OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 16 February 2005 (1)

Joined Cases C-354/03, C-355/03 and C-484/03

Optigen LtdandFulcrum Electronics Ltd (In liquidation)andBond House Systems Ltd

v

Commissioners of Customs & Excise

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Chancery Division (United Kingdom))

(Sixth VAT Directive – Article 2(1), Article 4(1) and (2) – Economic activity – Transaction forming part of a chain of supply involving a defaulting trader or a trader using an unauthorised VAT number – Carousel fraud)

1. In three cases concerning unwitting participants in a type of VAT fraud characterised as ‘carousel fraud’ the High Court of Justice of England and Wales, Chancery Division, asks the Court if transactions constituting part of a fraud scheme set up by others qualify as economic activities within the meaning of Article 4(2) of the Sixth Council Directive 77/388/EEC. (2)

2. The request for a preliminary ruling arises from appeal proceedings before the High Court of Justice (Chancery Division) in the cases of Optigen Ltd (‘Optigen’), Fulcrum Electronics Ltd (‘Fulcrum’), and Bond House Systems Ltd (‘Bond House’). The respondents in each case are the Commissioners of Customs and Excise. The appeals of Optigen and Fulcrum are directed against a decision of the VAT and Duties Tribunal, London. The appeal of Bond House is directed against a decision of the VAT and Duties Tribunal, Manchester. In both decisions it was held in essence that transactions forming part of a carousel fraud fall outside the scope of VAT.

I – **Relevant provisions of Community law**

3. Article 2 of the First Council Directive 67/227/EEC (3) sets out the essence of the common system of VAT:

‘The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.'

4. Under Article 2(1) of the Sixth Directive a supply of goods or services effected for consideration by a taxable person acting as such is subject to VAT.

5. Article 4(1) of the Directive provides that 'taxable person' is to mean 'any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'.

6. 'Economic activities' are defined in Article 4(2) as comprising 'all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions'. Article 4(2) goes on to provide that: 'The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity'.

II – **Facts and reference for a preliminary ruling**

A – *General background: 'carousel fraud'*

7. In its decision in the case of Bond House the VAT and Duties Tribunal, Manchester, provides a clear explanation of what the Commissioners describe as carousel fraud(4):

8. 'In its simplest form a carousel fraud works in this way. A VAT-registered trader ("A") in one EuropeanUnionMemberState sells taxable goods to a VAT-registered trader ("B") in another MemberState. A's sale to B is zero-rated in A's Member State.[(5)] B should declare the purchase and pay acquisition tax in its own Member State, and, upon the premise that it is intending to use those goods in order to make an onward taxable supply, then claim credit for the same amount as input tax. Usually, if it is a participant in a carousel fraud, it does neither. B then sells the goods to another VAT-registered trader ("C") in its own MemberState, charging and receiving VAT on the consideration. However, it fails to account to the tax authorities for that VAT and effectively disappears; it becomes what [the Commissioners] refer to as a "missing trader". Nevertheless, at the time of making its sale to C, while it is still registered for VAT and before the Commissioners are aware that it is or might become a missing trader and have been able to intervene (for example, by de-registering B) it provides a VAT invoice to C, which claims the VAT it has paid to B as input tax. C (to whom the Commissioners refer as a "broker") then sells the goods to a registered trader in another MemberState: the hallmark of the simplest fraud is that this purchaser is A, and it is this circularity which gives rise to the term "carousel fraud". C has an input tax claim but, because its sale to A is zero-rated in C's own Member State, is not required to account for any output tax.[(6)] The result, if the fraud is successful, is that B has received, but not accounted for, the VAT which the tax authorities must pay to C. In this situation B is certainly fraudulent and A probably so; C may well be entirely ignorant of what is happening, and of the use which is being made of its participation. ... B's objective, as the Commissioners perceive the matter, is not to buy and sell in the ordinary course of business, but to put itself in a position to receive VAT … The goods are no more than a token, necessary to lend verisimilitude to the transactions … A (at least, if it is participant in the fraud) likewise has no genuine business motive in buying back that which it has just sold. Though it is possible that A, too, is an unwitting participant if the goods are sold to it by C for a price lower than that at which it has sold them to B (or lower than a price for which, allowing for market movements, it could sell them in the future), the Commissioners' theory is that A and B are acting in concert and that re-purchase by A is desirable, partly for reasons of control and partly because it is simpler and cheaper to use a finite quantity of goods several times rather

than to buy a fresh supply in the open market for each sequence … B, knowing it will gain from its failure to account for the output tax it has incurred, can afford to sell goods to C for less than it paid to A, and will do so if necessary in order to secure a sale.'

