

- (a) that a challenge before a court to the procedural legality of decisions to which the provisions of this Directive on public participation are applicable can be successful and lead to the decision being set aside only if, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural error and if, at the same time, the procedural error affected a substantive legal position to which the applicant was entitled, or
- (b) that, in a challenge before a court to procedural legality, procedural errors in decisions to which the provisions of the Directive on public participation are applicable must be considerable on a wider scale?

If it is necessary to answer the above question as in b):

Which substantive requirements should apply to procedural errors, in order for these to be taken into account in challenges before a court to the procedural legality of the decision in favour of an applicant?

⁽¹⁾ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC — Statement by the Commission. (OJ L 156, p. 17).

⁽²⁾ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. (OJ L 175, p. 40).

Action brought on 13 February 2012 — European Commission v French Republic

(Case C-76/12)

(2012/C 133/29)

Language of the case: French

Parties

Applicant: European Commission (represented by: W. Roels and C. Soulay, Agents)

Defendant: French Republic

Form of order sought

— declare that, by maintaining in force a tax regime which exempts from tax dividends paid by a French company to investment funds established in France, whereas the same dividends distributed to investment funds established in another Member State of the European Union or of the European Economic Area are subject to a withholding tax, the French Republic has failed to fulfil its obligations under Article 63 of the Treaty on the Functioning of the European Union and Article 40 of the Agreement on the European Economic Area;

— order the French Republic to pay the costs.

Pleas in law and main arguments

By its action, the Commission challenges the difference in the tax treatment of dividends paid by French companies to undertakings for collective investment in transferable securities (UCITS) depending on whether those UCITS are resident or non-resident in France. One of the elements of the tax regime applied to UCITS resident in France is the fact that the latter are not subject to tax in respect of dividends distributed to them by French companies. By contrast, pursuant to Article 119a (2) of the French General Tax Code (Code général des impôts), a withholding tax is applied to dividends distributed by French companies to non-resident UCITS. The Commission takes the view that the differing tax treatment applied to resident and to non-resident UCITS, although they are in an objectively comparable situation irrespective of their State of residence, constitutes an obstacle to the free movement of capital, and that that obstacle is not justified by the effectiveness of fiscal supervision or by the need to safeguard a balanced apportionment of the power to tax.

The Commission notes that, according to settled case-law as set out in particular in the judgments in Case C-540/07 *Commission v Italy* [2009] ECR I-10983 and Case C-284/09 *Commission v Germany* [2011], the Court has held that Member States which subject dividends distributed to companies established in other Member States to a tax regime which is less favourable than that applied to dividends distributed to resident companies, without that difference in treatment being justified by objectively different situations or by overriding reasons in the general interest, have failed to fulfil their obligations in respect of the free movement of capital.

Reference for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 14 February 2012 — Evita-K EOOD v Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’, Sofia

(Case C-78/12)

(2012/C 133/30)

Language of the case: Bulgarian

Referring court

Administrativen sad Sofia-grad

Parties to the main proceedings

Applicant: Evita-K EOOD

Defendant: Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’, Sofia

Questions referred

1. Is the concept of 'supply of goods' within the meaning of Article 14(1) of Council Directive 2006/112/EC⁽¹⁾ of 28 November 2006 on the common system of value added tax in conjunction with Article 345 of the Treaty on the Functioning of the European Union to be interpreted as meaning that, in the circumstances of the main proceedings, it allows the person to whom a supply is made to acquire the right to dispose of the goods (movable property specified only by type) by acquiring the ownership of those goods from a non owner through bona fide possession acquired for consideration, which is permissible under the national law of the Member State, although it should be borne in mind that, under that law, the right of ownership of such property is transferred by delivery?
2. Does proof of effecting a 'supply of goods' within the meaning of Article 14(1) of Directive 2006/112 with respect to a specific invoice in connection with the exercise of the right under Article 178(a) of the Directive to deduct the tax actually paid and shown in that invoice presuppose that the person to whom the supply is made demonstrates the supplier's rights of ownership where the supply relates to movable property specified according to its type and under the national law of the Member State the right of ownership of such property is transferred by delivery, although under that law the acquisition of the right of ownership of such property by bona fide possession acquired for consideration from a non owner is also permitted?

Is a 'supply of goods' for the purposes of deduction of input tax within the meaning of the Directive to be regarded as proved where, in the circumstances of the main proceedings, the person to whom the supply is made has effected a subsequent supply of the same goods (animals subject to compulsory identification) by exportation with the submission of a customs declaration and there is no evidence of rights of third parties in those goods?

3. For the purposes of demonstrating that a 'supply of goods' within the meaning of Article 14(1) of Directive 2006/112 has been effected with respect to a specific invoice in connection with the exercise of the right under Article 178(a) of the Directive to deduct the tax actually paid and shown in that invoice, must it be assumed that the supplier and the person to whom the supply is made, who are not agricultural producers, are acting in bad faith where, on receipt of the goods, no document mentioning the animals' ear tags in accordance with the requirements of European Union veterinary legislation was provided by the previous owner, and the animals' ear tags are not mentioned in the veterinary certificate which was issued by an administrative authority and which accompanies the animals during transport in order to effect the specific supply?

Where the supplier and the person to whom the supply is made have independently made lists of the ear tags, must it then be assumed that they have complied with the requirements of that European Union veterinary legislation

if the administrative authority has not shown the animals' ear tags in the veterinary certificate which accompanies the animals during their shipment?

4. Are the supplier and the person to whom the supply is made in the main proceedings, who are not agricultural producers, required under Article 242 of Directive 2006/112 to show the goods supplied (animals subject to compulsory identification or 'biological assets') in their accounts pursuant to International Accounting Standard 41, Agriculture, and to prove control of the assets in accordance with that standard?
5. Does Article 226(6) of Directive 2006/112 require the ear tags of the animals, which are subject to compulsory identification under the European Union veterinary legislation and are the goods supplied, also to be shown in VAT invoices such as those at issue in the main proceedings where the national law of the Member State does not expressly lay down such a requirement for the transfer of the right of ownership of such animals and the persons involved in the supply are not agricultural producers?
6. Is it permissible under Article 185(1) of Directive 2006/112, on the basis of a national provision such as that in the main proceedings, to adjust the deduction of input tax on account of the conclusion that the supplier's right of ownership of the goods which are the content of the supply was not proved, where the supply was not cancelled by any of the persons involved in it, the person to whom the supply was made effected a subsequent supply of the same goods, there is no evidence of rights claimed by third parties in those goods (animals subject to compulsory identification), no bad faith on the part of the person to whom the supply was made is alleged and under the law of the Member State the right of ownership of such goods specified only according to their type is transferred by delivery?

⁽¹⁾ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

Reference for a preliminary ruling from the Verwaltungsgericht Berlin (Germany) lodged on 17 February 2012 — Ezatollah Rahmanian Koushkaki v Federal Republic of Germany

(Case C-84/12)

(2012/C 133/31)

Language of the case: German

Referring court

Verwaltungsgericht Berlin

Parties to the main proceedings

Applicant: Rahmanian Koushkaki

Defendant: Federal Republic of Germany