

JUDGMENT OF THE COURT (Sixth Chamber)

29 April 2004 *

In Case C-338/01,

Commission of the European Communities, represented by R. Lyal, acting as Agent, with an address for service in Luxembourg,

applicant,

supported by

European Parliament, represented by R. Passos and A. Baas, acting as Agents, with an address for service in Luxembourg,

intervener,

v

Council of the European Union, represented by M. Sims-Robertson and F. Florindo Gijón, acting as Agents,

defendant,

* Language of the case: English.

supported by

Ireland, represented by D. O'Hagan, acting as Agent, E. Fitzsimons SC, K. Maguire BL and D. Moloney BL, with an address for service in Luxembourg,

by

Grand Duchy of Luxembourg, represented by J. Faltz, acting as Agent,

by

Portuguese Republic, represented by L. Fernandes, V. Guimarães and Â. Seïça Neves, acting as Agents, with an address for service in Luxembourg,

and by

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, acting as Agent, and D. Wyatt QC, with an address for service in Luxembourg,

interveners,

APPLICATION for the annulment of Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties (OJ

2001 L 175, p. 17) and for the maintenance of the effects of that directive until the entry into force of a directive adopted on the correct legal basis,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, acting for the President of the Sixth Chamber, J.N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen (Rapporteur) and F. Macken, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2003,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 7 September 2001, the Commission of the European Communities brought an action under the first paragraph of Article 230 EC for the annulment of Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the

recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties (OJ 2001 L 175, p. 17) and for maintenance of the effects of that directive until the entry into force of a directive adopted on the correct legal basis.

Background to the dispute and legal framework

2 Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18) was adopted on the basis of Article 100 of the EEC Treaty (after amendment, Article 100 of the EC Treaty, which in turn became Article 94 EC).

3 Council Directive 79/1071/EEC of 6 December 1979 amending Directive 76/308 (OJ 1979 L 331, p. 10) broadened the scope of Directive 76/308 by extending it to claims relating to value added tax ('VAT'). In view of the fact that this directive dealt with indirect taxation, it was adopted on the basis of Articles 99 of the EEC Treaty (after amendment, Article 99 of the EC Treaty, which in turn became Article 93 EC) and 100 of the Treaty.

4 Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124) ('Directive 92/12'), once again enlarged the scope of Directive 76/308 by extending it to cover claims

relating to harmonised excise duties. Directive 92/12 was also based on Article 99 of the EEC Treaty.

5 The first four recitals in the preamble to Directive 2001/44 provide:

- ‘(1) The existing arrangements for mutual assistance for recovery set out in Directive 76/308 ... should be modified to meet the threat to the financial interests of the Community and the Member States and to the internal market posed by the development of fraud.

- (2) In the context of the internal market, Community and national financial interests, which are increasingly threatened by fraud, must be protected so as to safeguard better the competitiveness and fiscal neutrality of the internal market.

- (3) In order to safeguard better the financial interests of the Member States and the neutrality of the internal market, claims relating to certain taxes on income and capital and taxes on insurance premiums should be added to the scope of the mutual assistance provided for by Directive 76/308/EEC.

- (4) In order to permit more efficient and effective recovery of claims in respect of which a request for recovery has been made, the instrument permitting enforcement of the claim should, in principle, be treated as an instrument of the Member State in which the requested authority is situated.’

6 Article 2 of Directive 76/308, as amended by Directive 2001/44 ('Directive 76/308'), provides:

'This Directive shall apply to all claims relating to:

- (a) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guidance and Guarantee Fund (EAGGF), including sums to be collected in connection with these actions;
- (b) levies and other duties provided for under the common organisation of the market for the sugar sector;
- (c) import duties;
- (d) export duties;
- (e) value added tax;
- (f) excise duties on:
 - manufactured tobacco,
 - alcohol and alcoholic beverages,

— mineral oils;

(g) taxes on income and capital;

(h) taxes on insurance premiums;

(i) interest, administrative penalties and fines, and costs incidental to the claims referred to in points (a) to (h), with the exclusion of any sanction of a criminal nature as determined by the laws in force in the Member State in which the requested authority is situated.'

