Questions referred

(1) What is the scope of the power given to Member States under Article 13(3) of Directive 2001/42/EC [1] on the assessment of the effects of certain plans and programmes on the environment ('the SEA Directive') to determine that it is not feasible to require an environmental assessment of a plan or programme for which the first formal preparatory act occurred before 21 July 2004 and the matters the national authorities may take into account, on a case by case basis, in reaching such a determination?

(2) Whether it was open to the national authority of a Member State, having made a determination in 2004 that it was feasible for a plan to comply with the requirements of the SEA Directive [and having maintained that position thereafter and before the national court], to reconsider that decision and determine in November 2007 that it was not feasible for the said plan to comply with the SEA Directive?

(3) Whether the determination process described in question 2 amounts to a retrospective determination of a non feasibility determination, and if so, does Article 13(3) of the SEA Directive permit such retrospective determinations, and if so, under what conditions?

(4) Whether the factors taken into account by the national authority in the present case in determining on 6 November 2007 that it was not feasible to carry out an environmental assessment of the Draft North Area Plan were matters which it was entitled to take into account in making such a determination pursuant to Article 13(3) of the SEA Directive?

[1] OJ L 197, p. 30

Reference for a preliminary ruling from the Naczelny Sąd Administracyjny (Republic of Poland), lodged on 28 May 2009 — Dyrektor Izby Skarbowej w Białymstoku v 'Profaktor' Kulesza, Frankowski, Trzaska spółka jawna w Białymstoku

(Case C-188/09)

(2009/C 193/06)

Language of the case: Polish

Referring court

Naczelny Sąd Administracyjny

Parties to the main proceedings

Appellant: Dyrektor Izby Skarbowej w Białymstoku

Respondent: 'Profaktor' Kulesza, Frankowski, Trzaska spółka jawna w Białymstoku

Questions referred

1. Do the first and second paragraphs of Article 2 of First Council Directive 67/227/EEC [1] of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, in conjunction with Articles 2, 10(1) and (2) and 17(1) and (2) of Sixth Council Directive 77/388/EEC [2] of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, rule out the possibility of introducing temporary forfeiture of the right to reduce the amount of tax due by an amount equivalent to 30 % of the input tax on the acquisition of goods and services in relation to taxable persons who effect sales to natural persons not engaged in commercial activities, and to persons engaged in commercial activities in the form of individual agricultural holdings, and who fail to fulfil the obligation to keep records of turnover and amounts of tax due by using cash registers, pursuant to Article 111(2) of the Ustawa o Podatku od Towarów i Usług (Law on the tax on goods and services) of 11 March 2004 (*Dziennik Ustaw* No 54, item 535, as subsequently amended), in conjunction with Article 111(1) thereof?

2. Can 'special measures' within the terms of Article 27(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, consist, regard being had to their character and purpose, in a temporary restriction of the scope of a taxable person's right to reduce tax referred to in Article 111(2) of the Ustawa o Podatku od Towarów i Usług of 11 March 2004 (*Dziennik Ustaw* No 54, item 535, as subsequently amended), in conjunction with Article 111(1) thereof, in relation to taxable persons who fail to fulfil the obligation to keep records of turnover and amounts of tax by using cash registers, with the result that the introduction thereof requires compliance with the procedure set out in Article 27(2) to (4) of the abovementioned Sixth Council Directive of 17 May 1977?

3. Does the right of a Member State referred to in Article 33(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, encompass the right to impose a sanction on taxable persons who fail to fulfil the obligation to keep records of turnover and amounts of tax by using cash registers in the form of temporary forfeiture of the right to reduce the amount of tax due by an amount equivalent to 30 % of the input tax on the acquisition of goods and services referred to in Article 111(2) of the Ustawa o Podatku od Towarów i Usług of 11 March

2004 (*Dziennik Ustaw* No 54, item 535, as subsequently amended), in conjunction with Article 111(1) thereof?

(1) OJ, English Special Edition 1967, p. 14.
(2) OJ 1977 L 145, p. 1.

Appeal brought on 29 May 2009 by Council of the European Union against the judgment of the Court of First Instance (Second Chamber) delivered on 10 March 2009 in Case T-249/06: Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT), formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT), formerly Nizhnedneprovsky Tube-Rolling Plant VAT v Council of the European Union

(Case C-191/09 P)

(2009/C 193/07)

Language of the case: English

Parties

Appellant: Council of the European Union (represented by: J.-P. Hix, Agent, G. Berrisch, Rechtsanwalt)

Other parties to the proceedings: Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT), anciennement Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT), anciennement Nizhnedneprovsky Tube-Rolling Plant VAT, Commission of the European Communities

Form of order sought

The appellant claim that the Court should:

— set aside the judgment of the Court of First Instance of the European Communities of 10 March 2009 in so far as the CFI (1) annulled Article 1 of the Contested Regulation in so far as the anti-dumping duty fixed for exports towards the European Community of the products manufactured by the Applicants exceeds that which would have been applicable had the export price not been adjusted for a commission when sales took place through the intermediary of the affiliated trader, Sepco SA (point 1 of the operative part of the Contested Judgment) and (2) ordered the Council to bear its own costs and one quarter of the costs incurred by the Applicants (point 3 of the operative part of the judgment under appeal),

— give final judgment on the dispute by dismissing the Application in its entirety;

— order that the costs of the appeal proceedings and of the proceedings before the Court of First Instance be borne by the Applicants at first instance.

Pleas in law and main arguments

The Council submits that the Court of First Instance:

— erred in law when it applied the case-law on the single economic entity concept, by analogy, to the application of Article 2(10)(i) of the Basic Anti-dumping Regulation (1) because it failed to recognize that the calculation of the normal value, the calculation of the export price, and the question whether adjustments apply, are governed by distinct rules. In this regard, the CFI also breached the obligation to state reasons;

— erred in law when interpreting the burden of proof that the institutions must meet when making an adjustment pursuant to Article 2(10)(i) of the Basic Regulation by not applying the normal burden of proof in anti-dumping cases, and consequently, erred in law by not applying the correct standard of judicial review with respect to an economic assessment by the institutions;

— erred in law by applying the wrong legal test when assessing the institutions' decision to make the Article 2(10)(i) adjustment because it assessed the decision based on the assumption that the single economic concept applies to the comparison of the normal value and the export price;

— erred in law when it found that the institutions committed a manifest error of assessment in applying the first subparagraph of Article 2(10) of the Basic Regulation;

— erred in law in applying too strict an interpretation of the disclosure requirements;

— erred in law because it failed to apply correctly the legal test for a violation of the rights of defence which it had (correctly) identified;

— erred in law in assessing the effect of the alleged procedural irregularity also because it relied on the legally erroneous findings as to the legality of the Article 2(10)(i) adjustment.

(1) Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community OJ L 56, p. 1–20