

**OPINION OF ADVOCATE GENERAL**

**KOKOTT**

delivered on 2 June 2005 1(1)

**Case C-533/03**

**Commission of the European Communities**

**v**

**Council of the European Union**

(Regulation (EC) No 1798/2003 – Directive 2003/93/EC – Choice of legal basis – Concept of ‘fiscal provisions’)

**I – Introduction**

1. By this application for annulment the Commission is challenging the fact that the Council did not base the following legislation on Article 95 EC, as proposed by the Commission, but on Article 93 or Articles 93 and 94 EC respectively: Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92, (2) Council Directive 2003/93/EC of 7 October 2003 amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation. (3)

2. The contested regulation lays down the detailed rules governing mutual cooperation between the tax authorities of the Member States, and between those authorities and the Commission, in the collection of VAT; the contested directive extends the scope of Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (4) to taxation of insurance premiums.

3. The case turns on whether these provisions, which govern cooperation by the authorities in tax matters, are fiscal provisions in the words of Article 95(2) EC. Resolution of that matter will determine whether, in respect of this subject-matter, the co-decision procedure in Article 251 EC is applicable under Article 95(1) EC or whether, under Article 93 or Article 94 EC, the Council is to decide unanimously after consulting the European Parliament.

**II – The contested measures**

*A – Historical background*

4. Founded on Article 100 of the EEC Treaty (Article 100 of the EC Treaty, now Article 94 EC), Directive 77/799 placed the exchange of information between the tax authorities of the Member States in the field of direct taxation on a Community-law basis. Subsequently, the scope of that

directive was extended on the basis of Article 99 (amended to Article 99 of the EC Treaty, now Article 93 EC), and Article 100 of the EEC Treaty, first to VAT (5) and then – under Article 99 of the EEC Treaty – to tax on mineral oils, duty on the consumption of alcohol and alcoholic drinks and on tobacco products. (6)

5. Regulation (EEC) No 218/92 (7) then established a common system on the basis of Article 99 of the EEC Treaty for the exchange of information between the competent authorities of the Member States in respect of intra-Community transactions. (8) That common system was provisionally amended in 2002 by Regulation (EC) No 792/2002 – based on Article 93 EC – with a view to additional measures regarding electronic commerce. (9)

6. In order to consolidate in one legal instrument the mechanisms available in the field of VAT and to make clearer provision for cooperation between the Member States, the Commission on 18 June 2001 submitted to the Council a proposal for a regulation by the European Parliament and the Council concerning cooperation by the administrative authorities in the field of VAT. (10) It also submitted a proposal for a European Parliament and Council Directive amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (11) whereby assistance in the field of direct and indirect taxation was to be extended to the taxation of insurance premiums. Under the Commission's proposal both acts were to be based on Article 95 EC.

7. The Council gave effect to this proposal by enacting both the contested legal acts but altered the legal basis: it founded Regulation No 1798/2003 on Article 93 EC and Directive 2003/93 on Articles 93 and 94 EC.

#### B – *Content of Regulation No 1798/2003*

8. The first three recitals in the preamble to Regulation No 1798/2003 read as follows:

‘(1) Tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of the conditions of competition. They therefore affect the operation of the internal market.

(2) Combating value added tax (VAT) evasion calls for close cooperation between the administrative authorities in each Member State responsible for the application of the provisions in that field.

(3) The tax harmonisation measures taken to complete the internal market should therefore include the establishment of a common system for the exchange of information between the Member States whereby the Member States' administrative authorities are to assist each other and cooperate with the Commission in order to ensure the proper application of VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods.’

9. Chapter I contains definitions of terms and makes provisions for the assignment of competences.

10. Article 1(1) reads, in so far as relevant:

‘1. This Regulation lays down the conditions under which the administrative authorities in the Member States responsible for the application of the laws on VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods are to cooperate with each other and with the Commission to ensure compliance with those laws.

To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help them to effect a correct assessment of VAT.’

11. Chapter II concerns the exchange of information upon request and makes provision for presence in the administrative offices of other Member States’ authorities.

12. Article 5(1) provides:

‘At the request of the requesting authority, the requested authority shall communicate the information referred to in Article 1, including any information relating to a specific case or cases.’

13. Article 11 provides, so far as relevant for present purposes:

‘1. By agreement between the requesting authority and the requested authority and in accordance with the arrangements laid down by the latter, officials authorised by the requesting authority may, with a view to exchanging the information referred to in Article 1, be present in the offices where the administrative authorities of the Member State in which the requested authority is established carry out their duties. Where the requested information is contained in documentation to which the officials of the requested authority have access, the officials of the requesting authority shall be given copies of the documentation containing the requested information.