7 Article 7 of Directive 76/308 provides:

'1. The request for recovery of a claim which the applicant authority addresses to the requested authority must be accompanied by an official or certified copy of the instrument permitting its enforcement, issued in the Member State in which the applicant authority is situated and, if appropriate, by the original or a certified copy of other documents necessary for recovery.

2. The applicant authority may not make a request for recovery unless:

(a) the claim and/or the instrument permitting its enforcement are not contested in the Member State in which it is situated, except in cases where the second subparagraph of Article 12(2) is applied,

- (b) it has, in the Member State in which it is situated, applied appropriate recovery procedures available to it on the basis of the instrument referred to in paragraph 1, and the measures taken will not result in the payment in full of the claim.

3. The request for recovery shall indicate:

- (a) the name, address and any other relevant information relating to the identification of the person concerned and/or to the third party holding his or her assets;
- (b) the name, address and any other relevant information relating to the identification of the applicant authority;
- (c) a reference to the instrument permitting its enforcement issued in the Member State in which the applicant authority is situated;
- (d) the nature and the amount of the claim, including the principal, the interest, and any other penalties, fines and costs due indicated in the currencies of the Member States in which both authorities are situated;
- (e) the date of notification of the instrument to the addressee by the applicant authority and/or by the requested authority;

(f) the date from which and the period during which enforcement is possible under the laws in force in the Member State in which the applicant authority is situated;

(g) any other relevant information.

4. The request for recovery shall also contain a declaration by the applicant authority confirming that the conditions set out in paragraph 2 have been fulfilled.

5. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority it shall forward it to the requested authority.'

8 Article 8 of Directive 76/308 is worded as follows:

'1. The instrument permitting enforcement of the claim shall be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated.

2. Notwithstanding the first paragraph, the instrument permitting enforcement of the claim may, where appropriate and in accordance with the provisions in force in the Member State in which the requested authority is situated, be accepted as, recognised as, supplemented with, or replaced by an instrument authorising enforcement in the territory of that Member State.

Within three months of the date of receipt of the request for recovery, Member States shall endeavour to complete such acceptance, recognition, supplementing or replacement, except in cases where the third subparagraph is applied. They may not be refused if the instrument permitting enforcement is properly drawn up. The requested authority shall inform the applicant authority of the grounds for exceeding the period of three months.

If any of these formalities should give rise to contestation in connection with the claim and/or the instrument permitting enforcement issued by the applicant authority, Article 12 shall apply.'

9 Article 9(2) of Directive 76/308 provides as follows:

'The requested authority may, where the laws, regulations or administrative provisions in force in the Member State in which it is situated so permit, and after consultations with the applicant authority, allow the debtor time to pay or authorise payment by instalment. Any interest charged by the requested authority in respect of such extra time to pay shall also be remitted to the Member State in which the applicant authority is situated.

From the date on which the instrument permitting enforcement of recovery of the claim has been directly recognised or accepted, recognised, supplemented or replaced in accordance with Article 8, interest will be charged for late payment under the laws, regulations and administrative provisions in force in the Member State in which the requested authority is situated and shall also be remitted to the Member State in which the applicant authority is situated.'

10 Article 10 of Directive 76/308 provides:

‘Notwithstanding Article 6(2), the claims to be recovered shall not necessarily benefit from the privileges accorded to similar claims arising in the Member State in which the requested authority is situated.’

11 Article 12(2) of Directive 76/308 reads as follows:

‘As soon as the requested authority has received the notification referred to in paragraph 1 either from the applicant authority or from the interested party, it shall suspend the enforcement procedure pending the decision of the body competent in the matter. Should the requested authority deem it necessary, and without prejudice to Article 13, that authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the Member State in which it is situated allow such action for similar claims, unless the applicant authority requests otherwise in accordance with the second subparagraph.’

Notwithstanding the first subparagraph of paragraph 2, the applicant authority may, in accordance with the law[s], regulations and administrative practices in force in the Member State in which it is situated, request the requested authority to recover a contested claim, in so far as the relevant laws, regulations and administrative practices in force in the Member State in which the requested authority is situated allow such action. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for the reimbursement of any sums recovered, together with any compensation due, in accordance with the laws in force in the Member State in which the requested authority is situated.’