9. Endless variations on the chain of transactions are imaginable, considerably more complicated than the one described above, and in reality the same goods may be 'sent around' several different chains. Still, the problem fundamentally remains the same: a trader collects an amount paid to him as VAT but does not account for it to the tax authorities. The defaulting trader may use a 'hijacked' VAT number or it may register itself for VAT and simply disappear before the tax authorities take action.

10. There appears to have been an increase in this type of fraud in intra-Community trade over the past few years and it currently represents a major concern for Member States. Although the exact amount of money involved is difficult to quantify, it clearly causes a considerable loss of national revenue. (7)

B – *Facts in the present cases*

11. The facts in the present cases as they appear from the orders for reference from the High Court of Justice are as follows.

a) The facts in the cases of Optigen and Fulcrum

12. Optigen and Fulcrum were traders, mainly in computer chips, which they purchased from companies in the United Kingdom and sold to customers located in other Member States. Optigen and Fulcrum, so it is accepted, became innocent parties to a number of transactions comprising a carousel fraud. They had no dealings with the trader that went 'missing', nor did they have knowledge of, or reason to know of, their involvement in a scheme of transactions other than as ordinary buyers from a trader and ordinary sellers to a company in another MemberState. The Commissioners declined VAT returns submitted by Optigen and Fulcrum on the basis that the relevant purchases and sales were devoid of economic substance and were not part of any economic activity. According to the Commissioners, the purchases were not supplies used or to be used for the purposes of a business and the sales were not supplies made in the course of a business for the purposes of VAT.

13. Optigen and Fulcrum appealed against the decisions of the Commissioners to the VAT and Duties Tribunal, London, which joined the two cases. By decision of 1 May 2003, the VAT and Duties Tribunal dismissed the appeal of Fulcrum and Optigen, concluding that the Commissioners had rightly maintained that the transactions in question fell outside the scope of VAT. It found that a trader does not have a right to a refund of input VAT paid on goods which it then sold to companies outside the United Kingdom, when there is a defaulting trader or a trader using a hijacked VAT number in the chain of supply, even though the trader claiming the refund was in no way involved in, and had no knowledge of, the failure of the other trader to fulfil its obligations or the hijacking of the VAT number, and the chains of supply which included the purchases and sales by the trader were part of a carousel fraud operated by third parties without its knowledge. Optigen and Fulcrum each lodged appeals before the High Court of Justice against the decision of the VAT and Duties Tribunal.

b) The facts in the case of Bond House

14. Bond House was, at the material time, a company incorporated in England and Wales and was a dealer in computer components. The larger part, by value, of its business was the bulk purchase of processor chips ('CPUs') from traders registered for VAT in the United Kingdom,

which it sold to traders registered for VAT in other Member States. In May 2002, while trading as it was before, Bond House made a number of purchases and sales of CPUs. Part of these sales – 51 transactions representing approximately 99% of Bond House's turnover in May 2002 – was to customers in another MemberState. In each instance, Bond House bought the CPUs from a UK supplier at what it considered a fair market value, it took delivery of them and paid to the supplier the agreed price, plus an amount charged to it by way of VAT. It delivered the CPUs to its overseas customers for a somewhat higher price than it had paid itself. These supplies being zero-rated, Bond House made a VAT return for May 2002 which claimed a repayment of the amount it had paid on its purchases by way of VAT. The Commissioners of Customs and Excise refused Bond House's input tax claim with regard to 27 purchases.

15. Bond House appealed against the decision of the Commissioners to the VAT and Duties Tribunal, Manchester. By decision of 29 April 2003, amended by addendum of 8 May 2003, the VAT and Duties Tribunal concluded that 26 of the 27 purchases could not be regarded as economic activities within the meaning of the Sixth Directive and were outside the scope of VAT. It found that those purchases formed part of a series of transactions having a fraudulent objective. Even though Bond House did not know of that objective and was innocent of any wrongdoing, those operations were devoid of economic substance. They had to be evaluated according to objective criteria. It was therefore immaterial that Bond House did not act unlawfully. Finally, Bond House could have no legitimate expectation that its claim for a refund of the input VAT it had paid would be met, and the Commissioners, in depriving Bond House of that refund, did not offend against the principles of proportionality or of legal certainty and did not breach its human rights. Bond House lodged an appeal against that decision before the High Court of Justice. The High Court notes in its order for reference that Bond House did not know of the fraud alleged by the Commissioners and that the company did not act recklessly in conducting its business.