2. By agreement between the requesting authority and the requested authority and in accordance with the arrangements laid down by the latter, officials designated by the requesting authority may, with a view to exchanging the information referred to in Article 1, be present during the administrative enquiries.

...’

14. In Chapter III Article 14 provides that, upon request by the requesting authority, the requested authority is to notify the addressee, in accordance with the rules governing notification applicable in the Member State in which it is established, of all decisions concerning VAT legislation which emanate from the administrative authorities of the Member State in which the requesting authority is established.

15. Chapter IV governs exchange of information without prior request.

16. Article 17 provides:

‘Without prejudice to the provisions of Chapters V and VI, the competent authority of each Member State shall, by automatic or structured automatic exchange, forward the information referred to in Article 1 to the competent authority of any other Member State concerned, in the following cases:

1. where taxation is deemed to take place in the Member State of destination and the effectiveness of the control system necessarily depends on the information provided by the Member State of origin;

2. where a Member State has grounds to believe that a breach of VAT legislation has been

committed or is likely to have been committed in the other Member State;

3. where there is a risk of tax loss in the other Member State.'

17. Article 18 provides:

'The following shall be determined in accordance with the procedure referred to in Article 44(2):

1. the exact categories of information to be exchanged;
2. the frequency of the exchanges;
3. the practical arrangements for the exchange of information.

Each Member State shall determine whether it will take part in the exchange of a particular category of information, as well as whether it will do so in an automatic or structured automatic way.'

18. Chapter V makes provision for the storage and exchange of information specific to intra-Community transactions.

19. Under Article 22 the information to be collected by the Member States under Directive 77/388/EEC (12) (hereinafter 'the Sixth Directive') is to be stored in an electronic database.

20. Article 23 provides, in so far as relevant for present purposes:

'On the basis of the data stored in accordance with Article 22, the competent authority of a Member State shall have communicated to it automatically and without delay by any other Member State the following information, to which it may also have direct access:

1. VAT identification numbers issued by the Member State receiving the information;
2. the total value of all intra-Community supplies of goods to persons holding a VAT identification number by all operators identified for the purposes of VAT in the Member State providing the information.

... '

21. Article 24 provides, in so far as relevant for present purposes:

'On the basis of the data stored in accordance with Article 22 and solely in order to prevent a breach of VAT legislation, the competent authority of a Member State shall, wherever it considers it necessary for the control of intra-Community acquisitions of goods, obtain directly and without delay, or have direct access to by electronic means, any of the following information:

1. the VAT identification numbers of the persons who effected the supplies referred to in point 2 of Article 23; and
2. the total value of such supplies from each such person to each person holding a VAT identification number referred to in point 1 of Article 23.

... '

22. Article 27 provides, in so far as relevant for present purposes:

‘1. Each Member State shall maintain an electronic database containing a register of persons to whom VAT identification numbers have been issued in that Member State.

2. At any time the competent authority of a Member State may obtain directly or have communicated to it, from the data stored in accordance with Article 22, confirmation of the validity of the VAT identification number under which a person has effected or received an intra-Community supply of goods or services.

On specific request, the requested authority shall also communicate the date of issue and, where appropriate, the expiry date of the VAT identification number.

3. On request, the competent authority shall also provide without delay the name and address of the person to whom the number has been issued, provided that such information is not stored by the requesting authority with a view to possible use at some future time.’

23. Chapter VI concerns the special scheme in Article 26c of the Sixth VAT Directive for non-established taxable persons who provide electronic services to non-taxable persons. Inter alia, Regulation No 1798/2003 reiterates in Articles 29 and 30 the duty already imposed on the non-established taxable person in Article 26c of the Sixth VAT Directive to submit in electronic form the declaration concerning the taking up of activity as well as the tax return, provides for a procedure for determining technical details and makes provision for the information so obtained to be forwarded to the competent authorities of the other Member States.

24. Chapter VII governs cooperation with the Commission for the purposes of statistical compilation and evaluation of the effectiveness of the mechanisms provided for in the regulation. Chapter VIII determines the manner in which information from non-Member States is to be dealt with.

25. Chapter IX lays down the general conditions concerning exchange of information and sets out in Article 40 certain grounds on which the transmission of information may be refused.

26. Article 40 provides in so far as relevant:

‘ ...

2. This Regulation shall impose no obligation to have enquiries carried out or to provide information if the laws or administrative practices of the Member State which would have to supply the information do not authorise the Member State to carry out those enquiries or collect or use that information for that Member State’s own purposes.

3. The competent authority of a Member State may refuse to provide information where the Member State concerned is unable, for legal reasons, to provide similar information. The Commission shall be informed of the grounds of the refusal by the requested Member State.

4. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

...’

27. Article 41 goes on to indicate aspects relating to data protection which are to be observed. Finally, Chapter X contains certain general provisions and final provisions.

## C – *Content of Directive 2003/93*

28. The first and third recitals in the preamble to the directive read:

‘(1) In order to combat value added tax (VAT) evasion it is necessary to strengthen cooperation between tax administrations within the Community and between the latter and the Commission in accordance with common principles.’

‘(3) The scope of mutual assistance laid down by Directive 77/799/EEC must be extended to taxation of the insurance premiums referred to in Directive 76/308/EEC so as to better protect the financial interests of the Member States and the neutrality of the internal market.’

29. Article 1(1) and (2) of the directive then set out the changes to Directive 77/799 in order to extend its scope to the taxation of insurance premiums.

30. Further, Article 1(3) effectuates a drafting amendment to the secrecy provisions in Directive 77/799 and adds a new subparagraph.

31. The second subparagraph of Article 1(3) reads:

‘In addition, Member States may provide for the information referred to in the first subparagraph to be used for assessment of other levies, duties and taxes covered by Article 2 of Directive 76/308/EEC.’

## D – *Content of Directive 77/799*

32. Directive 77/799, which was extended by Directive 2003/93, makes analogous provision in the same way as the contested regulation for cooperation by the Member States in the field of direct taxation and some indirect taxes. The relevant provisions of Directive 77/799 are as follows:

‘Article 2

### Exchange on request

1. The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case.

...

### Article 3

### Automatic exchange of information

For categories of cases which they shall determine under the consultation procedure laid down in Article 9, the competent authorities of the Member States shall regularly exchange the information referred to in Article 1(1) without prior request.

## Article 4

### Spontaneous exchange of information

1. The competent authority of a Member State shall without prior request forward the information referred to in Article 1(1), of which it has knowledge, to the competent authority of any other Member State concerned, in the following circumstances:

...

2. The competent authorities of the Member States may, under the consultation procedure laid down in Article 9, extend the exchange of information provided for in paragraph 1 to cases other than those specified therein.

...

## Article 6

### Collaboration by officials of the State concerned

For the purpose of applying the preceding provisions, the competent authority of the Member State providing the information and the competent authority of the Member State for which the information is intended may agree, under the consultation procedure laid down in Article 9, to authorise the presence in the first Member State of officials of the tax administration of the other Member State. The details for applying this provision shall be determined under the same procedure.

...

## Article 8

### Limits to exchange of information

1. This Directive shall impose no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes.

2. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

3. The competent authority of a Member State may refuse to provide information where the State concerned is unable, for practical or legal reasons, to provide similar information.

...'

### **III – Procedure and forms of order sought**

33. By application dated 18 December 2003, which was received at the Court on 19 December 2003, the Commission brought an action challenging Regulation No 1798/2003 and Directive 2003/93. It claims that the Court should:

1. Declare that Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 and Council Directive 2003/93/EC of 7 October 2003 amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation are void;

2. Maintain the effects of these measures until the entry into force of legislation adopted on the correct legal basis;

3. Order the Council of the European Union to pay the costs.

34. The Council contends that the Court should:

1. Dismiss the action;

2. Order the Commission to pay the costs;

3. In the alternative, if the legal instruments are declared void, maintain the effects of those measures pending entry into force of legislation adopted on the correct legal basis.

35. By order of 8 June 2004 the Court gave the United Kingdom of Great Britain and Northern Ireland, the Portuguese Republic and Ireland leave to intervene in support of the Council's submissions.

36. All participants expressed their views of the matter in the written procedure. There was no oral procedure.

### **IV – Submissions of the parties**

37. The Commission submits that the provisions in the present case are measures concerning the establishment of the internal market which are to be based on Article 95(1) EC. It takes the view that the fact that a measure is adopted in the context of taxation does not render such measure a fiscal provision. In particular it considers that measures of cooperation between the tax administrations of the Member States do not constitute fiscal provisions within the meaning of Article 95(2) EC; nor are they to be regarded as provisions concerning indirect taxation for the purposes of Article 93 EC.

38. Admittedly it acknowledges that, on the adoption of Article 95 EC, the Member States excluded particularly sensitive areas from the scope of majority decision, such as in particular



fiscal provisions. However, it considers that this exception should be construed narrowly and should be restricted to what is necessary in order to safeguard the tax jurisdiction of the Member States. Therefore, in the Commission's view, the expression 'fiscal provisions' is to be understood as including rules on taxable persons, taxable events, basis of taxation, rates and exemptions, together with the detailed rules on assessment and enforcement. Yet provisions concerning mutual assistance do not impinge on this area or on the tax jurisdiction of the Member States. They are merely aimed at facilitating the application by each Member State of its own tax legislation and accordingly do not substantively affect national tax systems.

39. Conversely, the Council emphasises the fact that the objective pursued by the measures is to combat tax evasion and avoidance and to ensure correctness in the assessment of taxes in the interests of national budgets and of the operation of the internal market. Through the harmonisation of the rules governing exchange of information both contested legal instruments have a direct impact on the rights of taxpayers and on the duties of tax administrations, on tax assessment and thus on tax revenue. Thus, the aim of the measures is also of a fiscal nature. Accordingly, in the case of measures which pursue both fiscal and internal-market aims, Articles 93 and 94 EC constitute the appropriate legal basis.

40. In particular, the Council points out that Article 93 EC is the more specific provision in relation to Article 95 EC and that the scope of Article 93 EC is not altered by Article 95 EC. Both provisions were enacted with that wording in the Single European Act and there are no grounds for supposing that provisions on indirect taxation which do not impinge on the core area of the Member States' tax jurisdiction were not to come under Article 93 EC. Nor, therefore, does the interpretation of Article 95(2) EC have any effect on the scope of Article 93 EC which, irrespective of the effects on Member States' tax jurisdiction, is the more specific provision in the field of indirect taxation. Nor would it be appropriate for the concept of fiscal provisions to be given a different meaning in the field of direct taxation. The extension of the Member States' investigative powers beyond their national territories has a very specific impact on tax sovereignty, even under the narrow definition of that concept advocated by the Commission.

41. In regard to Regulation No 1798/2003, the United Kingdom Government emphasises that assistance in the assessment and collection of VAT by countering tax evasion and avoidance improves the efficiency with which a tax system is administered and thus has a practical impact on the raising of revenue. The contested measures are therefore an important feature of the tax system's capacity to function and have an impact on the legal position of taxpayers. In addition Article 30 of the Regulation (13) directly imposes an obligation on taxpayers. Thus the Regulation harmonises national legislation on indirect taxation within the meaning of Article 93 EC.

42. In respect of Directive 2003/93 the United Kingdom Government stresses that the aim and content thereof may be determined only by examining Directive 77/799 whose scope is extended by the contested directive to taxation on insurance premiums. In this case as well the efficiency with which a tax system is administered is an important factor in determining the effective rate of tax and is thus inseparable from the revenue-raising power of the Member States. Thus the Directive harmonises national legislation in regard to direct and indirect taxation and therefore operates within the framework of Articles 93 and 94 EC.

43. The Portuguese Government claims that Article 41(5) of Regulation No 1798/2003 allows the rights under data protection directive 95/46/EC (14) to be restricted and that Article 1(3) of Directive 2003/93 entails a change to Article 7(1) of Directive 77/799, which directly affects the rights of taxpayers. Since those provisions determine the rights of taxpayers they constitute fiscal provisions for the purposes of Articles 93 and 95(2) EC.

44. The Irish Government is of the view that Article 93 EC furnishes the legal basis for all

legislation purporting to harmonise national legislation touching upon or connected with indirect taxation. It further submits that there is no warrant in the wording of Article 95 EC for interpreting 'fiscal provisions' in Article 95(2) narrowly, especially since that would then also have to apply to 'the free movement of persons' and the 'rights and interests of employed persons'. Yet there is nothing in Article 95 to justify such a narrow interpretation. According to its content, the Regulation lays down detailed rules on the harmonisation of provisions concerning VAT. The directive similarly consists of fiscal provisions. Accordingly, both legal instruments were enacted upon the correct legal basis.

## V – Legal assessment

45. In the present application the Commission claims that the contested legal acts were adopted on the wrong legal basis in breach of the second paragraph of Article 230 EC.

### A – *Criteria governing the choice of legal basis*

46. It is settled case-law that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure. (15)

47. The parties are agreed that Regulation No 1798/2003 and Directive 2003/93 are essential to the functioning of the internal market.

48. The contested regulation governs cooperation between the administrations of the Member States and between them and the Commission in the field of VAT. It is apparent from the recitals in the preamble to the regulation that its aim is to combat tax evasion and avoidance because they lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of the conditions of competition and, therefore, to affect the operation of the internal market. (16)

49. The contested directive extends the provisions concerning cooperation by the authorities of the Member States in the field of direct taxation and certain taxes on consumption (17) to taxation on insurance premiums and also amends the data protection rules to be observed in the context of such cooperation. It is the declared aim of the regulation better to protect the financial interests of the Member States and the neutrality of the internal market. (18)

50. The ever closer integration of the economies of the Member States goes hand in hand with the abolition of bureaucratic obstacles to the free movement of goods and services within the common market. Where a tax administration is inadequately informed about cross-border transactions there is an increasing risk of tax evasion. Combating this risk serves the Member States' and the Community's interests in undistorted competition and in a secure financial base and thus in the maintenance of the level of integration achieved. That is why legal acts can also contribute, through the elimination of consequential problems attendant upon the exercise of the fundamental freedoms, to the functioning of the internal market. (19) In the result there is no doubt that both contested legal acts substantively and objectively promote this stated aim.

