of registration’.
- 12 The Member State of registration could be the State according to whose law a vehicle is registered for trading in the public sphere. According thereto, in relation to seagoing vessels, the State which establishes the legal standards for the operation of the seagoing vessel in general trade and therefore the framework conditions for the use of the seagoing vessel could be considered the Member State of registration. In view of the general operational risk associated with vehicles, the criterion of registration could also be suitable for clearly geographically locating the risk associated with a vehicle for insurance matters.
- 13 The provisions of the UNCLOS could also support a link to the Member State of registration. Pursuant to Article 91(1) UNCLOS, ships have the nationality of the State whose flag they are entitled to fly. Pursuant to Article 94(1) UNCLOS, every State is to exercise its jurisdiction and control over ships flying its flag. In particular every State is to take such measures for ships flying its flag as are necessary to ensure safety at sea (see Article 94(3) UNCLOS).
- 14 It is also to be taken into consideration that language versions of Directive 88/357 other than the German (such as the English and Italian versions) refer in the second indent of Article 2(d) not to the Member State in which a vehicle is registered, but to the Member State in which it is entered in a register.

- 15 According to the case-law of the Court of Justice too, in relation to the interpretation of the second indent of Article 2(d) of Directive 88/357, it is questionable to what extent account can be taken solely of a register entry regardless of a possible registration of a vehicle for trading.
- 16 On the one hand, it can be inferred from the case-law of the Court of Justice (judgments of 14 June 2001, C-191/99, *Kvaerner*, EU:C:2001:332, and of 17 January 2019, C-74/18, *A.*, EU:C:2019:33, paragraph 29) that concrete and physical, rather than legal criteria should be decisive for the question of the risk situation and therefore of the attribution of the right of taxation, and that there should be a concrete factor corresponding to each risk which would allow it to be localised in a specific Member State (see judgment of 14 June 2001, C-191/99, *Kvaerner*, EU:C:2019:33, paragraph 44).
- 17 On the other hand, the Court of Justice states that the Member State where the risk is situated is the Member State in which the vehicle is registered, even if that is not the Member State in which the vehicle is used (see judgment of 14 June 2001, C-191/99, *Kvaerner*, EU:C:2001:332, paragraph 45).
- 18 In addition, the Court of Justice (judgments of 14 June 2001, C-191/99, *Kvaerner*, EU:C:2001:332, paragraph 46, and of 17 January 2019, C-74/18, *A.*, EU:C:2019:33, paragraph 30) has made it clear that the provision in the final indent of Article 2(d) of Directive 88/357, which goes beyond the special cases regulated in the first to third indents of Article 2(d) of Directive 88/357, ‘has the objective in particular of laying down a residual rule for the determination of the place where a business risk is situated where that risk is not specifically linked to a building, a vehicle or travel. To that end, emphasis is placed on the place where the activity whose risk is covered by the contract is exercised.’