C – *Questions referred for a preliminary ruling*

16. Considering that the applicable national law – the Value Added Tax Act 1994 – has to be interpreted in light of the Community common system of VAT, the High Court of Justice seeks guidance as to how to establish whether the transactions at issue fall within the scope of that system. In the present case it is in dispute whether Bond House, Fulcrum and Optigen were carrying out an economic activity when unwittingly acting as part of a 'carousel'. The High Court of Justice essentially asks whether transactions such as those at issue qualify as economic activities within the meaning of Article 4(2) of the Sixth Directive and whether, in order to make this assessment, regard should be had to the chain of transactions as a whole or to each transaction individually.

17. Written observations have been submitted by Optigen, Fulcrum and Bond House; by the governments of the United Kingdom and Denmark; by the Council; and by the Commission. At the hearing held on 8 December 2004 the Court heard oral argument from Optigen, Fulcrum and Bond House, from the governments of the United Kingdom, the CzechRepublic and Denmark, as well as from the Commission. The Council decided not to present oral argument after it had become clear that none of the parties would question the validity of provisions of the Sixth Directive.

III – **Assessment**

18. Obviously, the trade in CPUs is usually regarded as an economic activity. The following analysis will therefore focus principally on the reasons why, in the United Kingdom's view, that is not the case in these circumstances. First, I shall examine the proposition that the nature of the transactions must be assessed by reference to the carousel scheme as a whole. Secondly, I shall discuss the idea that regard must be had to the underlying fraudulent purpose of the transactions. I shall subsequently consider the implications of case-law in which it has been held that certain

unlawful activities fall outside the scope of VAT. Fourthly, I shall discuss the issue of legal certainty, an element on which Optigen, Fulcrum and Bond House have placed much emphasis in their oral and written submissions. The final part will offer some reflections in view of the need to address carousel fraud.

A – *The view that the carousel must be regarded as a whole*

19. Optigen, Fulcrum, Bond House and the Commission maintain that the transactions qualify as economic activities within the meaning of Article 4(2) of the Sixth Directive. According to them, the purchase and sale of CPUs is in itself an economic activity. The fact that other persons initiated a chain of transactions to defraud the tax authorities has no bearing on the nature of the transactions to which Bond House, Optigen and Fulcrum were party.

20. The governments of Denmark and the CzechRepublic support the United Kingdom's submission that the transactions do not qualify as economic activities within the meaning of that directive. The United Kingdom argues that transactions which form part of a carousel fraud fall outside the scope of the Sixth Directive, because they are not genuine economic activities; their ultimate purpose is the misappropriation of money paid as VAT, rather than the release of products onto the market for consumption. Since no VAT is payable on the transactions, there can be no basis for the recovery of VAT. The argument applies to each link in the carousel because, without the fraud scheme, none of the transactions would have taken place.

21. Crucial to the United Kingdom's line of reasoning is the view that the carousel scheme must be regarded as a whole in order to determine whether VAT applies to the separate transactions therein. I do not share this view.

22. The Court has repeatedly held that the scope of the term 'economic activity' in Article 4(2) of the Sixth Directive is wide and that the term is objective in character. (8) Exemptions from the scope of VAT must be expressly provided for and precisely defined. (9) As the Court stated in *Rompelman* '[t]he common system of value-added tax … ensures that all economic activities, whatever their purpose or results … are taxed in a wholly neutral way'. (10) In its judgment of 26 March 1987 in *Commission* v *Netherlands* the Court held that in order to determine whether an activity is an economic activity for the purposes of the common system of VAT, 'the activity is considered per se and without regard to its purpose or results'. (11)

23. The United Kingdom relies on the rulings in *Faaborg-Gelting Linien* (12)and *Stockholm Lindöpark* (13) to argue that transactions must be considered in the light of the circumstances in which they take place in order to ascertain whether they are subject to VAT. However, those judgments are not authority for the conclusion that a supply chain must be considered as a whole in order to determine whether the transactions forming part of it qualify as an economic activity.

