

3. Is the answer to question 1 affected by the fact that the dominant undertaking does not have any regulatory obligation to supply on the wholesale market but has, rather, chosen to do so on its own initiative?
4. Is an anti-competitive effect required in order for a practice of the kind described in question 1 to constitute abuse and, if so, how is that effect to be determined?
5. Is the answer to question 1 affected by the degree of market strength enjoyed by the dominant undertaking?
6. Is the dominant position on both the wholesale market and the end-user market of the undertaking engaging in the practice required in order for a practice of the kind described in question 1 to constitute abuse?
7. For a practice such as that described in question 1 to constitute abuse, must the good or service supplied by the dominant undertaking on the wholesale market be indispensable to competitors?
8. Is the answer to question 1 affected by the question whether the supply is to a new customer?
9. Is an expectation that the dominant undertaking will be able to recoup the losses it has incurred required in order for a practice of the kind described in question 1 to constitute abuse?
10. Is the answer to question 1 affected by the question whether a change of technology is involved on a market with a high investment requirement, for example with regard to reasonable establishment costs and the possible need to sell at a loss during an establishment phase?

Parties to the main proceedings

Applicant: Commissioners for Her Majesty's Revenue and Customs

Defendant: Loyalty Management UK Limited

Questions referred

'In circumstances where a taxable person (the "Promoter") is engaged in the business of running a multi-participant customer loyalty rewards programme (the "Scheme"), pursuant to which the Promoter enters into various agreements as follows:

- (i) Agreements with various companies referred to as "Sponsors" under which the Sponsors issue "Points" to customers of the Sponsors ("Collectors") who purchase goods or services from the Sponsors and the Sponsors make payments to the Promoter;
- (ii) Agreements with the Collectors which include provisions such that, when they purchase goods and/or services from the Sponsors, they will receive Points which they can redeem for goods and/or services; and
- (iii) Agreements with various companies (known as "Redeemers") under which the Redeemers agree, among other things, to provide goods and/or services to Collectors at a price which is less than would otherwise be payable or for no cash payment when the Collector redeems the Points and in return the Promoter pays a "Service Charge" which is calculated according to the number of Points redeemed with that Redeemer during the relevant period.

1. How are Articles 14, 24 and 73 of Council Directive 2006/112/EC of 28 November 2006 ⁽¹⁾ (formerly Articles 5, 6 and 11(A)(1)(a) of Council Directive 77/388/EEC of 17 May 1977 ⁽²⁾) to be interpreted where payments are made by the Promoter to the Redeemers?

2. In particular, are those provisions to be interpreted such that the payments of the kind made by the Promoter to Redeemers are to be characterised as:

- (a) consideration solely for the supply of services by the Redeemers to the Promoter; or
- (b) consideration solely for the supply of goods and/or services by the Redeemers to the Collectors; or

Reference for a preliminary ruling from House of Lords (United Kingdom) made on 6 February 2009 — Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Limited

(Case C-53/09)

(2009/C 90/20)

Language of the case: English

Referring court

House of Lords

(c) consideration in part for the supply of services by the Redeemers to the Promoter and in part for the supply of goods and/or services by the Redeemers to the Collectors?

3. If the answer to question 2 is (c), so that the Service Charge is consideration for two supplies by the Redeemers, one to the Promoter and the other to the Collectors, what are the criteria laid down by Community law to determine how a charge such as the Service Charge is to be apportioned between those two supplies?

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

(²) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment OJ L 145, p. 1'

Reference for a preliminary ruling from House of Lords (United Kingdom) made on 9 February 2009 — Commissioners for Her Majesty's Revenue and Customs v Baxi Group Limited

(Case C-55/09)

(2009/C 90/21)

Language of the case: English

Referring court

House of Lords

Parties to the main proceedings

Applicant: Commissioners for Her Majesty's Revenue and Customs

Defendant: Baxi Group Limited

Questions referred

In circumstances where

A. a taxable person runs a business promotion scheme operated by an advertising and marketing company under which 'points' are issued to the taxable person's customers

in connection with the purchase of goods by the customers from the taxable person;

B. customers redeem the points by obtaining reward goods from the advertising and marketing company without payment;

C. the taxable person has agreed with that other company to pay it the recommended retail price of the reward goods

1. How are Articles 14, 24 and 73 and 168 of the VAT Directive (¹) (formerly Articles 5, 6 and 11(A)(1)(a) and 17(2) of the Sixth Directive (²)) to be interpreted as regards the payments by the taxable person to the other company?

2. In particular, are those provisions to be interpreted such that the payments by the taxable person to the other company are to be characterised:

(a) solely as consideration for a supply of services by the other company to the taxable person;

(b) solely as third party consideration for the supply of goods by the other company to the customers;

(c) as consideration in part for the supply of services by the other company to the taxable person and in part for the supply of goods by the other company to the customers; or

(d) as consideration for supplies both of advertising and marketing services and of reward goods by the other company to the taxable person?

3. If the answer to question 2 is that such payments are to be characterised in part as consideration for a supply of services by the other company to the taxable person and in part as third party consideration from the taxable person to the other company in respect of the other company's supply of goods to the customers, what are the criteria laid down by Community law to determine how the payment is to be apportioned between those two supplies?

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

(²) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment OJ L 145, p. 1'