- 12 Directive 2001/44 resulted from a procedure which the Commission initiated when it submitted, on 26 June 1998, a proposal for a European Parliament and Council directive amending Directive 76/308 (OJ 1998 C 269, p. 16). That proposal, which envisaged extending the scope of Directive 76/308 to certain direct taxes and was also to have a bearing on the procedure for the recovery of the taxes and charges covered by Directive 76/308, was based on Article 100a of the EC Treaty (now, after amendment, Article 95 EC).
- 13 Following the opinion of the European Parliament, the Commission, on 10 May 1999, submitted a new proposal for a European Parliament and Council directive amending Directive 76/308 (OJ 1999 C 179, p. 6) which took account of a number of the modifications which the Parliament had proposed. This proposed text was also based on Article 95 EC.
- 14 As it took the view, however, that this proposal related to fiscal matters, the Council of the European Union adopted Directive 2001/44 on the basis of Articles 93 EC and 94 EC.
- 15 Being satisfied that Directive 2001/44 ought to have been adopted on the basis of Article 95 EC, the Commission brought the present action for annulment.
- 16 By order of the President of the Court of 23 January 2002, the Parliament was granted leave to intervene in support of the form of order sought by the Commission, while leave was granted to Ireland, the Grand Duchy of Luxembourg, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland to intervene in support of the form of order sought by the Council.

The action

Arguments of the parties

- 17 The Commission submits at the outset that Directive 2001/44 could be adopted only on the basis of Articles 93 EC and 94 EC or on that of Article 95 EC. Contrary to what the Council argues, it would have been impossible to base that directive on both Article 93 EC and Article 95 EC. According to the judgment in Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraph 21 (hereinafter ‘the *titanium dioxide* judgment’), such a dual basis is not possible where the procedures provided for each legal basis are incompatible.
- 18 So far as the purpose of Directive 2001/44 is concerned, the Commission submits that it is common ground that the measures introduced by that directive are necessary for the establishment of the internal market. In the Commission’s view, it follows clearly from the preamble to Directive 76/308 and from the preambles to the various amending directives which successively extended its scope, including Directive 2001/44, that the objective pursued by those directives was to make it possible to recover claims in a Member State on the basis of instruments originating in another Member State, thereby removing barriers to cross-border economic activities. The Commission contends that those directives therefore clearly seek to bring about the internal market.
- 19 That being so, the choice of Article 95 EC as the legal basis for the adoption of Directive 2001/44 was necessary, unless the view is to be taken that the

amendments which it made to Directive 76/308 relate to fiscal provisions, in which case that choice would come up against the prohibition laid down in Article 95(2) EC. In view, however, of the fact that Article 95(2) EC constitutes an exception to the principle set out in Article 95(1) EC, it should be narrowly construed and its application restricted to what is necessary for the attainment of its objectives, such as the protection of Member States' sovereignty in matters relating to taxation.

20 Directive 2001/44 respects that sovereignty in so far as it does not relate to 'fiscal provisions' within the meaning of Article 95(2) EC. That notion refers solely to the substantive provisions determining taxable persons, taxable events, basis of taxation, rates and exemptions, together with the detailed rules for the assessment and enforcement of tax claims. Directive 2001/44 has no effect whatever on these national provisions in view of the fact that the mutual assistance to which it seeks to give effect can take place without harmonisation or approximation of national rules on taxation. While Directive 2001/44 does, admittedly, extend the mechanisms of Directive 76/308, in particular, to certain direct taxes and introduces changes to the information which must be notified, the substantive tax law of the different Member States is not affected.

21 The Commission notes in particular in this regard that the new version of Article 9 (2) of Directive 76/308 does not affect the national provisions concerning payment periods or 'fines'.

22 The Commission adds that, in any event, as demonstrated by a large number of measures adopted on the basis of Article 95 EC, the fact that a measure has a link with taxation does not suffice to bring it within the scope of the prohibition laid down in Article 95(2) EC.

- 23 The Parliament takes the view that the position adopted by the Commission is in line with the established case-law to the effect that the choice of the correct legal basis for a measure must rest on objective factors such as the purpose and content of that measure. As different legal bases may be incompatible by reason of the decision-making procedures which they involve, it is necessary, in order to define the correct legal basis, to refer to the ‘centre of gravity’ of the measure to be adopted (see Case C-42/97 *Parliament v Council* [1999] ECR I-869, paragraph 43).
- 24 The purpose of Directive 2001/44, it argues, is to protect the financial interests of the Community and the Member States, to combat fraud and to safeguard the fiscal neutrality of the internal market. As the fight against fraud is an important, but not essential, element of the directive, it was not necessary to use Article 280 EC as the legal basis.
- 25 The Parliament submits further that, even if the term ‘fiscal provisions’ in Article 95(2) EC were to be construed as referring to provisions dealing with the arrangements for the payment and recovery of taxes, such wording does not preclude Directive 2001/44 from being adopted on the basis of Article 95 EC. Directive 2001/44 does not contain any provision relating to national provisions on the collection and recovery of the claims here in issue and merely prescribes ‘national treatment’ for foreign claims. The various elements which the Council treats as being covered by the term ‘fiscal provisions’ continue to be governed by national law and Directive 2001/44 does not harmonise them.
- 26 The Parliament adds that Article 95 EC must be construed as being a derogation from Article 94 EC and that the latter cannot therefore constitute a proper legal basis for the adoption of Directive 2001/44. Article 93 EC, for its part, cannot be chosen as a legal basis by virtue of the fact that Directive 2001/44 does not aim to harmonise indirect taxation within the meaning of that article. Finally, Article 95

(2) EC cannot apply on the ground that Directive 2001/44 does not introduce any fiscal provision. Article 95 EC alone is therefore the correct legal basis for the adoption of Directive 2001/44.

27 That conclusion cannot be brought into question by the fact that some of the claims covered by Directive 2001/44 are fiscal in nature. The 'centre of gravity' of that directive is clearly the establishment and operation of the internal market, a fact which calls for the choice of Article 95 EC as the legal basis.

28 The Council begins by submitting that, contrary to what the Commission asserts, the possible correct legal bases for the adoption of Directive 2001/44 are not limited to either Articles 93 EC and 94 EC or Article 95 EC. There is, for instance, nothing to preclude the choice of Articles 93 EC and 95 EC as a legal basis in view of the fact that the Court has already admitted the possibility of a dual legal basis requiring a decision by the Council by qualified majority and unanimity (Case 165/87 *Commission v Council* [1988] ECR 5545).

29 The Council goes on to point out that the Court has consistently held that the choice of the legal basis for a measure must be founded on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure. Furthermore, the fact that an institution wishes to participate more fully in the adoption of a given measure has no bearing on that choice.

30 So far as the purpose of Directive 2001/44 is concerned, the Council states that it follows from the recitals in the preamble to that directive that this is to protect the financial interests of the Community and the Member States, as well as better to safeguard the competitiveness and fiscal neutrality of the internal market and limit the risk of fraud. It also follows from the Commission's proposal for a directive of

26 June 1998 that the directive forms part of the Community strategy of building up non-distortionary and Single-Market-oriented tax systems, as set out in the Commission communication entitled ‘Taxation in the European Union’ (COM/96/546 final).

- 31 With regard to the content of Directive 2001/44, the Council argues that its provisions set out the procedure to be followed by the Member States respectively requesting and providing assistance in relation to a claim to collect the money owed and define the legal standing of the debtor throughout this procedure. Directive 2001/44 deals specifically with the privileges which may be accorded to the claim, the recourses available to the debtor, the recovering of costs incurred by the Member States from the debtor and the sharing of funds between the Member States concerned. As Directive 2001/44 applies those rules to claims relating to taxes on income and capital and to taxes on insurance premiums, it applies in both the area of direct taxation and that of indirect taxation.
- 32 Finally, in regard to the legal bases capable of being used for adopting measures relating to such taxes, the Council submits, first, that, contrary to what the Commission argues, the procedure laid down in Article 95(1) EC cannot be regarded as the ‘normal’ procedure for the adoption of measures intended to complete the internal market.
- 33 Second, the Council notes that the Court has consistently held that, where there is a specific legal basis, this should form the basis of the measure to be adopted (Case C-271/94 *Parliament v Council* [1996] ECR I-1689). As Articles 93 EC and 94 EC clearly relate to the adoption of measures within the area of taxation, they are specific provisions in contrast to Article 95 EC.