51. Legal acts which have as their object the completion of the internal market may be adopted by qualified majority by the Council under Article 95 EC after consultation of the Economic and Social Committee under the co-decision procedure provided for in Article 251 EC. However, where such acts at the same time concern provisions on indirect taxes the relevant legal basis is provided by the special provision in Article 93 EC with the result that the Council must adopt its decision unanimously after consulting the European Parliament and the Economic and Social Committee. That may be accounted for by the fact that by its very wording Article 95(1) EC is

applicable save where otherwise provided for in the EC Treaty. Where the EC Treaty contains a more specific provision which may serve as the legal basis for the legal act in question the more specific provision must be used as the basis for the legal act. That is, in particular, the case with regard to Article 93 EC in so far as the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation is concerned. (20)

52. Since Article 95(2) EC also excludes fiscal provisions from the scope of Article 95(1) EC such provisions cannot as a general rule be harmonised on the basis of that article. In so far as provisions on direct taxes are concerned recourse must be had therefore, when harmonising the legislation of the Member States on the establishment of the common market, to Article 94 EC which similarly provides for adoption of a unanimous decision by the Council after consultation of the European Parliament and the Economic and Social Committee.

53. Nor, owing to these differing methods of proceeding, can the bases in Articles 93 and 94 on the one hand and Article 95 EC on the other be combined. (21)

54. The decisive criterion in the choice of legal basis is therefore whether the contested legal acts are fiscal provisions for the purposes of Articles 93 and 95(2) EC.

55. A more detailed elucidation of the scope of this term is not to be found in the Treaty. However, the interpretation of these Treaty provisions recently formed the subject-matter of a dispute before the Court.

56. As the Court held in the judgment of 29 April 2004 in regard to Article 95(2) EC, by reason of their general character, the term 'fiscal provisions' covers not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether they concern substantive rules or procedural rules. (22)

57. The extension to matters of procedure was deduced by the Court from the fact that, on the one hand, in certain Member States the provisions governing the arrangements for payment and collection of direct and indirect taxes are treated as being 'fiscal provisions' and, on the other, that, in accordance with the Court's case-law on Article 90 EC, it is necessary, for the purposes of assessing whether or not a system of taxation is discriminatory, to take into consideration not only the rate of tax but also the basis of assessment and the detailed rules for levying the various duties. (23) The detailed arrangements for the collection of taxes of whatever kind cannot be disassociated from the system of taxation or imposition of which they form part. The Court went on to hold that Article 95(2) EC must be interpreted as covering not only the provisions determining taxable persons, taxable transactions, the basis of imposition, and rates of and exemptions from direct and indirect taxes, but also those relating to arrangements for the collection of such taxes. (24)

58. Hitherto, there has been no further indication in the Court's case-law of whether procedural rules always constitute fiscal provisions within the meaning of Article 93 EC or Article 95(2) EC or whether they only do so in specific cases.

59. Accordingly, the provisions at issue in the present case cannot be readily classified in the light of existing case law. Indubitably the present case concerns neither provisions determining taxable persons, nor taxable transactions, bases of imposition, rates of taxation and exemptions therefrom. Nor does the exchange of information directly concern the collection of taxes. Unquestionably they are provisions concerning procedure in tax matters which have an impact on the determination and collection of taxes by assisting in the collation of the requisite information in that connection.

60. A criterion must therefore be found on the basis of which it may be determined when such procedural provisions are to be regarded as fiscal provisions within the meaning of the Treaty.

61. The Council and the United Kingdom Government argue, in regard to the contested legal acts, that a more efficient tax administration can more effectively implement the tax legislation and thus, in the result, can achieve higher tax revenue. Therefore, measures concerning the exchange of information by the tax authorities also concern the tax yield. However, couched in such general terms, that argument cannot determine the classification of a measure as a fiscal provision. An increase in the efficiency of the tax administration is conceivable by means of many kinds of provision, for example, concerning the structuring of working time; such provisions cannot thereby at the same time become fiscal provisions.