24. In *Faaborg-Gelting Linien* the Court was asked whether restaurant transactions qualify as supplies of goods or as supplies of services under the Sixth Directive. It held that restaurant transactions must be regarded as supplies of services, because they are characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. (14)

25. *Stockholm Lindöpark* concerned the question whether the activity of running a golf course should, for the purposes of determining whether it may be considered exempt from VAT, be classified as the letting of immovable property or as the supply of services linked to the practice of sport or physical education. The Court found that 'the activity of running a golf course generally entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the

service-provider, provision of other facilities and so forth.' (15) Therefore, in the absence of quite exceptional circumstances letting out a golf course cannot constitute the main service supplied. (16)

26. Neither in *Faaborg-Gelting Linien* nor in *Stockholm Lindöpark* was it in doubt that the activities at issue were economic in nature. Both cases involved taxable transactions under the Sixth Directive. However, instead of breaking the taxable transaction down into its various parts in order to tax them separately, the Court applied the principle of 'the unity of the supply', as Advocate General Ruiz-Jarabo Colomer observed in his Opinion in *Hotel Scandic Gåsabäck*. (17)

27. Moreover, the circumstances taken into account by the Court in *Faaborg-Gelting Linien* concerned a cluster of acts performed on the same occasion in connection with a single transaction by one taxable person. In *Stockholm Lindöpark* the Court looked at a cluster of acts that, taken together, constituted one economic activity.

28. In contrast, carousel fraud concerns a series of consecutive activities, performed by a number of traders in a supply chain. It is an essential feature of the common system of VAT that VAT becomes chargeable on each transaction in a supply chain. (18) Each transaction must therefore be regarded on its own merits. Consequently, the character of a particular transaction in the chain cannot be altered by earlier or subsequent events. (19)

29. The United Kingdom correctly submits that VAT must be applied in accordance with the actual economic situation. However, this does not imply that the character of a transaction in a supply chain must be determined by reference to the whole chain. Quite the opposite, the case-law reaffirms the rule that an activity must be considered objectively and per se when it states that regard must be had to the actual economic situation and that legal form is not conclusive. (20)

30. The rule that each transaction must be considered individually and per se, without regard to its purpose or results, is founded on the requirement that the common system of VAT should be neutral and on the principle of legal certainty, which requires that the application of Community legislation be foreseeable by those subject to it. (21) It ensures that, at the time of the taxable transaction, it can in principle be determined whether or not that transaction comes within the scope of the Sixth Directive.

B – *The underlying purpose of the transactions*

31. The United Kingdom furthermore submits that it is necessary to look at the underlying purpose of the transactions, (22) which in this instance is to commit fraud. Without this purpose, the carousel and all its constituent transactions would not have existed as a normal economic phenomenon. Optigen argues that this viewpoint is in fact subjective, because it adopts the perspective of the defaulting trader, while disregardingthe intentions of the other traders. Yet, according to the United Kingdom, its viewpoint is based not on the intentions of one particular trader but on the objective deduction that the goods circulated as part of a carousel scheme which did not serve an economic purpose.

32. That argument must be rejected, if only for the reason that it is based on an assessment of the purpose and results of the entire chain, instead of the characteristics of each individual transaction. The assertion that the transactions ultimately did not have an economic purpose is based on a range of circumstances which go beyond the factors that determine whether a transaction in the chain falls within the scope of VAT. As I concluded above, each transaction must be considered individually, without regard to its purpose or result. The character of a transaction in a chain is not affected by the fact that goods subsequently pass through the hands of the same trader. The aim of misappropriating money may have been at the origin of the chain of

transactions, but such misappropriation is an activity in its own right; it is not inherent in the activity of trading CPUs and it does not alter the character of individual transactions elsewhere in the chain.

33. Clearly, the United Kingdom attaches particular importance to the fact that the underlying purpose of the carousel is to commit what it considers to be VAT fraud.

34. Yet, contrary to what the United Kingdom suggests, it does not follow from the Court's position in *Breitsohl* (23)and *INZO* (24)that an activity may be deprived of its economic nature when it is carried out for fraudulent purposes or when, on account of its result, it somehow facilitates fraud.