34 With more specific reference to the correct legal basis for the adoption of Directive 2001/44, the Council contends that, as that directive deals with the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation by establishing common rules for the collection of such taxes and duties, Article 93 EC alone can constitute a valid legal basis. As it follows from the Court's case-law that provisions dealing with the collection of taxes and with the penalties imposed for offences relating to the payment of VAT form part of the internal taxation of Member States (see Case 55/79 *Commission v Ireland* [1980] ECR 481 and Case 299/86 *Drexel* [1988] ECR 1213), provisions such as those introduced by Directive 2001/44 also form part of the internal taxation of the Member States.

35 With regard to the extension of the scope of Directive 76/308 to claims relating to certain direct taxes, the Council submits that it is precisely this extension which meant that Article 95(1) EC could no longer be treated as constituting an appropriate legal basis for the adoption of Directive 2001/44, as Article 95(2) EC states that paragraph (1) may not apply to 'fiscal provisions'.

36 'Fiscal provisions' within the meaning of Article 95(2) EC must be understood as meaning any measure regulating public revenue, covering not only the definition and description of taxes but also the manner in which taxes are assessed and collected. The word 'fiscal' refers to the notion of public revenue. In referring to 'tax provisions', the English version of the title of Chapter 2 of Title VI of Part Three of the Treaty emphasises the compulsory nature of such public revenue. This idea of compulsion, linked to the very special privileges and powers which Member States enjoy to assess and collect fiscal revenues, is an important characteristic of taxes or fiscal charges and is more clearly embodied in the word 'fiscal' as used in other language versions. The expression 'fiscal law' in principle comprises the law dealing with the structure of taxes, their assessment and their

collection. The interpretation of Article 95(2) EC must take this into account and the prohibition set out therein thus covers all provisions relating to the structure, assessment and collection of the taxes in question.

37 Contrary to the Commission's argument, there is nothing in the wording of Article 95(2) EC to suggest that the term 'fiscal provisions' should be interpreted restrictively. Nor can the choice of legal basis be made to depend on the degree to which the measure to be adopted impinges on the sovereignty of Member States, as such an approach would be dependent on political assessments, something which would be at variance with the system of the attribution of powers within the Community and with the principle of legal certainty. Finally, the provisions of Directive 2001/44 do not foresee a diffuse cooperation or verification among administrative authorities aimed at serving purely national interests but rather are designed to regulate the manner in which Member States collect their fiscal revenues and apply their fiscal provisions with a view to eliminating the disparities in this regard in conditions of competition.

38 The Council also points out that, even though the Court has ruled that a mere practice cannot derogate from the rules laid down in the Treaty (Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 19), the practice in regard to the choice of legal basis has in this context been consistent and recourse has been made to Articles 93 EC and/or 94 EC whenever fiscal provisions have been the subject of harmonisation.

39 The Irish Government submits that the Commission's interpretation of the term 'fiscal provisions' is too restrictive. A fiscal provision, it argues, is any provision that is related to the administration and collection of taxes. Moreover, it is clear from the English version of Article 95(2) EC that this refers to provisions relating

to government finances and tax revenue. Nor is there anything in the Treaty or the case-law to support the construction advocated by the Commission.

- 40 The Irish Government further contends that the question of the extent to which the Commission is free to choose Article 95 EC as the legal basis for the adoption of a directive cannot be answered in the absence of a definition of the concept of approximation of laws as opposed to harmonisation of laws. If doubts exist as to the specific effects of a measure, it is necessary, in order to comply with the principle of legal certainty, to refer to the rules which govern the implementation of the Community provisions on harmonisation of such legislation.
- 41 In the present case, as Directive 2001/44 relates to fiscal matters, the prohibition laid down in Article 95(2) EC prevents that directive from being adopted on the basis of Article 95 EC. It follows from both the purpose and the content of Directive 2001/44 that, apart from the fact that it extended the mutual assistance regime to taxes on income and capital and to taxes on insurance premiums, it also imposed mandatory obligations on Member States in respect of the enforcement and collection of taxes and levies. As the measures introduced by Directive 2001/44 relate to tax collection, tax administration and tax enforcement, and thus to fiscal matters, the 'centre of gravity' of that directive is clearly demarcated.
- 42 The Irish Government adds that Article 95(1) EC also precludes the adoption of Directive 2001/44 on the basis of Article 95 EC. According to its wording, Article 95 EC can apply only where the Treaty does not provide otherwise. As Articles 93 EC and 94 EC constitute more specific provisions than does Article 95 EC for

the adoption of measures such as those laid down in Directive 2001/44, Article 95 EC cannot be applied.