62. The determining factor in order to enable such provisions to be regarded as fiscal provisions should instead be a specific connection made by the procedural provisions with the substantive core of the tax legislation. Thus, for example, there is a specific connection between the fiscal provisions under substantive law and rules on enforcement of tax decisions since the possibility of compulsory collection constitutes a very decisive factor for the actual collection of tax and thus of revenue yields. Thus, in substantiating that interpretation of the provision, the Court held that the detailed arrangements for the collection of taxes cannot be disassociated from the system of taxation or imposition of which they form part. (25)

63. In the assessment of the connection at issue two considerations are decisive in regard to the contested legal acts: the opening up of tax administrations, which Community-wide is dealt with as a delicate matter, and the grant of access to tax information in favour of the tax administrations of the other Member States, constitute from the point of view of the Member State providing information, the nub of tax jurisdiction in procedural terms. Secondly, obtaining information about taxpayers and taxable transactions makes it possible for the Member State receiving the information to determine the tax correctly and is thus a direct precondition for the levying of taxes in that State. This will be illustrated below on the basis of the individual provisions.

#### B – *The provisions of Regulation No 1798/2003*

64. Regulation No 1798/2003 contains certain elements which in the field of cooperation between the Member States in tax matters break new ground and to an extent go beyond the current stage of cooperation.

65. Under Article 5 of the regulation the tax administrations of the Member States are required to provide the authorities of other Member States, upon request, with information concerning taxable transactions. Such information can be refused only on one of the grounds set out in Article 40, that is to say when the provisions of the requested State also preclude the provision or evaluation of such information in the case of purely internal factual situations (Article 40(2)), when reciprocity of the exchange of corresponding information is not ensured (Article 40(3)) and where transmission of the information would disclose certain specifically stated secrets or disclosure would contravene public policy (Article 40(4)).

66. Consequently, pursuant to that obligation, the Member States must forward various information to authorities in other Member States providing direct clarification concerning tax-relevant transactions. That information is intended to serve as a connecting factor for taxation in the requesting Member State.

67. A further aspect alluded to at the outset is that this is information specially protected in certain Member States under special secrecy provisions for tax information. It is true that the

information conveyed is subject also in the host State to secrecy and the protection applicable there for information of this kind. None the less the regulation extends the circle of those entitled to access and thus manifestly intervenes in national legislation on the handling of tax information.

68. Beyond the exchange of information upon request the possibility is further provided in Article 17 of automatic or structured automatic exchange of information. However, under Article 18 the Member States are to decide themselves the extent to which they wish to take part in this exchange of information. The fact that options and possibilities are here offered to the Member States does not alter the subject-matter of the measure, namely the exchange of tax information. In so far as a Member State adheres to the system, it delivers up information held by the tax administration which is needed in another Member State for tax purposes. The difference from the information procedure provided for in Article 5 is solely that the information is provided in an automated manner in the context of data sharing under Article 17, without any specific request being made.

69. Article 22 of the Regulation obliges the Member States to set up and maintain a central database with comprehensive information relevant to the levying of VAT. The electronic exchange of information under Article 23 of the regulation is dependent upon the existence of the database. However, from a structural point of view, Article 22 also issues a direction to the national tax administrations which in its scope goes further than mere administrative cooperation.

70. In addition, the retrievability provided for in Article 23 of information from the electronic database also makes it possible to transfer information which in terms of its value as a connecting factor can be of considerable significance for tax purposes. Thus, the VAT identification number issued by the requested State and the total value of all intra-Community supplies made to the person concerned are directly retrievable or must at least be transmitted automatically and without delay. Moreover, under Article 24 of the regulation and under the conditions laid down therein, certain further information is directly retrievable or must be transmitted immediately and without delay by electronic means. This is complemented by Article 27 of the regulation which lists further data to be stored and to be transmitted to other administrations, in particular the name and address of the person to whom the number was issued.

71. In addition to the exchange of information, which can form the basis of taxation, and the attendant effects on tax secrecy in the Member States, the regulation makes a further serious inroad into the autonomy of the national tax administrations.

72. Under Article 11 of the regulation the officials of the requesting authority are authorised by arrangement with the requested authority to be present on the premises of the administrative authority of the Member State in which the requested authority is established (Article 11(1)). They may also be present on the occasion of administrative inquiries (Article 11(2)).

73. This opening up of the tax administrations constitutes an appreciable change in cooperation in tax matters. It is true that Directive 77/799 had already made it possible for the Member States to make arrangements for officials of the interested State to be present in the State providing the information. As the Commission stated in its proposal for the regulation concerning cooperation by the administrative authorities in the field of VAT most Member States did not make legal provision for such a possibility. In practice the presence of foreign officials at investigations was in almost all the Member States permitted only with the consent of the taxpayer. (26) In certain Member States the participation by an official from another Member State in an inquiry in its territory was even expressly prohibited owing to the attendant legal problems. (27) It is clear from this that the possibility of access to the tax administrations of other Member States intervenes very appreciably in the organisation of the national tax administrations.

