Case C-406/20

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:

28 August 2020

Referring court:

Finanzgericht Köln (Germany)

Date of the decision to refer:

25 August 2020

Applicant:

Phantasialand

Defendant:

Finanzamt Brühl

Subject matter of the main proceedings

Directive 2006/112 – Article 98(2), in conjunction with Annex III(7) – Compatibility with EU law of the differing taxation of fairs and theme parks – Similarity of services – Gathering of evidence on the 'point of view of the average consumer'

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law; Article 267 TFEU

Questions referred

1. Can the listing of fairs and amusement parks in Annex III(7) to Directive 2006/112, in conjunction with Article 98(2) thereof, be relied on as the basis for drawing a distinction in the form of the taxation of a theme park at the standard rate, even though the term 'amusement park' covers both static and mobile fairground undertakings?

2. Is the case-law of the Court of Justice of the European Union, to the effect that different services may be dissimilar on account of their context, applicable to the provision of services by mobile fairground entertainers and by static fairground undertakings in the form of theme parks?

3. In the event that the second question is answered in the negative:

   Does the 'point of view of the average consumer', which, in accordance with the case-law of the Court of Justice of the European Union, is an essential element of the principle of fiscal neutrality, constitute a 'conceptual perspective' not amenable to the gathering of evidence based on expert opinion?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 98(2), in conjunction with Annex III(7)

Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, in particular Article 32

Provisions of national law cited

Umsatzsteuergesetz (Law on turnover tax; 'the UStG'), in particular Paragraph 12(2), point 7(d)

Umsatzsteuer-Durchführungsverordnung (Regulation implementing the UStG; 'the UStDV'), in particular Paragraph 30

Brief presentation of the facts and procedure

1 The applicant is one of the most famous theme parks in Europe. In return for payment of an admission fee, visitors to the theme park acquire the right to use its facilities.

2 The applicant applied for its admissions to be taxed on the basis of Paragraph 12(2), point (7)(d), of the UStG. Under that provision, a reduced rate of VAT of 7% applies to, inter alia, services provided through activities carried on as a fairground entertainer. In accordance with Paragraph 30 of the UStDV, services provided through activities carried on as a fairground entertainer consist of amusements, musical performances, shows or other attractions at fairs, funfairs, traditional shooting fairs or similar events. The defendant refused the application. The action brought before the referring court is directed against that refusal.

Brief presentation of the grounds for the reference

3 It falls to the referring court to determine, inter alia, whether, in accordance with the principle of fiscal neutrality, fairground entertainment services at fairs and similar temporary events, which are taxed at a reduced rate under national law, are similar, from the point of view of the average consumer, to funfair entertainment services in the form of static amusement parks or theme parks, which are taxed at the standard rate.

4 The Bundesfinanzhof (Federal Finance Court, Germany; 'the BFH') has held that the fact that services provided by fairground entertainers at fairs, on the one hand, and services provided by a static amusement park, such as that operated by the applicant, on the other, are treated differently for turnover tax purposes does not infringe the principle of fiscal neutrality.

5 In setting out the reasons for this decision, the BFH stated that a static fairground undertaking whose operations are not time limited could not be regarded as an event similar to a funfair. From the point of view of EU law, there is, in its view, no question in this regard. If the national legislature chooses to avail itself of the discretion granted to it by the categories of supplies set out in Annex III to Directive 2006/112, it is under no obligation to transpose all of the individual categories listed there. In the absence of any similarity between the services in question, there is, by extension, also no infringement of the principle of fiscal neutrality.

The terms 'Jahrmärkte', 'Vergnügungsparks' and 'Freizeitparks'

6 According to the German version of Annex III(7) to Directive 2006/112, 'Jahrmärkte' and 'Vergnügungsparks' are among the services to which reduced rates of tax may be applied in accordance with Article 98 of that directive. The corresponding terms in the English text are 'fairs' for 'Jahrmärkte' and 'amusement parks' for 'Vergnügungsparks', and, in the French text, 'foires' for 'Jahrmärkte' and 'parcs d'attraction' for 'Vergnügungsparks'. By contrast, the German version of Article 32 of Implementing Regulation No 282/2011, which relates to Article 53 of Directive 2006/112, refers only to 'Freizeitpark' as the equivalent term for 'fairs' and 'amusement parks' and for 'foires' and 'parcs d'attraction' respectively.

7 In German language usage, the term 'Freizeitpark' is understood as referring to static fairground undertakings, while the term 'Vergnügungspark' covers both amusement parks which are permanent, in which case they are called 'Freizeitparks', and those that operate on a time-limited basis, which are known as 'Kirmes', 'Jahrmarkt' or 'Volksfest'.

8 The referring court considers it desirable, given the linguistic confusion outlined above, for the Court of Justice to rule on how the terms 'Jahrmärkte', 'Vergnügungsparks' and 'Freizeitparks' in Directive 2006/112 and in

Implementing Regulation No 282/2011 are to be defined and distinguished from one another.

9 The question, given that 'Vergnügungsparks' (amusement parks) may be both static and mobile, is whether the BFH's argument that the distinction between 'Jahrmärkte' (fairs) and 'Vergnügungsparks' (amusement parks) in Annex III(7) to Directive 2006/112 militates in favour of the permissibility of treating [those venues] differently for turnover-tax purposes, can be regarded as valid.