- 43 According to the Luxembourg Government, the Commission's interpretation of the term 'fiscal provisions' is unduly restrictive and does not correspond to the legislative reality in the Member States. When interpreting that provision, account must be taken of the fact that the concepts of 'taxation', 'fiscal provisions' and 'taxes' cover provisions relating to the administration and collection of taxes, and that, in several Member States, the arrangements for the administration and collection of taxes come under tax law.
- 44 The Luxembourg Government also takes note of the Commission's acknowledgment, in its reply, that Directive 2001/44 is not intended to harmonise existing rules but seeks to create possibilities for the exchange of information and mutual assistance which did not exist hitherto. For that reason, the choice of Article 95 EC as the basis for the adoption of that directive cannot be justified.
- 45 The Luxembourg Government submits further that, contrary to what the Commission argues, Article 8 of Directive 76/308 does have a direct effect on the national provisions of Member States.
- 46 The Court, the Luxembourg Government adds, has already ruled that payment arrangements, tax bases and the penalties for tax offences may come within the prohibition laid down in Article 90 EC (see Case C-47/88 *Commission v Denmark* [1990] ECR I-4509). It cannot therefore be validly argued that provisions governing the arrangements for the recovery of direct and indirect taxes are not fiscal provisions.

- 47 In the present case, Directive 2001/44 allows national authorities to determine and collect properly any tax due by extending the scope of their competence beyond the boundaries of the territory of the Member State concerned. Mutual assistance in matters of recovery of amounts owing thus constitutes an essential complement inherent in the exercise of Member States' fiscal functions at an internal level. The correct legal basis for the adoption of that directive is therefore Articles 93 EC and 94 EC.
- 48 The Portuguese Government also takes the view that the interpretation of the term 'fiscal provisions' proposed by the Commission is too restrictive and must be rejected. That term, it argues, must include the rights and guarantees of taxable persons. Directive 2001/44 lays down, in particular by way of the amendments to Articles 8(1), 10 and 12 of Directive 76/308, a number of rules which are in direct conflict with the rights of taxable persons and which must therefore be transposed into national law. Further, Directive 2001/44 infringes the principle of *audi alteram partem* in so far as an alleged resident debtor to a State seeking recovery of a claim is unable to contest the instrument permitting enforcement of the recovery of that claim even if the claim which that State invokes is contested. Finally, Directive 2001/44 creates, through its amendment of Article 12(2) of Directive 76/308, a direct substantive right to compensation whenever improper use or erroneous exercise of the powers conferred on Member States gives rise to injury. In light of the content of Directive 2001/44, the Portuguese Government argues, Articles 93 EC and 94 EC must be used as the legal basis for its adoption.
- 49 The United Kingdom Government shares the position taken by the Irish Government. It submits that Article 93 EC is the specific legal basis for the adoption of harmonisation measures in the field of indirect taxation. Inasmuch as the Treaty thus made specific provision for such harmonisation, Article 95 EC cannot serve as a legal basis for this. So far as harmonisation of the provisions relating to direct taxation is concerned, it follows clearly from Article 95(2) EC that the applicable Treaty provision is Article 94 EC.

50 The United Kingdom Government criticises the Commission for its unduly strict interpretation of the term ‘fiscal provisions’ and for failing to take account of the opening sentence of Article 95(1) EC, to the effect that this provision applies only where nothing in the Treaty provides otherwise. Article 93 EC and Article 94 EC are both special provisions for the adoption of measures relating to direct and indirect taxes. In view of the fact that Directive 2001/44 harmonises national rules on those two types of taxes, Article 95(1) EC is not the correct legal basis for its adoption.

