Exemptions from the one-month delay rule for the deduction of VAT from 1 January 1989 onwards

The French Government points out that this measure enabled the PMU to deduct VAT paid on its purchases by reference to the month when those purchases were made and not the following month, as would have been the normal rule.

Since its inception in 1969, that cash-flow facility was offset, however, by the lodging of a permanent non-interest-bearing deposit with the Treasury.

It is true, as the Court of First Instance observed, that the Commission made a factual error in its decision in so far as it stated that the Treasury deposit had only existed since 1989.

The Commission considered that the measure at issue constituted a State aid, compatible with the common market before 1989 by reason of the fact that any disturbance thereby caused to the common market was negligible. After 1 January 1989, by reason of the existence of the compensatory deposit with the Treasury, the Commission took the view that it no longer constituted State aid.

The Court of First Instance annulled the Commission's assessment regarding the period after 1 January 1989 on the basis of factors essentially related to the preceding period and the mere finding that the compensation for the year 1989 had been inadequate.

However, the Court of First Instance could not rely solely on those factors in order to infer that the Commission's assessment in respect of the entire period after 1 January 1989 was erroneous. In this respect also the judgment of the Court of First Instance is vitiated by flawed reasoning and by an inadequate statement of grounds.

(B) **Recovery of aid which is incompatible with the common market**

Since the Commission found in its Decision that the PMU's exemption from the housing levy as from 1989 was incompatible with the Treaty, but that the recipient was required to repay amounts involved only with effect from the date when the procedure was opened in 1991, by reason of the fact that it could legitimately have entertained expectations based on the earlier decision of the Conseil d'État, the Court of First Instance essentially held that the Commission could not itself take into account the recipient's legitimate expectations, as relied upon by the Member State, in order to dismiss the requirement to repay aid which it deemed incompatible with the common market.

The French Government believes that the judgment of the Court of First Instance is also vitiated in this respect by an error of law and that when the Commission is advised by a Member State of legitimate expectations on the part of the recipient of an aid measure which the Commission has held to be incompatible with the common market, it may itself, in accordance with the fundamental principles of Community law, take this into account in order to waive reimbursement of the measure in question.

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([1]) OJ C 90, 26.3.1994, p. 23.

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**References for a preliminary ruling from the Consiglio di Stato (Council of State) by orders of that court of 20 January 1998, in the cases of (1) Questore (senior police official), Macerata v. Claudio Peroni, (2) Questore, Genoa v. Eliana Fasciolo, (3) Questore, Genoa v. Umberto Merlo, (4) Questore, Catanzaro v. Patrizia Caffarelli, (5) Questore, Milan v. Chiara Picerno, (6) Questore, Imperia v. Gianluca Barrese, Andrea De Sanctis and SaS Riviera, (7) Questore, Pavia v. Giovanni Giacchetto and (8) Questore, Savona v. Francesco Amato**

**(Case C-86/98 to C-93/98)**

(98/C 209/30)

Reference has been made to the Court of Justice of the European Communities by orders of the Consiglio di Stato of 20 January 1998, which were received at the Court Registry on 13 March 1998, for a preliminary ruling in the cases of (1) Questore, Macerata v. Claudio Peroni, (2) Questore, Genoa v. Eliana Fasciolo, (3) Questore, Genoa v. Umberto Merlo, (4) Questore, Catanzaro v. Patrizia Caffarelli, (5) Questore, Milan v. Chiara Picerno, (6) Questore, Imperia v. Gianluca Barrese, Andrea De Sanctis and SaS Riviera, (7) Questore, Pavia v. Giovanni Giacchetto and (8) Questore, Savona v. Francesco Amato on the following question:

Do the Treaty provisions on the provision of services preclude rules such as the Italian betting legislation in view of the social policy concerns and of the concern to prevent fraud that justify it?

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**Action brought on 7 April 1998 by the Republic of Austria against the Commission of the European Communities**

**(Case C-99/98)**

(98/C 209/31)

An action against the Commission of the European Communities was brought before the Court of Justice of the European Communities on 7 April 1998 by the Republic of Austria, represented by Dr. Wolf Okresek, Head of Section, Director of the Constitutional Section of the Office of the Federal Chancellor of the Republic of Austria, with an address for service in Luxembourg at the office of Dr. Josef Magerl, Ambassador, Austrian Embassy, 3 Rue des Bains.

The applicant claims that the Court should:

— annul Commission Decision SG(98) D/1124 of 9 February 1998 in its entirety on the grounds of breach of the EC Treaty and breach of essential procedural requirements and misuse of powers by the Commission,

— order the Commission of the European Communities to pay the costs.

*Pleas in law and main arguments adduced in support:*

Breach of the EC Treaty, breach of essential procedural requirements and misuse of powers: The aid which is the subject of the proceedings is to be regarded as existing aid, since the Commission failed to express its opinion on the proposed aid within a reasonable time. The opening of a formal examination procedure therefore conflicts with the Treaty, since the legally incorrect classification as a newly notified aid is thereby effected and the application of the prohibition of implementation under Article 93(3) expressly stated. The applicant considers that by the letter of 19 March 1997 at the latest it transmitted in full to the Commission all the information which the Commission required to be able to express an opinion on the compatibility of the measure with the Treaty; none of the later 'questions' of the Commission were in any way material for the decision, but evidently served only to delay a decision.

The Commission asserts that it is entitled to oppose the implementation of the measures after proper notification by the Member State under the 'Lorenz procedure'. That opposition is evidently intended to have the consequence that thereafter (ex tunc or ex nunc?) there is no existing aid. That follows from the final paragraph of the 'Background' section of the contested decision and from the last sentence of Point 2.1 and the last sentence of Point 5.1 of the Commission's 'Guidelines'. In the applicant's opinion, there is no such right of opposition; moreover, even supposing that it did exist as stated in the Commission's 'Guidelines', it was exercised too late, and is therefore of no effect.

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**Action brought on 9 April 1998 by the Kingdom of Sweden against the Council of the European Union**

**(Case C-100/98)**

(98/C 209/32)

An action against the Council of the European Union was brought before the Court of Justice of the European Communities on 9 April 1998 by the Kingdom of Sweden, represented by Lotty Nordling, Rättschef, with an address for service in Luxembourg at the Swedish Embassy, 2 Rue H. Heine, Luxembourg.

The applicant claims that the Court should:

— pursuant to Article 173, declare invalid the 1998 TAC Regulation (EC No 45/98) [1], in so far as the regulation provides for the allocation of cod in zone IIIbcd, and

— order the council to pay the Kingdom of Sweden's costs.

*Pleas in law and main arguments adduced in support:*

Article 121(1) of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, as worded according to Council Decision 95/1/EC, Euratom, ECSC [2], should be annulled:

For the year 1998 a quantity of 86 547 tonnes of Community cod is available for fishing in Community waters in zone IIIb, c, d. According to the conditions laid down in Article 121(1) of the Act of Accession, Sweden should have been allocated 29 921 tonnes (0.35037 × 50 000 + 0.4 × 36 947 – 400 – 1 976) of that amount. This is taking into account the fact that the transfer of 400 tonnes to Poland under the agreement between the Community and Poland has been deducted from Sweden's quota and that in 1998 1 976 tonnes of Sweden's quota is to be transferred to other Member States in accordance with the agreement made in connection with the signing of the EEA Agreement. Instead, Sweden has been allocated under Regulation (EC) No 45/98 29 246 tonnes, which is 675 tonnes less than results from the Act of Accession.

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[1] Council Regulation (EC) No 45/98 of 19 December 1997 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1998 and certain conditions under which they may be fished (OJ L 12, 19.1.1998, p. 1).

[2] OJ L 1, 1.1.1995, p. 1.

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**Reference for a preliminary ruling from the Bundesgerichtshof by order of that court of 5 March 1998 in the case of Union Deutsche Lebensmittelwerke GmbH v. Schutzverband gegen Unwesen in der Wirtschaft e.V.**

**(Case C-101/98)**

(98/C 209/33)

Reference has been made to the Court of Justice of the European Communities by an order of the 1st Civil Chamber of the Bundesgerichtshof (Federal Court of