74. This factor also must be taken into consideration in classifying the contested regulation in light of the concept of 'fiscal provisions'. In Case C-338/01 the Court expressly focused on the fact that in certain Member States provisions concerning methods of payment and collection are regarded as fiscal provisions. (28) To take account of practice in this matter does justice to the role of the Member States as masters of the Treaty. If the Member States make provision for a specific procedure in tax matters and specific secrecy provisions for tax measures and regard them as fiscal provisions then that points to the fact that procedural measures adopted by the Community which fundamentally alter this area also constitute fiscal provisions within the meaning of the EC Treaty.

75. The surrender of information and the opening up of the tax authorities is only one side of the medal which concerns the State giving the information. More significant from the point of view of the aim of the measure is that the data obtained through such cooperation may form the basis for taxation in the Member States receiving such information. The regulation is intended specifically to enable tax to be determined correctly and to afford to the tax administrations the requisite clarifications in that regard.

76. Thus, plainly, the procedural questions determined in Regulation No 1798/2003 are not only devoted generally to cross-border administrative cooperation but are specifically related to the substantive tax provisions and cannot be separated from the tax system.

77. It should in addition be pointed out that the regulation in Articles 29 and 30 restates the obligation already laid down in Article 26cB of the Sixth VAT Directive on non-established taxpayers providing electronic services to non-taxable persons to submit certain information, in particular the quarterly tax return, in electronic form. Following on from that, provision is made for the procedure governing technical details as well as transmission to the other Member States. Thus the regulation itself directly contains relevant measures of taxation. It is irrelevant in that connection that the subject-matter in part is already contained in the Sixth VAT directive since the basis on which a legal act is authorised must as a matter of principle be determined irrespective of parallel provisions. In addition the regulation elevates the provisions, by contrast with those contained in the directive, to a new legal status since it is directly applicable, thus imposing obligations on the individual which are not dependent on national transposition measures.

78. Regulation No 1798/2003 therefore contains fiscal provisions for the purposes of Article 93 EC.

#### *C – The provisions of Directive 2003/93*

79. Apart from extending the scope of Directive 77/799 to taxation on insurance premiums Directive 2003/93 also makes a slight amendment to the secrecy provision of that directive: Article 1(3) of the contested directive contains a new version of Article 7(1) of Directive 77/799. Under it the information provided by the Member States may also be used to determine taxes, duties and fees under Article 2 of the directive on mutual assistance in the collection of claims in connection with measures forming part of the system for financing the European Guidance and Guarantee Fund for agriculture and determining levies and duties. (29)

80. Since the content of the contested directive primarily consists of declaring the provisions of Directive 77/799 applicable also to taxation on insurance premiums, regard must be had, in order to determine the correct legal basis, to the provisions of Directive 77/799.

81. It is true that Directive 77/799 was at the time not challenged before the courts. The periods allowed in that connection have long since expired. However, by extending the scope of Directive

77/799 Directive 2003/93 for its part constitutes a separate challengeable act whose legality is dependent on the content of all measures whose scope was extended.

82. Under Article 1 of Directive 77/799 the Member States are to exchange all information which may be appropriate in order correctly to determine taxes coming within the scope of the Directive. In that connection Article 2 of Directive 77/799 defines in greater detail the procedure of information upon request. Article 3 provides for a procedure for the automatic exchange of the information mentioned in Article 1(1) and Article 4 governs the procedure for information exchange in the cases therein described.

83. Just as in the case of the Regulation there is an obligation to provide information. The information may be refused only on the grounds mentioned in Article 8 of Directive 77/799, that is to say when the obtaining or the use thereof by the competent authority of the State providing information for its own tax purposes are precluded by legal provisions or their administrative practice (Article 8(1)), when the transmission of the information entails disclosure of secrets more particularly listed or if the disclosure of the information concerned would contravene public policy (Article 8(2)) or if the State concerned were not in a position for legal or factual reasons to transmit information of the same kind (Article 8(3)).

84. Thus the Directive has a content which is structured in parallel to that of Regulation No 1798/2003. Thus a duty to exchange information is established which may form the basis of taxation.

85. It is true that in certain respects the provisions of Directive 77/799 do not go as far as the abovementioned Regulation: in particular, the presence of officials of the requesting Member State is made a matter for the discretion of the Member States (Article 6). Nevertheless, in the area of exchange of information, just as in the case of Regulation No 1798/2003, the disclosure of tax information is regulated and furthermore the basis is created for a correct determination of taxes.