51 Moreover, there can be no doubt that rules pursuing such an objective impinge on the tax sovereignty of Member States and that their adoption must for that reason be unanimous.

52 The United Kingdom Government adds that the term ‘fiscal’ used in the English-language version of Article 95 EC embraces not only taxation *stricto sensu* but also public spending and borrowing. Contrary to the Commission’s contention, there is no justification for drawing a distinction between rules on taxable persons, taxable events, bases of taxation, rates and exemptions and rules for the administration and enforcement of taxes. This interpretation, moreover, is in line with the Court’s settled case-law (see Case C-327/90 *Commission v Greece* [1992] ECR I-3033 and Case C-68/96 *Grundig Italiana* [1998] ECR I-3775).

53 In conclusion, the United Kingdom Government states that the regulation of taxpayers with a view to preventing fraud and tax evasion is a matter which goes to the core of the relationship between the revenue authorities and taxpayers of the Member States and is thus inseparable from Member States’ revenue-raising powers.

Appraisal of the Court

54 It is settled case-law that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure (see, inter alia, the *titanium dioxide* judgment, paragraph 10, Case C-269/97 *Commission v Council* [2000] ECR I-2257, paragraph 43, and Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 38).

55 If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component (see to that effect, inter alia, Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraphs 19 and 21, Case C-36/98 *Spain v Council* [2001] ECR I-779, paragraph 59, and Case C-211/01 *Commission v Council*, cited above, paragraph 39).

56 By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases (see, inter alia, Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 31; Case C-281/01 *Commission v Council* [2002] ECR I-12049, paragraph 35, Case C-211/01 *Commission v Council*, paragraph 40, and Opinion 2/00 [2001] ECR I-9713, paragraph 23).

57 However, no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other (*titanium dioxide* judgment, cited above, paragraphs 17 to 21, and Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] ECR I-1139, paragraph 14).

- 58 In the present case, the procedures set out under Articles 93 EC and 94 EC, on the one hand, and that set out under Article 95 EC, on the other, mean that the latter article cannot be applied in conjunction with one of the other two articles mentioned above in order to serve as the legal basis for a measure such as Directive 2001/44. Whereas unanimity is required for the adoption of a measure on the basis of Articles 93 EC and 94 EC, a qualified majority is sufficient for a measure to be capable of valid adoption on the basis of Article 95 EC. Thus, of the provisions cited above, Articles 93 EC and 94 EC alone may provide a valid dual legal basis for the adoption of a legal measure by the Council.
- 59 So far as concerns the scope of Article 95 EC, which the Commission and Parliament argue ought to have been used as the legal basis for the adoption of Directive 2001/44, it must be pointed out that it is clear from the very wording of Article 95(1) EC that that article applies only if the Treaty does not provide otherwise.
- 60 It follows that, if the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, that measure must be founded on such provision. That is, in particular, the case with regard to Article 93 EC so far as concerns the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation.
- 61 It must also be pointed out that Article 95(2) EC expressly excludes certain areas from the scope of that article. This is in particular the case with regard to ‘fiscal provisions’, the approximation of which cannot therefore take place on the basis of that article.
- 62 The Court considers that it is first necessary to examine whether Directive 2001/44 comes within the concept of ‘fiscal provisions’ within the meaning of Article 95(2) EC.

63 With regard to the interpretation of the words ‘fiscal provisions’, there is nothing in the Treaty to indicate how that concept should be construed. It is, however, necessary to point out that, by reason of their general character, those words cover not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural rules.

54 This is also corroborated by the fact that in certain Member States the provisions governing the arrangements for payment and collection of direct and indirect taxes are treated as being ‘fiscal provisions’.

55 It should further be added that, in accordance with the Court’s case-law on Article 90 EC, it is necessary, for the purposes of assessing whether or not a system of taxation is discriminatory, to take into consideration not only the rate of tax but also the basis of assessment and the detailed rules for levying the various duties. The decisive criterion for purposes of comparison with a view to the application of Article 90 EC is the actual effect of each tax on domestic production, on the one hand, and on imported products, on the other. Even where the rate is the same, the effect of the tax may vary according to the detailed rules for the assessment and collection thereof applied to domestic production and imported products (*Commission v Ireland*, paragraph 8, and *Grundig Italiana*, paragraph 13, cited above).