35. An altogether different issue is concerned when a person applying to deduct VAT makes false declarations about his status as a taxable person. This was the issue addressed in *Breitsohl* and *INZO*. The Court held that 'a taxable person acquires that status definitively only if the person concerned made the declaration of intention to begin the envisaged economic activities in good faith. In cases of fraud or abuse, in which, for example, the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations'. (25)

36. That case-law acknowledges that tax authorities may require 'objective evidence in support of a person's declared intention to pursue an economic activity which will give rise to taxable transactions, and in the absence of such evidence may refuse the right to deduct'. (26) That issue is not relevant in the present case. First, it is not asserted either that Fulcrum, Optigen and Bond House applied for a VAT deduction on the basis of false declarations made by them or that they did not intend to pursue economic activities. Secondly, a clear distinction should be drawn between the intention to engage in economic activities and the intended purpose of the economic activities themselves. (27)

37. Moreover, the United Kingdom's submission that particular importance should be attached to the fact that the underlying purpose of the transactions is fraud would, were it accepted, be hard to reconcile with the text of Article 4(1) of the Sixth Directive, which refers to any economic activity, whatever the purpose or results of that activity. In fact, such an approach would disregard the objective character of the concept of 'economic activity' and would produce the incongruous result of an entire supply chain falling outside the scope of the Sixth Directive merely because one trader in the chain has failed to account for VAT to the tax authorities. Such an outcome is particularly puzzling since it would mean that, as a result of that trader's failure to account for VAT, he would in fact be under no obligation to pay VAT in the first place.

C – *Unlawful activities and the scope of VAT*

38. The United Kingdom suggests that there is a parallel between the present cases and cases in which the Court has held that certain unlawful activities do not qualify as economic activities and therefore fall outside the scope of the common system of VAT. I do not find that analogy convincing.

39. According to well-established case-law, the principle of fiscal neutrality precludes a generalised differentiation between lawful and unlawful activities. (28) In principle even unlawful transactions fall within the scope of the Sixth Directive and are subject to VAT. (29) The only exception is when an activity falls completely outside the lawful economic sector because of its special characteristics. (30) For example, the supply of narcotic drugs falls outside the scope of

the Sixth Directive, (31) whereas the operation of an unlawful game of roulette falls within that scope, since the latter is in competition with lawful gambling activities. (32)

40. However, unlike narcotic drugs or counterfeit currency, CPUs are not, in the words of the Court, by definition subject to a total prohibition on importation and marketing in the Community. (33) The exclusion from the scope of the VAT system relates only to products which by their very nature and because of their special characteristics may not be marketed or incorporated into economic channels. (34) This is not the case with CPUs.

41. Secondly, contrary to what the United Kingdom argues, the trade in CPUs does not fall completely outside the lawful economic sector because the chain of transactions ultimately turns out to be circular. As becomes clear from the Commissioners' own description of what they consider to constitute carousel fraud, its characteristic is that it makes use of lawful economic channels in order to facilitate the retention of money paid as VAT.

D – *The principle of legal certainty*

42. If the Court were to accept the interpretation advocated by the United Kingdom, that would give rise to considerable uncertainty concerning the application of the Sixth Directive. Such an interpretation would mean that, if traders wanted to be sure at the time of a transaction that they were incurring rights and obligations under the VAT system, they would have to predict whether the specific goods which were the subject of the transaction would at some point fall back into the hands of a trader who had already played a part in the supply chain. If that were to be the case, they would also need to know about any subsequent 'disappearance' on the part of that trader. (35) Meanwhile, account should be taken of the possibility that one and the same consignment may contain goods that are used in the fraud and goods that are not – only the latter would be subject to VAT, if the United Kingdom's argument were accepted. This interpretation of the notion of 'economic activity' runs counter to the principle of legal certainty, which is a general principle of Community law that must be observed by Member States when implementing the Sixth Directive. (36) As Optigen, Fulcrum and Bond House moreover correctly submit, the United Kingdom's approach might act as a deterrent to legitimate trade.

E – *Ways of tackling carousel fraud*

43. The United Kingdom seems to envisage combating carousel fraud – or at least dispensing with the problems it poses – by limiting the scope of the VAT system. To my mind, the Court should not consent to this approach. It would drastically shift the burden of the problem from the tax authorities to the private sector, at the expense of legitimate trade and the proper functioning of the VAT system. Moreover, it would deter Member States from taking appropriate measures against carousel fraud. In this regard it is particularly worthy of note that where an activity falls within the scope of the Sixth Directive, that does not mean that Member States lose their power to take action against it. (37) In fact, Article 21 of the Sixth Directive gives Member States the opportunity to introduce joint and several fiscal liability. A taxable person can accordingly be held accountable for the payment of VAT due by his co-contractor, if he knew or should have known of his co-contractor's fraudulent activities. (38) Several Member States have adopted measures of that kind against carousel fraud. (39)

IV – **Conclusion**

44. Based on these considerations I am of the view that the Court should give the following answer to the High Court of Justice:

In order to determine whether a transaction in a supply chain qualifies as an economic activity

within the meaning of Article 4(2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, the transaction must be considered individually and per se. Transactions forming part of a circular supply chain in which a trader misappropriates the amounts paid to it as VAT instead of accounting for those amounts to the tax authorities do not on that account cease to constitute an economic activity within the meaning of Article 4(2) of the Sixth Directive.

1 – Original language: Portuguese.

2– Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

3– First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation in the Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14; 'the First Directive').

4 – Decision of 29 April 2003 of the VAT and Duties Tribunal, Manchester (chairman: Colin Bishopp), Bond House Systems Limited v C&E, paragraphs 15 to 18 (footnotes added).

5– According to Article 28c(A)(a) of the Sixth Directive, the supply of goods to an operator in another Member State shall be exempted from VAT. In the wording of the UK Value Added Tax Act 1994 the supply is 'zero-rated'.

6– As noted above, the supply of goods to an operator in another Member State is exempted from VAT. The vendor is entitled to recover input tax pursuant to Article 17(2)(d) of the Sixth Directive as inserted by Article 28f(1) thereof.

7– Report from the Commission to the Council and the European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud, 16 April 2004, COM(2004) 260 final.

8– E.g. Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 8; Case 268/83 Rompelman [1985] ECR 655, paragraph 19; Case C-186/89 Van Tiem [1990] ECR I-4363, paragraph 17; Case C-305/01 MKG-Kraftfahrzeuge-Factory [2003] ECR I-6729, paragraph 42

9– Commission v Netherlands, paragraph 19.

10– Rompelman, paragraph 19; Case 50/87 Commission v France [1988] ECR 4797, paragraph 15.

11– Commission v Netherlands, paragraph 8.

12– Case C-231/94 [1996] ECR I-2395

13– Case C-150/99 [2001] ECR I-493.

14– Faaborg-Gelting Linien, paragraph 14. The Court noted that the situation is different 'where the transaction relates to "take-away" food and is not coupled with services designed to enhance consumption on the spot in an appropriate setting'.

15– Stockholm Lindöpark, paragraph 26.

16– Ibidem.

17– Case C-412/03 [2005] ECR I-0000, at point 21. Cf. Case C-275/01 Sinclair Collis [2003] ECR I-5965, paragraphs 25 to 30.

18– See Article 2 of the First Council Directive.

19– To that effect: Case C-158/98 Coffeeshop Siberië [1999] ECR I-3971 paragraph 22.

20– To that effect: Case C-8/03 BBL [2004] ECR I-0000, paragraph 36; Case C-77/01 EDM [2004] ECR I-0000, paragraph 48; Van Tiem, paragraph 18; Rompelman, paragraph 23.

21– See, for example, Case 70/83 Kloppenburg [1984] ECR 1075, paragraph 11; Case 348/85 Denmark v Commission [1987] ECR 5225, paragraph 19; Case C-209/96 United Kingdom v Commission [1998] ECR I-5655, paragraph 35; Case C-301/97 Netherlands v Council [2001] ECR I-8853, paragraph 43; Case C-17/01 Sudholz [2004] ECR I-0000, paragraph 34.

22– In this regard the United Kingdom refers to Case C-155/94 Wellcome Trust [1996] ECR I-3013, paragraphs 31 to 36; Case C-60/90 Polysar Investments [1991] ECR I-3111, paragraph 12.

23– Case C-400/98 [2000] ECR I-4321.

24– Case C-110/94 [1996] ECR I-857.

25– INZO, paragraph 24. See also: Breitsohl, paragraph 39; Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others [2000] ECR I-1577.

26– Opinion of Advocate General Jacobs in Case C-32/03 I/S Fini H [2005] ECR I 0000, paragraph 21.

