

the taxable person who receives it, the subsidy concerned will be liable to VAT twice. Although Article 19 provides expressly that the Member States may include in the deductible proportions for mixed taxable persons those subsidies which are not part of the basis of assessment, that exception to the 'normal' method of calculation is a tool available to the national legislature to prevent a body which is 'by its nature' subsidised obtaining repayment of VAT for carrying out a merely nominal activity in order to qualify as a taxable person. However, that provision is to be interpreted restrictively. On the other hand, it is clear that, by including subsidies in the deductible proportion, the right to deduct of mixed taxable persons is reduced, while that is not possible with regard to fully taxable persons. Article 19 is an optional provision and the Member States may determine the procedures for implementing it provided they observe, as a whole, the basic principles and provisions of the Sixth Directive, which contains other provisions which make it possible to prevent deductions considered to be abusive.

2. Laying down of a special rule which limits the right to deduct VAT owed for the purchase of goods or services financed in whole or in part by subsidies (second paragraph of Article 104(2) of the Spanish Law on VAT).

That special rule, according to which subsidies to finance the purchase of certain goods or services do not give rise to the application of the deductible proportion and are not included in the denominator but instead limit the right to deduct the VAT paid on the portion of the price of the goods or services financed by the subsidy, is incompatible with the Sixth Directive. Indeed, the Spanish provision establishes a limit on the right to deduct in respect of fully taxable persons which is not provided for under the directive. As for mixed taxable persons, the only limitation possible under the directive is the inclusion of the subsidies in the denominator of the deductible proportion. The VAT which a taxable person has paid for a certain service or certain goods is always deductible in accordance with the rules on the right to deduct provided for by the directive and, to that end, the source of the financing for the goods or services are of no relevance whatever. The Member States may take into account only those subsidies which are not linked to the price of the transaction, and may choose whether or not to include them in the deductible proportion only if the taxable person carries out, at the same time, taxed and exempt transactions. Application of the provision is optional and the Member States may determine the procedures for implementing it provided they observe the basic principles and provisions of the Sixth Directive as a whole.

The Spanish provision infringes the fundamental right to deduct VAT, acknowledged as such in the case-law of the

Court of Justice, inasmuch as it is a special rule which has no basis in the directive, applies to all taxable persons in receipt of a subsidy, including fully taxable persons, and, even if it is applied to mixed taxable persons, it may in certain circumstances be less advantageous than using the option provided for by Article 19 of the directive.

(1) OJ 1977 L 145, p. 1.

Reference for a preliminary ruling by the Tribunale Amministrativo Regionale per la Lombardia — Sezione staccata di Brescia — by order of that Court of 8 October 2002, 17 December 2002 and 14 February 2003 in the case of Consorzio Aziende Metano — CO.NA.ME. against il Comune di Cingia de' Botti; with the participation of Padania Acque S.p.A.

(Case C-231/03)

(2003/C 226/05)

Reference has been made to the Court of Justice of the European Communities by order of the Tribunale Amministrativo Regionale per la Lombardia — Sezione staccata di Brescia (Lombardy Regional Administrative Court — Separate Chamber for Brescia) of 8 October 2002, 17 December 2002 and 14 February 2003, received at the Court Registry on 28 May 2003, for a preliminary ruling in the case of Consorzio Aziende Metano — CO.NA.ME. against il Comune di Cingia de' Botti; with the participation of Padania Acque S.p.A. on the following question:

Do Articles 43, 49 and 81 EC, in so far as they prohibit, respectively, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and on the freedom to provide services within the Community in respect of nationals of Member States and the commercial practices of undertakings which have as their effect the prevention, restriction or distortion of competition within the European Union, preclude provision for the direct award, without the announcement of a tender, of the management of a public contract for the distribution of gas to a company in which a local authority participates, whenever that participation in the share capital is such as to preclude any direct control over the management itself and must it therefore be declared that, as is the case in these proceedings where the shareholding amounts to 0,97 % of the share capital, the essential preconditions for 'in-house' management are not met?