6 It follows that the detailed arrangements for the collection of taxes of whatever kind cannot be disassociated from the system of taxation or imposition of which they form part.

- 67 In the light of those considerations, the words ‘fiscal provisions’ contained in Article 95(2) EC must be interpreted as covering not only the provisions determining taxable persons, taxable transactions, the basis of imposition, and rates of and exemptions from direct and indirect taxes, but also those relating to arrangements for the collection of such taxes.
- 68 With regard to the purpose of Directive 2001/44, it follows from the first three recitals in its preamble that it seeks to safeguard the ‘fiscal neutrality of the internal market’ and to protect the financial interests of both the Community and the Member States.
- 69 As the recitals in the preamble to Directive 2001/44 make clear, that objective is to be attained, on the one hand, by extending the scope of Directive 76/308 to certain taxes on income and capital and to certain taxes on insurance premiums (recital (3)) and, on the other, by ensuring that instruments permitting enforcement of a claim issued in the Member State of the requesting authority should in principle be treated as an instrument of the Member State in which the requested authority is situated (recital (4)).
- 70 The amendments which Directive 2001/44 makes to Directive 76/308 reflect those objectives. Thus, Article 2 of Directive 76/308, which defines that directive’s scope, now provides, under headings (g) and (h), that the directive is to apply to taxes on income and capital and to taxes on insurance premiums. Article 7(3) of Directive 76/308 was so amended as now to provide for a more detailed list of the information which must be set out in a request for recovery sent by the applicant authority to the requested authority.

71 In accordance with Article 8 of Directive 76/308, instruments permitting enforcement of the recovery of claims must now, as a general rule, be directly recognised and automatically treated as instruments permitting enforcement of a claim within national territory, whereas previously those instruments had only to be accepted, recognised, supplemented or replaced by an instrument authorising their enforcement within the territory of the Member State in which the requested authority was situated.

72 So far as concerns Article 10 of Directive 76/308, which provided that instruments for recovery were not to be given preferential treatment in the Member State in which the requested authority was situated, the amended version of that article resulting from Directive 2001/44 provides that such claims will not necessarily benefit from the privileges accorded to similar claims arising in the Member State in which the requested authority is situated. Such an amendment constitutes a substantial change in the treatment of the claims covered by Directive 76/308 inasmuch as it is equivalent to a reversal of the principle hitherto applicable that such claims could not benefit from preferential treatment in the Member State to which the request was addressed.

73 The unavoidable conclusion is that all of these amendments concern the recovery of claims relating to both direct and indirect taxes and will require Member States to adopt laws, regulations or administrative provisions in order to guarantee their implementation.

74 Next, it must be noted that, while it is true, as the Commission argues, that Directive 2001/44 does not harmonise the substantive provisions on arrangements for recovery in the Member States, the fact none the less remains that the Member States are required to extend the scope of their national provisions on arrangements for recovery of claims relating to direct taxes such as taxes on income and capital in order that they can also apply to tax claims originating in another Member State.

- 75 Finally, it is necessary to add that Directive 2001/44 carries out a degree of approximation of national provisions in the area of taxation inasmuch as it obliges all Member States to treat claims originating in other Member States as being national claims, such an interpretation being corroborated by the words ‘fiscal neutrality’ featuring in the second recital in the preamble to Directive 2001/44.
- 76 In the light of all those factors, it must be held that Directive 2001/44 does relate to ‘fiscal provisions’ within the meaning of Article 95(2) EC, with the result that Article 95 EC cannot constitute the correct legal basis for the adoption of that directive.
- 77 That being so, the Council acted correctly in adopting Directive 2001/44 on the basis of Article 93 EC and Article 94 EC.
- 78 The action brought by the Commission must accordingly be dismissed.

Costs

- 79 Under Article 69(2) of the Rules of Procedure, 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 Council has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States and institutions which intervene in proceedings must bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application;
2. Orders the Commission of the European Communities to pay the costs;
3. Orders Ireland, the Grand Duchy of Luxembourg, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to pay their own costs.

C. Gulmann J.N. Cunha Rodrigues J.-P. Puissochet

R. Schintgen

F. Macken

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass

Registrar

V. Skouris

President