The different contexts of the supplies of services

10 The BFH also invokes the fact that the services provided by a static fairground undertaking in the form of a theme park and those provided by fairground entertainers who carry on their itinerant trade at fairs are dissimilar on account of the different contexts in which the supplies of services are effected. There is, in its view, no doubt that the context of a time-limited funfair or fair is different from that of a static amusement park, including in particular from the point of view of the recipient of the services.

11 The referring court notes in this regard that, in accordance with the case-law of the Court of Justice (judgment of 27 February 2002, *Commission* v *France*, C-302/00, EU:C:2002:123, paragraph 23), the concept of the similarity of services must be interpreted widely.

12 To that effect, the Court of Justice has held (judgment of 10 November 2011, *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 50) that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services in question, as the context of the services to be compared, may, in certain exceptional cases, have the result that that context may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs (see also judgments of 23 April 2009, *TNT Post UK*, C-357/07, EU:C:2009:248, paragraphs 38, 39 and 45, and of 27 February 2014, *Pro Med Logistik and Pongratz*, C-454/12 and C-455/12, EU:C:2014:111, paragraph 52 *et seq.*).

13 The referring court is uncertain whether that case-law is applicable in the present case. Unlike in the situations adjudicated upon by the Court of Justice, the contexts of the two supplies of fairground entertainment services are not characterised by the fact that each supply is governed by different legal framework conditions. Thus, the law does not prescribe, either for fairground undertakings such as that operated by the applicant or for fairground entertainers at fairs, whether they must charge a [single] admission fee for the use of all fairground entertainment services or charge for each fairground entertainment service individually. Moreover, rides at both theme parks and fairs are subject to the same safety standards. Neither does the law prescribe, either for static fairground undertakings or for mobile fairground entertainers, when in the year they must provide their services.

The 'point of view of the average consumer' and the gathering of evidence in this regard

14 The BFH also cites the fact that the differences which, in its view, exist between the supply of services by static fairground undertakings in the form of theme parks and the supply of services by fairground entertainers at fairs exert a not inconsiderable influence on the average consumer's decision to choose one or the other of those supplies of services. Its judgment might support the inference that the essential difference lies not only in the static nature of the fairground entertainment services, but also in the fact that a static fairground undertaking whose operations are not time limited does not serve the purpose of providing all-round public entertainment – as fairground entertainers who travel from one fair to another do – and cannot therefore be classified as an event similar to a funfair.

15 It should be borne in mind that, even in the BFH's view, the average consumer uses fairground entertainment services in both venues, at fairs and in theme parks. It is true that the average consumer will encounter only one fairground undertaking at a theme park, but will encounter a variety of fairground entertainers at a fair. Consequently, there are perceptible differences as regards accessibility in terms of location and opening times and atmosphere. However, it follows from the case-law of the Court of Justice (judgments of 10 November 2011, *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 47, and of 17 February 2005, *Linneweber and Akritidis*, C-453/02 and C-462/02, EU:C:2005:92, paragraphs 29 and 30) that those aspects, which must be distinguished from the legal context of the supply of services, are of no relevance to the question of the comparability of the services.

16 The referring court takes the view that, on the assumption that there is no difference between the context of the services provided by mobile fairground entertainers at fairs and [that of the services provided by] static fairground undertakings such as the applicant's theme park, the key criterion is, from the point of view of the current average consumer, which needs are met at fairs, on the one hand, and at a theme park, on the other, and whether they are met to the same extent at a fair and at a theme park.

17 Once those needs have been clarified, it would be necessary to determine whether, for the average consumer, fairground entertainment services at fairs and in theme parks meet the same needs in terms of the similarity and comparability of their use, and whether or not any differences between them have a significant influence on the decision of the average consumer to choose the services available at a fair or in a theme park (judgments of 10 November 2011, *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 44; of 11 September 2014, *K*, C-219/13, EU:C:2014:2207, paragraph 25; and of 9 November 2017, *AZ*, C-499/16, EU:C:2017:846, paragraph 31).

18 The referring court considers that it would be able to make that determination only by seeking an expert opinion, since its own expertise is not so extensive as to

afford it an understanding of the needs of the average fair and theme park visitor that is as comprehensive as it needs to be.

19 It is questionable, however, whether the referring court is entitled to gather such evidence. The BFH – unlike the Bundesverwaltungsgericht (Federal Administrative Court, Germany), whose position is in line with that of the Court of Justice (judgment of 16 July 1998, *Gut Springenheide and Tusky*, C-210/96, EU:C:1998:369, paragraphs 14, 15 and 35) – has held that gathering evidence based on empirical studies into the 'point of view of the average consumer' on two supplies of services in the context of the principle of fiscal neutrality is unnecessary, since such views represent only a conceptual perspective.

20 However, the meaning of the concept of 'conceptual perspective' is unclear to the adjudicating Chamber. If it is supposed to mean that the 'point of view of the average consumer' is an objectified consumer concept that is amenable to legal interpretation alone, this would not explain why the point of view of the financial courts or the BFH should ultimately become the 'point of view of the average consumer', when it is the average consumer's point of view that falls to be determined in the context of an examination of the principle of fiscal neutrality in a given dispute (see, in this regard, judgment of 19 December 2019, *Segler-Vereinigung Cuxhaven*, C-715/18, EU:C:2019:1138, paragraph 37).