

- error of law, in that the Court of First Instance considered that the Commission was not required to determine the actual effect on competition and intra-Community trade in its examination of the aid at issue in the light of Article 87 EC;
- distortion of the sense of the claims in the application and error in law consisting of breach of the procedural rules concerning the right to a fair hearing, in that the Court of First Instance did not examine the claims relating to the existence of exceptional circumstances and the protection of legitimate expectations;
- distortion of the sense of the claims in the application and error in law consisting of infringement of the procedural rules concerning the right to a fair hearing, in that the Court of First Instance did not examine the claims relating to infringement of Article 10 EC and breach of the principle of good and proper administration by the Commission;
- error of law consisting of breach of the procedural rules concerning the right to a fair hearing, in that the Court of First Instance did not give a decision on the preparatory inquiry proposed in the application.

Reference for a preliminary ruling by the Hoge Raad der Nederlanden by judgment of that Court of 7 November 2003 in the case of Staatssecretaris van Financiën against the single taxable entity Arthur Andersen & Co Accountants c.s.

(Case C-472/03)

(2004/C 21/27)

Reference has been made to the Court of Justice of the European Communities by judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 7 November 2003, received at the Court Registry on 12 November 2003, for a preliminary ruling in the case of Staatssecretaris van Financiën against the single taxable entity Arthur Andersen & Co Accountants c.s. on the following question:

Where a taxable person has concluded an agreement with a (life) assurance company, such as the agreement at issue between ACMC and UL, under which that taxable person undertakes, for a certain remuneration and with the aid of qualified personnel who are expert in the insurance field, most of the actual activities related to insurance — including, as a rule, the taking of decisions that bind the insurance company to enter into insurance contracts and maintaining contact with the agents and, as the occasion arises, with the insured — while the insurance contracts are concluded in the name of the

insurance company and the insurance risk is borne by the latter, are the activities undertaken by that taxable person in execution of the agreement ‘related services performed by insurance brokers and insurance agents’ within the meaning of Article 13B(a) of the Sixth Directive ⁽¹⁾?

⁽¹⁾ 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 of 13.06.1977, p. 1-40).

Reference for a preliminary ruling by the Tribunale Ordinario di Milano — Sezione X Penale — by order of that Court of 23 October 2003 in the criminal proceedings against Adelio Aggio, Paolo Berlusconi and Giovanni Butti

(Case C-473/03)

(2004/C 21/28)

Reference has been made to the Court of Justice of the European Communities by order of the Tribunale Ordinario di Milano - Sezione X Penale - (Milan District Court, Tenth Criminal Chamber) of 23 October 2003, received at the Court Registry on 13 November 2003, for a preliminary ruling in the criminal proceedings against Adelio Aggio, Paolo Berlusconi and Giovanni Butti on the following question:

- Is Article 6 of Directive 68/151/EEC ⁽¹⁾ to be understood as requiring the Member States to establish appropriate penalties not only for failing to disclose company balance sheets and profit and loss accounts but also for falsifying those documents, or other company documents addressed to the members or the public or any information on a company's assets and liabilities, and economic and financial situation which the company is required to provide in relation to the company or the group of which it forms a part?
- Do the requirements that the penalty be effective, proportionate and dissuasive, with which terms the Court defined the concept of ‘appropriate penalty’ in its judgment of 21 September 1989 in Case 68/88 [Commission v Hellenic Republic [1989] ECR I-2965], refer to the nature or type of penalty considered in the abstract, or rather also to its application in practice having regard to the structural characteristics of the legal system within which it takes effect? and finally

— Does Article 2621 of the Codice Civile (as amended by Legislative Decree No 61 of 11 April 2002), which provides for a sentence of imprisonment of up to 18 months and consequently a maximum limitation period from the time when the offence is committed of four and a half years, satisfy those requirements? That occurs in a legal system which provides, after the investigating judge completes his investigation and the public prosecutor brings criminal proceedings, for review by the investigating judge to ascertain that there is sufficient evidence to commit the accused for trial and for the possibility of three tiers of courts before judgment is definitive and thus, in the case of a conviction, the penalty is actually imposed. In addition, account must be taken of the complexity of the findings required under Article 2621 of the Codice Civile, given the thresholds of criminal relevance set by Articles 2621, paragraphs 3 and 4.

(¹) OJ L 65 of 14.3.1968, p. 8; English Special Edition: Series-I I Chapter 1968(I), p. 41.

Reference for a preliminary ruling by the Commissione Tributaria Provinciale di Cremona, Sezione 02 by order of that Court of 9 October 2003 in the case of Banca Popolare di Cremona Soc. Coop.a.r.l. against Agenzia Entrate Ufficio Cremona

(Case C-475/03)

(2004/C 21/29)

Reference has been made to the Court of Justice of the European Communities by order of the Commissione Tributaria Provinciale di Cremona, Sezione 02 (Cremona Tax Court, Second Chamber) of 9 October 2003, received at the Court Registry on 17 November 2003, for a preliminary ruling in the case of Banca Popolare di Cremona Soc. Coop.a.r.l. against Agenzia Entrate Ufficio Cremona on the following question:

Must Article 33 of Directive 77/388/EEC (¹) (as amended by Directive 91/680/EEC (²)) be interpreted as meaning that it prohibits a charge to IRAP of the net value of production deriving from the regular exercise of independent activity to produce or exchange goods or to provide services?

(¹) OJ L 145 of 3.6.1977, p. 1.

(²) OJ L 376 of 31.12.1991, p. 1.

Action brought on 17 November 2003 by the Commission of the European Communities against the Republic of Austria

(Case C-476/03)

(2004/C 21/30)

An action against the Republic of Austria was brought before the Court of Justice of the European Communities on 17 November 2003 by the Commission of the European Communities, represented by Dr Claudia Schmidt and Dr Wouter Wils, with an address for service in Luxembourg.

The applicant claims that the Court should:

1. declare that, by failing to adopt the laws, regulations of administrative provisions necessary to transpose Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (¹) or, at any rate, by failing to inform the Commission thereof, the Republic of Austria has failed to fulfil its obligations under that directive;
2. declare that, by failing to adopt the laws, regulations of administrative provisions necessary to transpose Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (²) or, at any rate, by failing to inform the Commission thereof, the Republic of Austria has failed to fulfil its obligations under that directive;
3. declare that, by failing to adopt the laws, regulations of administrative provisions necessary to transpose Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (³) or, at any rate, by failing to inform the Commission thereof, the Republic of Austria has failed to fulfil its obligations under that directive;
4. order the Republic of Austria to pay the costs of the proceedings.

Pleas in law and main arguments

The period for transposition of those directives expired on 15 March 2003.

(¹) OJ No L 75, 15.03.2001, p. 1.

(²) OJ No L 75, 15.03.2001, p. 26.

(³) OJ No L 75, 15.03.2001, p. 29.