86. Contested Directive 2003/93 transposes this regime to taxation on insurance premiums. Just as in the case of Regulation No 1798/2003, the subject-matter governed by the contested directive is therefore so closely connected with the determination of taxes that it reveals a specific relationship with substantive tax law and thus also contains provisions on indirect taxation.

#### **D – Result**

87. In the result both contested legal acts contain fiscal provisions. Since Regulation No 1798/2003 concerns VAT, it was correctly based on Article 93 EC. On the one hand, Directive 2003/93 concerns taxes on insurance premiums and must therefore be based on Article 93 EC. Since, moreover, it modifies Directive 77/799 overall, which also affects the direct taxes mentioned in Directive 77/799, it was possible at the same time for Article 94 EC to be used as a legal basis. The legal acts were therefore founded on the correct legal basis.

88. The Commission's application is therefore unfounded and must be rejected.

#### **VI – Costs**

89. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to pay the costs if they have been asked for in the successful party's pleading. Since the Commission has been unsuccessful in its pleas and the Council made an appropriate application in that regard, the costs are to be borne by the Commission. Under Article 69(4) of the Rules of Procedure, the Member States which have joined in the proceedings as interveners have to bear their own costs.

## VII – Conclusion

90. In light of the foregoing I propose that the Court should:

- (1) dismiss the application;
- (2) order the Commission of the European Communities to pay the costs;
- (3) order the United Kingdom of Great Britain and Northern Ireland, the Portuguese Republic and Ireland to bear their own costs.

1 – Original language: German.

2 – OJ 2003 L 264, p. 1.

3 – OJ 2003 L 264, p. 23.

4 – Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

5 – Council Directive 79/1070/EEC of 6 December 1979 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1979 L 331, p. 8).

6 – Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).

7 – Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) (OJ 1992 L 24, p. 1).

8 – The Commission had also based the proposal for this regulation on Article 100a of the EC Treaty (now, after amendment, Article 95 EC) but did not challenge the change of that legal basis by the Council.

9 – Council Regulation (EC) No 792/2002 of 7 May 2002 amending temporarily Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT) as regards additional measures regarding electronic commerce (OJ 2002 L 128, p. 1). Both Commission and Parliament proceeded against this regulation by means of an action for annulment because in their view the legal basis was inadequate (Case C-272/02 *Commission v Council* and Case C-273/02 *Parliament v Council*). After the regulation had been replaced by Regulation No 1798/2003 at issue in these proceedings, both actions were withdrawn.

10 – COM(2001) 294 fin – 2001/0133(COD), OJ 2001 C 270 E, p. 87.

11 – COM(2001) 294 fin – 2001/0134(COD), OJ C 270 E, p. 96.

12 – 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).

13 – Under that provision the return with details of services provided in electronic form is to be submitted in an electronic manner. It is to that extent identical as to substance to the provision in the first subparagraph of Article 26c(B)(5) of Directive 77/388 (Sixth VAT directive); cf. point 23



above.

14 – Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

15 – Cf. inter alia judgments in Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraph 10, Case C-269/97 *Commission v Council* [2000] ECR I-2257, paragraph 43 and Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 38.

16 – Cf. recitals 1 to 3 of the preamble to the regulation, reproduced in point 8 above.

17 – Provided for in Directive 77/799.

18 – Cf. recital 3 of the preamble to the regulation, reproduced in point 28 above.

19 – Cf. Opinion of Advocate General Alber of 9 September 2003 in Case C-338/01 *Commission v Council* [2003] ECR I-0000, at point 46 et seq.

20 – Judgment in Case C-338/01 *Commission v Council* [2001] ECR I-0000, paragraph 60.

21 – Case C-338/01 *Commission v Council*, cited above in footnote 20, paragraph 58.

22 – Judgment in Case C-338/01 *Commission v Council*, cited in footnote 20, paragraph 63.

23 – Judgment in Case C-338/01 *Commission v Council*, cited in footnote 20, paragraphs 64 and 65.

24 – Judgment in Case C-338/01 *Commission v Council*, cited in footnote 20, paragraph 67.

25 – Judgment in Case C-338/01 *Commission v Council*, cited in footnote 20, paragraph 66.

26 – COM (2001) 294 fin – 2001/0133 (COD); 2001/0134 (COD); p. 9 at 4.2.5.

27 – Cf. Commission, loc. cit.

28 – Case C-338/01 *Commission v Council*, cited in footnote 20, paragraph 64.

29 – Council Directive 76/308/EEC of 15 March 1976 (OJ 1976 L 73, p. 18).