27– A comparison between the following two situations may clarify this point. Situation I: X declares he will open a restaurant and acquires the (provisional) status of taxable person. He buys chairs, tables and other equipment and applies for a VAT deduction. However, he never opens the restaurant. Situation II: Y opens a restaurant and uses it to operate a swindle. He provides restaurant services and charges VAT to his customers, but then suppresses the recorded takings in an attempt to deceive the tax-authorities and retain part of the VAT received. Situation I casts a shadow of doubt on X's status as a taxable person. The tax authorities may require objective evidence in support of X's declared intention and assess whether X did in fact intend to pursue restaurant activities (see e.g. INZO, cited above; Case C-37/95 Ghent Coal Terminal [1998] ECR I-1; Case C-396/98 Schloßstraße [2000] ECR I-4279). Conversely, situation II does not affect Y's status as a taxable person, because Y does carry out an economic activity: he provides restaurant services. It follows from Article 4(1) of the Sixth Directive that the purpose or result of that activity does not affect his status as a taxable person.

28– E.g. Rompelman, paragraph 19; Case C-283/95 Fischer [1998] ECR I-3369, paragraph 28.

29– Case 294/82 Senta Einberger [1984] ECR 1177; Case C-111/92 Lange [1993] ECR I-4677, paragraph 16; Case 289/86 Happy Family [1988] ECR 3655, paragraph 20; Case 269/86 Mol [1988] ECR 3627, paragraph 18; Case C-3/97 Goodwin and Unstead [1998] ECR I-3257, paragraph 9; Case C-455/98 Salumets and Others [2000] ECR I-4993, paragraph 19.

30– Happy Family, paragraph 20; Mol, paragraph 18.

31– Senta Einberger; Happy Family, paragraph 23..

32– Fischer, paragraphs 19 to 23 and 28. As to the legal basis of the Court's reasoning Advocate General Jacobs' remarks at paragraph 20 of his Opinion in Witzemann that 'the true basis of the rule is somewhat obscure' and that 'it cannot … be suggested that there is any fundamental principle of law precluding the taxation of illicit transactions': Case C-343/89 Witzemann [1990] ECR I-4477. The Court considers, in essence, that VAT applies to activities coming within the scope of the normal economic sector, either because they are legitimate or because they may compete with legitimate economic activities; outside that area the principle of fiscal neutrality does not come into play. See also: Opinion of Advocate General Fennelly in Coffeeshop Siberië, at point 16..

33– Senta Einberger, paragraph 15. See also Witzemann, and point 20 of the Opinion of Advocate General Léger in Goodwin and Unstead.

34– Salumets and Others, paragraphs 19 and 21; Fischer, paragraph 20; Lange, paragraph 12.

35– Only when these conditions occur cumulatively would the United Kingdom's theory apply. Neither the circularity of the supply chain nor the fact that there is or will be a defaulting trader would by itself be sufficient to conclude that a transaction falls outside the scope of VAT. 'Missing trader fraud' may happen in a linear supply chain, in which case the transactions in the chain would nevertheless fall within the system of VAT. Circular trade may come about as a normal economic phenomenon in certain commodity markets. The system of VAT is designed to cope with this phenomenon and the transactions remain subject to VAT, whether or not the traded goods actually end up with a consumer.

36– To the same effect: Joined Cases C-487/01 and C-7/02 Gemeente Leusden and Holin [2004] ECR I-0000, paragraphs 57, 58, 65 and 69. By analogy: Case C-4/94 BLP [1995] ECR I-983, paragraph 24. See also: Case C-381/97 Belgocodex [1998] ECR I-8153, paragraph 26; Schloßstraße, paragraph 44; Case C-62/00 Marks & Spencer [2002] ECR I-6325, paragraph 44; Case 316/86 Krücken [1988] ECR 2213, paragraph 22. The Court has consistently held that the requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of their rights and obligations. See, for example, Case 325/85 Ireland v Commission [1987] ECR 5041, paragraph 18; Case 326/85 Netherlands v Commission [1987] ECR 5091, paragraph 24; Sudholz, paragraph 34; and, to the same effect, Case 169/80 Gondrand Frères [1981] ECR 1931, paragraph 17.

37– Illegal gambling, for example, is an economic activity in the sense of Article 4(2) of the Sixth Directive; of course, that does not preclude Member States from taking action against illegal gambling: Fischer. See also, expressly, paragraph 24 of the judgment in Lange.

38– It is in this context that the issue as to whether the traders in actual fact knew or should have known about the existence of a fraud scheme should be dealt with and not, as the Danish government suggests, in the context of the definition of 'economic activity'.

39– Including, in the meantime, the United Kingdom (see Section 18 of the Finance Act 2003).