

That is true, *inter alia*, of all the plans or projects which are not subject to an environmental permit in the Walloon Region.

⁽¹⁾ OJ 1992 L 206, p. 7.

Action brought on 21 December 2009 — European Commission v Federal Republic of Germany

(Case C-539/09)

(2010/C 51/39)

Language of the case: German

Parties

Applicant: European Commission (represented by: A. Caeiros and B. Conte, Agents)

Defendant: Federal Republic of Germany

Form of order sought

— Declare that, by refusing to permit the Court of Auditors to carry out audits in Germany concerning the administrative cooperation in the field of value added tax which is provided for under Regulation No 1798/2003 and the relevant implementing measures, the Federal Republic of Germany has failed to fulfil its obligations under Article 248(1), (2) and (3) EC, Article 140(2) and Article 142(1) of Regulation No 1605/2002, and Article 10 EC;

— Order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The subject of the present action is the refusal of the German authorities to permit the Court of Auditors of the European Union to carry out audits in Germany concerning the administrative cooperation in the field of value added tax which is provided for under Regulation No 1798/2003 and the relevant implementing measures.

According to the Commission, the Federal Republic of Germany has thereby failed to fulfil its obligations under Article 248 EC and Regulation No 1605/2002, and also infringed its obligation to cooperate in good faith under Article 10 EC.

The Court of Auditors audit powers should be interpreted broadly: the role of the Court of Auditors is to audit EU finances and to propose improvements. In order to do so it must have the right to carry out comprehensive audits and checks relating to all sectors and actors concerned by EU revenue and expenditure. Such audits may also be carried out in the Member States, which must, under Article 248(3) EC,

Article 140(2) and Article 142(1) of Regulation No 1605/2002, and pursuant to the obligation to cooperate in good faith laid down in Article 10 EC, provide full support for the Court of Auditors activities. That also includes the obligation to permit all audits by the Court of Auditors which are designed to assess how EU financial resources were collected and used.

In the present case the German authorities refused to permit the Court of Auditors to do precisely that.

Regulation No 1798/2003 lays down rules and procedures for the lawful and correct assessment of Community revenue. The Regulation forms part of a web of various measures which are designed to ensure that the Member States have at their disposal the correct value added tax yield, and therefore the Community — in optimal circumstances — the own resources to which it is entitled, by means of combating fraudulent practices or preventing their very occurrence. From that perspective, the Commission regards it as necessary that, in order to be able to examine whether value added tax revenue has been lawfully and correctly assessed, the Court of Auditors should be able to check the implementation and application of Regulation No 1798/2003. That means that it should be able to examine whether Member States have established an efficient system of cooperation and assistance and whether they can implement it satisfactorily in practice or whether improvements are required.

The implementation in practice of the administrative cooperation provided for in Regulation No 1798/2003 has an impact on the own resources based on value added tax to be paid by the Member States. Effective cooperation in this sector prevents value added tax evasion and avoidance and therefore leads automatically to increased value added tax revenue and thus also to an increase in Community own resources based on value added tax. If a Member State does not however cooperate properly, it infringes not only its obligations under Regulation No 1798/2003, but also its obligation under the Directive on value added tax to take all legislative and administrative measures appropriate for ensuring collection of all value added tax due on its territory.

Reference for a preliminary ruling from the Regeringsrätten (Sweden) lodged on 21 December 2009 — Skandinaviska Enskilda Banken AB Momsgrupp v Skatteverket

(Case C-540/09)

(2010/C 51/40)

Language of the case: Swedish

Referring court

Regeringsrätten

Parties to the main proceedings

Applicant: Skandinaviska Enskilda Banken AB Momsgrupp

Defendant: Skatteverket

Question referred

Is Article 13B of the Sixth VAT Directive (Article 135(1) of the Council Directive on a common system of value added tax ⁽¹⁾) to be interpreted as meaning that the tax exemptions provided for therein also include services (underwriting) which involve a credit institution providing, for consideration, a guarantee to a company which is about to issue shares, where under that guarantee the credit institution undertakes to acquire any shares which are not subscribed within the period for share subscription?

⁽¹⁾ Council Directive 77/388/EEC (OJ L 145, p. 1).

Appeal brought on 22 December 2009 by the Federal Republic of Germany against the judgment of the Court of First Instance (Seventh Chamber) delivered on 6 October 2009 in Case T-21/06 Germany v Commission

(Case C-544/09 P)

(2010/C 51/41)

Language of the case: German

Parties

Appellant: Federal Republic of Germany (represented by: M. Lumma, J. Möller and B. Klein, acting as Agents)

Other party to the proceedings: European Commission

Form of order sought

- Set aside the judgment of the Court of First Instance of the European Communities of 6 October 2009 in Case T-21/06 *Germany v Commission*;
- Annul Commission Decision C(2005)3903 of 9 November 2005 on the State Aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg; and
- Order the defendant to pay all the costs.

Pleas in law and main arguments

This appeal relates to the judgment of the Court of First Instance of the European Communities by which the action brought by the Federal Republic of Germany against the Commission's decision of 9 November 2005 in State aid case C-25/2004 on the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg was dismissed as unfounded. The Commission had, in that decision, found the aid to be incompatible with the common market (Article 107(3)(c) TFEU).

The Federal Republic of Germany puts forward five grounds of appeal by which it alleges that the Court failed to recognise a misuse of powers on the part of the Commission and, accordingly, that it erred in dismissing the action.

First, the Court erred in denying the incentive effect of the measure by focusing only on the very limited period of the switch-over from analogue terrestrial transmission to DVB-T, instead of considering the cost of the measure as a whole to those broadcasters in receipt of aid. In addition to the switch-over itself, the measure as a whole includes an obligation to maintain broadcasting output via DVB-T for a period of five years, irrespective of the degree of market acceptance which is difficult to forecast. Accordingly, the ancillary costs in respect of this mandatory transmission period should also be taken into account.

Second, the Court erred in overextending the Commission's assessment criteria under Article 107(3)(c) TFEU by accepting that the Commission could dismiss the suitability of the aid measure solely on the ground that the same objective would be attained by means of alternative regulatory measures. The comparison with alternative measures is not, according to the purpose of the TFEU's State aid control provisions, within the parameters of what the Commission may review. In that context, the Federal Government also complains that the Court is passing on to the Member State the burden of proving that the alternative measures suggested by the Commission would have been ineffective from the outset. This is contrary to the principle of legal certainty, the general principles of the allocation of the burden of proof and the purpose of the control of State aid.

Third, the Court misjudged the relevance of the fundamental rights of the European Union when considering Article 107(3)(c) TFEU, rights which, as part of primary law, are binding on all institutions of the European Union in respect of all acts. To accept that the mere reference to alternative regulatory measures allegedly available is sufficient for approval of an aid measure to be refused is to overlook the fact that regulatory measures interfere with the fundamental right of the freedom of undertakings to pursue an economic activity. This, at the very least, should be taken into consideration, but that did not happen in this case.