

- (c) Is the right to such payment:
- i. A right to reimbursement of sums unduly levied such that repayment is a consequence of, and an adjunct to, the right conferred by Articles 43 and/or 56; and/or
  - ii. A right to compensation or damages such that the conditions for recovery laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* must be satisfied; and/or
  - iii. A right to recover a benefit unduly denied and, if so:
    1. is such a right a consequence of, and an adjunct to, the right conferred by Articles 43 and/or 56; or
    2. must the conditions for recovery laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* be satisfied; or
    3. must some other conditions be met?
- (d) Does it make any difference for the purposes of Question 2(c) above whether as a matter of the domestic law of State A the claims are brought as restitutionary claims or are brought or have to be brought as claims for damages?
- (e) In order to recover, is it necessary for the company making the claim to establish that it, or its parent, would have claimed a tax credit (full or partial as the case may be) if it had known that under Community law it was entitled to do so?
- (f) Does it make any difference to the answer to Question 2(a) that in accordance with the ruling of the Court of Justice in Joined Cases C-397/98 and C-410/98 *Hoechst and Metallgesellschaft* the relevant subsidiary in Member State A may have been reimbursed or may be entitled in principle to reimbursement of, or in respect of, advance corporation tax in relation to the dividend paid to the relevant parent company in Member State B or Member State C?
- (g) What guidance, if any, does the Court of Justice think it appropriate to provide in the present cases as to which circumstances the national court ought to take into consideration when it comes to determine whether there is a sufficiently serious breach within the meaning of the judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame*, in particular as to whether, given the state of the case law on the interpretation of the relevant Community law provisions, the breach was excusable?

**Reference for a preliminary ruling by the Court of Appeal (England and Wales) (Civil Division), by order of that court dated 30 July 2004, in the case of (1) Commissioners of Customs and Excise (2) H.M. Attorney-General against Federation of Technological Industries and 53 others**

**(Case C-384/04)**

(2004/C 273/31)

Reference has been made to the Court of Justice of the European Communities by an order of the Court of Appeal (England and Wales) (Civil Division) dated 30 July 2004, which was received at the Court Registry on 4 September 2004, for a preliminary ruling in the case of (1) Commissioners of Customs and Excise (2) H.M. Attorney-General against Federation of Technological Industries and 53 others, on the following questions:

1. Does Art. 21.3 of Council Directive 77/388/EEC (!) as amended by Council Directive 2000/65/EC permit Member States to provide that any person may be made jointly and severally liable for payment of tax with any person who is made so liable by Art. 21.1 or 21.2, subject only to the general principles of Community law namely that such a measure must be objectively justifiable, rational, proportionate and legally certain?
2. Does Art. 22(8) of the Directive permit Member States to provide that any person may be made so liable or to provide that one person may be required to provide security for tax due from another subject only to the aforesaid general principles?
3. If the answer to question 1 is no, what limits, other than those imposed by the aforesaid general principles, are there on the power conferred by Art. 21.3?
4. If the answer to question 2 is no, what limits, other than those imposed by the aforesaid general principles, are there on the power conferred by Art. 22(8)?

5. Are member states precluded by the Directive as amended from providing for joint and several liability of taxpayers or from requiring one taxpayer to provide security for tax due from another in order to prevent abuse of the VAT system and the protection of revenues properly due under that system, if such measures comply with the aforesaid general principles?

(<sup>1</sup>) 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, 13.6.1977, p. 1).

### Action brought on 10 September 2004 by the Commission of the European Communities against the French Republic

(Case C-389/04)

(2004/C 273/32)

An action against the French Republic was brought before the Court of Justice of the European Communities on 10 September 2004 by the Commission of the European Communities, represented by A. Bordes and K. Simonssen, acting as Agents, with an address for service in Luxembourg.

The Commission of the European Communities claims that the Court should declare:

— that firstly, by failing to transpose correctly the first paragraph of Article 22 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (<sup>1</sup>), concerning the requirement of operational independence as between the national regulatory authority and postal operators, and by maintaining in force legislation which does not guarantee the regulatory body of the postal sector sufficient operational independence vis-à-vis the public postal operator, La Poste,

— and that secondly, by failing to transpose within the period prescribed Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (<sup>2</sup>),

— the French Republic has failed to fulfil its obligations under the first paragraph of Article 22 and Article 24 of Directive 97/67/EC, and Article 2 of Directive 2002/39/EC.

order the French Republic to pay the costs.

*Pleas in law and main arguments:*

Pursuant to Article 22 of Directive 97/67/EC, the French Republic has designated the Minister for Economic Affairs, Finance and Industry, who is the minister responsible for postal services, as the national regulatory authority for the postal sector. At the same time, this minister is head of the directorates-general for industry, information technology and postal services (DIGITIP) set up within the Ministry of Economic Affairs, Finance and Industry, which performs the duties of supervising La Poste through its subdirectorates for postal services. In the context of a public undertaking, the concept of supervision encompasses certain tasks and responsibilities, connected with the exercise of the right to property and with the economic and financial performance of La Poste, such as the establishment of strategic guidelines, the services to be offered in addition to the universal service and pricing policy in relation to such services, involvement in the selection of board members of the undertaking, acquisition of an interest in other undertakings etc., whose performance should be kept separate from regulatory tasks in order to comply with the requirement of operational independence as laid down by the Postal Directive. This requirement aims to preclude any risk of a conflict of interests arising between the national regulatory authority responsible for adopting legislation applicable to the postal sector and for verifying its implementation, and undertakings offering goods and services in this sector. In the case in question such a conflict of interests exists, since the two tasks are carried out within the same ministry. Consequently, the effectiveness of Article 22, first paragraph, of Directive 97/67/EC is not guaranteed.

Furthermore, the time-limit for transposition of Directive 2002/39/EC expired on 31 December 2002.

(<sup>1</sup>) OJ L 15, 21.1.1998, p. 14.

(<sup>2</sup>) OJ L 176, 5.7.2002, p. 21.

### Reference for a preliminary ruling by the Regeringsrätten (Supreme Administrative Court) by decision of that court of 7 September 2004 in the case of GöteborgsOperan AB v Skatteverket

(Case C-390/04)

(2004/C 273/33)

Reference has been made to the Court of Justice of the European Communities by order of the Regeringsrätten (Supreme Administrative Court) (Sweden) of 7 September 2004, received at the Court Registry on 13 September 2004, for a preliminary ruling in the case of GöteborgsOperan AB against Skatteverket on the following questions: